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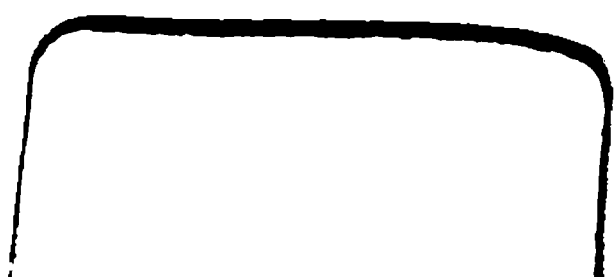
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**THE HISTORY
OF THE
PLEAS OF THE CROWN**

BY

Sir Matthew Hale, Knt.

SOME TIME LORD CHIEF JUSTICE OF THE COURT OF KING'S BENCH.

FIRST PUBLISHED FROM HIS LORDSHIP'S ORIGINAL MANUSCRIPT, AND THE SEVERAL REFERENCES TO THE RECORDS EXAMINED BY THE ORIGINALS, WITH NOTES BY

S O L L O M E M L Y N

OF LINCOLN'S INN, ESQ.

WITH A TABLE OF THE PRINCIPAL MATTERS.

First American Edition.

WITH NOTES AND REFERENCES TO LATER CASES

BY

W. A. STOKES AND E. INGERSOLL

OF THE PHILADELPHIA BAR.

IN TWO VOLUMES

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ROBERT H. SMALL,

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Pennsylvania.**

TO
HENRY J. WILLIAMS

THIS EDITION OF
HALE'S HISTORY OF THE PLEAS OF THE CROWN

IS
RESPECTFULLY INSCR.

EXTRACT FROM THE JOURNAL OF THE HOUSE OF COMMONS.

LUNÆ 29^o DIE NOVEMB. 1680.

Ordered, That the executors of Sir MATTHEW HALE, late Lord Chief Justice of the court of King's Bench be desired to print the MSS. relating to the crown law and that a committee be appointed to take care in the printing thereof; and it is referred to

Sir WILL. JONES,

Serj. MAYNARD,

Sir FRA. WINNINGTON,

Mr. SACHEVEREL,

Mr. GEO. PELHAM,

Mr. PAUL FOLEY.

MR. EMLYN'S PREFACE

(TO THE ORIGINAL EDITION.)

THE following treatise being the genuine offspring of that truly learned and worthy judge Sir *Matthew Hale*,^(a) stands in need of no other recommendation, than what that great and good name will always carry along with it.

Whoever is in the least acquainted with the extensive learning, the solid judgment, the indefatigable labours, and above all the unshaken integrity of the author, cannot but highly esteem whatever comes from so valuable an hand.

Being brought up to the profession of the law, he soon grew eminent in it, discharging his duty therein with great courage and faithfulness; and tho he lived in critical times, when disputes ran so high between king and parliament, as at last broke out into a civil war, yet he engaged in no party, but carried himself with such moderation and evenness of temper, as made him loved and courted by all.

It was this great and universal esteem he was then in, that made *Cromwel* so desirous to have him for one of his judges; which offer he would willingly have declined. Being prest by *Cromwel* to give his reason, he at last plainly told him, that he was not satisfied with the lawfulness of his authority, and therefore scrupled the accepting

(a) He was born at *Alderley*, in *Gloucestershire*, Nov. 1, 1609.

Was entered at *Magdalen-Hall*, in *Oxford*, in the 17th year of his age.

Admitted of *Lincoln's-Inn*, Nov. 8, 1629.

Made a judge of the court of *Common Pleas*, 1653.

Lord Chief Baron of the Court of *Exchequer*, Nov. 7, 1660.

And at last Lord Chief Justice of the court of *King's Bench*, May 18, 1671.

Which place he resigned Feb. 20, 1675-6.

And died the *Christmas* following, Dec. 25, 1676.

any commission under it; to which *Cromwel* replied that since he had got the possession of the government, he was resolved to keep it, and would not be argued out of it; that however it was his desire to rule according to the laws of the land, for which purpose he had pitched upon him as a person proper to be employed in the administration of justice; yet if they would not permit him to govern by red gowns, he was resolved to govern by red coats.

Upon this consideration, as also of the necessity there at all times is, that justice and property should be preserved, he was prevailed with to accept of a judge's place in the court of common-pleas, wherein he behaved with great impartiality, constantly avoiding the being concerned in any state-affairs; and tho for the first two or three circuits he sat indifferently on the plea-side, or the crown-side, yet afterwards he absolutely refused to sit on the crown-side, thinking it the safer course in so dubious a case.

But notwithstanding his dislike to *Cromwel's* government, yet this did not drive him, as it did some others, into the extremes of the contrary party; for upon the restoration, of which he was no inconsiderable promoter, he was not for making a surrender of all, and receiving the king without any restrictions; on the contrary, he thought this an opportunity not to be lost for limiting the prerogative, and cutting off some useless branches, that served only as instruments of oppression; for which purpose he moved, as bishop *Burnet* relates, (b) "That a committee might be appointed to look into the propositions that had been made, and the concessions that had been offered by the late king, and from thence to digest such propositions, as they should think fit to be sent over to the king."

This motion was seconded, and tho through general *Monk's* means it failed of success, yet it shewed our author's tender regard for the liberties of the subject, and that he was far from being of a mind with those, who looked on every branch of the prerogative as *jure divino* and indefeasible.

But notwithstanding this attempt, which shewed he was not cut out for such compliances as usually render a man acceptable to a court, yet such was his unblemished character, that it was thought an honour to his majesty's government to advance him first to the station of Lord Chief

(b) *Burnet's Hist. of own Times, Vol. I. p. 88.*

Baron, and afterwards to that of Lord Chief Justice of the king's bench; nor indeed could so great a trust be lodged in better hands.

When he was first promoted, the Lord Chancellor *Clarendon*, upon delivering to him his commission, told him, among other things, "That if the king could have found out an honest or fitter man for that employment, he had not advanced him to it, and that he had therefore preferred him, because he knew none that deserved so well." (c)

He behaved in each of these places with such uncorrupt integrity, such impartial justice, such diligence, candor, and affability, as justly drew the chief practice after him, whithersoever he went; he constantly shunned not only the being corrupt, but every thing which had any appearance, or might afford the least suspicion of it; he was sincerely bent on discovering the truth and merits of a cause, and would therefore bear with the meanest counsel, supply the defects of the pleader, and never take it amiss, when summing up the evidence to be reminded of any circumstance he had omitted; for being in a high degree possessed of that qualification so peculiarly necessary to a judge, I mean patience (without which the most excellent talents may become insignificant) no considerations of his own convenience could prevail with him to hurry over a cause, or dispatch it without a thorough examination; for which reason he made it a rule, especially upon the circuits, to be short and sparing at meals, that he might not either by a full stomach unfit himself for the due discharge of his office, or by a profuse waste of time, be obliged to put off, or precipitate the business that came before him. [1]

(c) *Burnet's life of Hale, Edit. 1682. p. 53.*

[1] Lord Hale wrote the following rules for his judicial guidance:

Things necessary to be continually had in remembrance.

I. That in the administration of justice I am entrusted for God, the king and country; and therefore,

II. That it be done, 1st, uprightly; 2dly, deliberately; 3dly, resolutely.

III. That I rest not upon my own understanding or strength, but implore and rest upon the direction and strength of God.

IV. That in the execution of justice I carefully lay aside my own passions, and do not give way to them, however provoked.

V. That I be wholly intent upon the business I am about, remitting all other cares and thoughts as unseasonable, and interruptions.

He was a great lamenter of the divisions and animosities which raged so fiercely at that time among us, especially about the smaller matters of external ceremonies, which he feared might in the end subvert the fundamentals of all religion: and tho he thought the principles of the non-conformists too narrow and strait-laced, yet he could by no means approve the penal laws which were then made against them; he knew many of them to be sober, peaceable men, who were well affected to the government, and had shewn as much dislike as any to the late usurpation, and therefore he thought they deserved a better treatment; besides, he looked on it as an infringement on the rights of conscience, which ought always to be held sacred and inviolable, and therefore used to say, that the only way to heal our breaches was *a new act of uniformity*; for which purpose he concurred with Lord Keeper *Bridgman* and Bishop *Wilkins*, in setting on foot a scheme for the comprehension of the more moderate dissenters, and an indulgence towards others, and drew the same up into the form of a bill, altho by a vote of the house of commons it was prevented from being laid before the parliament.

VI. That I suffer not myself to be prepossessed with any judgment at all, till the whole business, and both parties be heard.

VII. That I never engage myself in the beginning of a cause, but reserve myself unprejudiced till the whole be heard.

VIII. That in business capital, though my nature prompt me to pity, yet to consider that there is also a pity due to the country.

IX. That I be not too rigid in matters purely conscientious, where all the harm is diversity of judgment.

X. That I be not biassed with compassion to the poor or favor to the rich, in point of justice.

XI. That popular or court applause, or distaste, have no influence upon any thing I do in point of distribution of justice.

XII. Not to be solicitous what men will say or think, so long as I keep myself exactly according to the rules of justice.

XIII. If in criminals it be a measuring cast, to incline to mercy and acquittal.

XIV. In criminals that consist merely in words when no more harm ensues, moderation is no injustice.

XV. In criminals of blood, if the fact be evident, severity is justice.

XVI. To abhor all private solicitations, of what kind soever, and by whomsoever, in matters depending.

XVII. To charge my servants; 1st, not to interpose in any business whatsoever; 2d, not to take more than their known fees; 3d, not to give any undue precedence to causes; 4th, not to recommend counsel.

XVIII. To be short and sparing at meals, that I may be fitter for business.

Tho by this means he was hindered from obtaining a repeal of those laws, yet could he never be brought to give any countenance to the execution of them. I have heard it credibly related, that once when he was upon the circuit, there happened to be a grand jury, who thought to make a merit of presenting a worthy peaceable non-conformist, that lived in their neighbourhood; upon this occasion our judge could not avoid reprimanding them for their ill-placed zeal, which vented itself this way, while no notice was taken of the prophaneness, drunkenness and other immoralities, which abounded daily amongst them; in short, he told them, that if they were resolved to persist, he would remove the affair to *Westminster-Hall*, and if he could not then prevail to have a stop put to it, he would resign his place; for he had told the king, when he first accepted it, that if any thing was pressed upon him, which was against his judgment, he would quit his post.

He always retained a serious impression of religion, and in particular was a punctual observer of any vow or engagement he had laid himself under. Having in his younger days on a particular occasion made a vow never to drink an health again, he could never be prevailed on upon any consideration to dispense with it, altho drinking healths was then grown to be the fashionable loyalty of the times.

And thus in every character of life he was a pattern well worthy of imitation: in short, he was a public blessing to the age he lived in, and not to that only, but by his bright and amiable example to succeeding generations; for as a pattern of virtue and goodness will always be a silent, tho sharp reproof to those who deviate from it, so to noble and generous minds it will not fail of being a mighty spur and incentive to the imitation of it, and by that means leave a real and lasting, tho secret, influence, behind it.

As he justly merited the esteem of all, so in particular he has well deserved of the profession of the law, to which he was so shining an ornament; he contributed more by his example to the removal of the vulgar prejudices against them, than any argument whatever could do.

The great Archbishop *Usher* had entertained some prejudices of that kind, but by conversation with our author and the learned *Selden*, he was convinced of his mistake; our author declaring, "That by his acquaintance with them, he believed there was as many honest men among the lawyers

proportionably, as among any profession of men in *England*."

Never was the old monkish maxim, *Bonus Jurista malus Christa*, more thoroughly confuted, than by his example. He demonstrated by a living argument, how practicable it was to be both an able lawyer and a good christian; indeed he saw nothing in the one that was any way incompatible with the other, nor did he think, that an unaffected piety sat with an ill grace on any, be his station never so high, or his learning never so great; for tho he diligently applied himself to the business of his profession, yet would he never suffer it so to engross his time as to leave no room for matters of a more serious concernment, as may appear from the many tracts he has wrote on moral and religious subjects.

For this reason, when he found the decays of nature gaining ground upon him, he could no longer be prevailed with to suspend the resolution he had taken to resign his place; that after the example of that great emperor *Charles V.* he might have an interstice between the business of life and the hour of death. (*d*)

No wonder then that one so great, so good, should be loved and esteemed while living, should be revered and admired when dead; no wonder the king should be loth to part with him, who had been such a credit to his government; tho had he held his place some few years longer, such a scene of affairs did then open, as in all likelihood would have greatly distressed him how to behave, as well as the court how to get rid of one, who could not have been removed without great reproach, nor continued without great obstruction to the violent measures that were then pursued.

But it is time to stop, for I mean not to write the history of his life; this would require a volume of itself, and is long ago performed by an able hand; (*e*) I shall therefore only subjoin his character, as drawn by that learned prelate, and other eminent cotemporaries, by which it will appear, that future times cannot outgo his own in the veneration and esteem they bore him.

The bishop expresses it in short thus: "That he was one of the greatest patterns this age has afforded, whether in his private deportment as a christian, or in his public employ-

(*d*) *Inter vitæ negotia & mortis diem oportere spatium intercedere.*
Strada de bello Belgico, Vol. I. sub anno 1555.

(*e*) Bp. Burnet.

ments, either at the bar or on the bench;" (*f*) having given it more at large (*g*) in the words of a noble person, whom he styles one of the greatest men of the profession of the law: (*h*) "he would never be brought to discourse of public matters in private conversation; but in questions of law, when any young lawyer put a case to him, he was very communicative, especially while he was at the bar: but when he came to the bench, he grew more reserved, and would never suffer his opinion in any case to be known, till he was obliged to declare it judicially; and he concealed his opinion in great cases so carefully, that the rest of the judges in the same court could never perceive it: his reason was, *because every judge ought to give sentence according to his own persuasion and conscience, and not to be swayed by any respect or deference to another man's opinion*: and by this means it happened sometimes, that when all the barons of the Exchequer had delivered their opinions, and agreed in their reasons and arguments, yet he coming to speak last, and differing in judgment from them, hath expressed himself with so much weight and solidity, that the barons have immediately retracted their votes, and concurred with him. He hath sat as a judge in all the courts of law, and in two of them as chief; but still wherever he sat, all business of consequence followed him, and no man was content to sit down by the judgment of any court, till the case was brought before him, to see whether he were of the same mind; and his opinion being once known, men did readily acquiesce in it; and it was very rarely seen, that any man attempted to bring it about again; and he that did so, did it upon great disadvantages, and was always looked upon as a very contentious person; so that what *Cicero* says of *Brutus*, did very often happen to him, *Etiam quos contra statuit, æquos placatosque dimisit*.

"Nor did men reverence his judgment and opinion in courts of law only; but his authority was as great in courts of equity, and the same respect and submission was paid him there too; and this appeared not only in his own court of equity in the Exchequer chamber, but in the Chancery too, for thither he was often called to advise and assist the lord chancellor, or lord keeper for the time being; and if the

(*f*) p. 218.

(*g*) p. 172.

(*h*) Supposed to be the then earl of Nottingham.

cause were of difficult examination, or intricate and entangled with variety of settlements, no man ever shewed a more clear and discerning judgment; if it were of great value, and great persons interested in it, no man shewed greater courage and integrity in laying aside all respect of persons. When he came to deliver his opinion, he always put his discourse into such a method, that one part of it gave light to the other; and where the proceedings of Chancery might prove inconvenient to the subject, he never spared to observe and reprove them: And from his observations and discourses, the Chancery hath taken occasion to establish many of those rules by which it governs itself at this day.

“He did look upon equity as a part of the common law, and one of the grounds of it; and therefore, as near as he could; he did always reduce it to certain rules and principles, that men might study it as a science, and not think the administration of it had any thing arbitrary in it. Thus eminent was this man in every station, and into what course soever he was called, he quickly made it appear, that he deserved the chief seat there.

“As great a lawyer as he was, he would never suffer the strictness of law to prevail against conscience; as great a chancellor as he was, he would make use of all the niceties and subtilties in law, when it tended to support right and equity. But nothing was more admirable in him, than his patience: he did not affect the reputation of quickness and dispatch, by a hasty and captious hearing of the counsel: he would bear with the meanest, and gave every man his full scope, thinking it much better to lose time than patience: in summing up of an evidence to a jury, he would always require the bar to interrupt him if he did mistake, and to put him in mind of it, if he did forget the least circumstance: some judges have been disturbed at this as a rudeness, which he always looked upon as a service and respect done to him.

“His whole life was nothing else but a continual course of labour and industry, and when he could borrow any time from the public service, it was wholly employed either in philosophical or divine meditations: and even that was a public service too, as it hath proved; for they have occasioned his writing of such treatises as are become the choicest entertainment of wise and good men; and the world hath

reason to wish that more of them were printed. He that considers the active part of his life, and with what unwearied diligence and application of mind he dispatched all mens business which came under his care, will wonder how he could find any time for contemplation: he that considers again the various studies he past thro, and the many collections and observations he hath made, may as justly wonder how he could find any time for action: but no man can wonder at the exemplary piety and innocence of such a life so spent as this was, wherein as he was careful to avoid every idle word, so it was manifest he never spent an idle day. They who came far short of this great man, will be apt enough to think that this is a panegyric, which indeed is a history, and but a little part of that history which was with great truth to be related of him. Men who despair of attaining such perfection, are not willing to believe that any man else did ever arrive at such a height.

“ He was the greatest lawyer of the age, and might have had what practice he pleased; but tho he did most conscientiously affect the labours of his profession, yet at the same time he despised the gain of it; and of those profits which he would allow himself to receive, he always set apart a tenth penny for the poor, which he ever dispensed with that secrecy, that they who were relieved, seldom or never knew their benefactor. He took more pains to avoid the honours and preferments of the gown, than others do to compass them. His modesty was beyond all example; for where some men who never attained to half his knowledge, have been puffed up with a high conceit of themselves, and have affected all occasions of raising their own esteem by depreciating other men, he on the contrary was the most obliging man that ever practised. If a young gentleman happened to be retained to argue a point in law, where he was on the contrary side, he would very often mend the objections when he came to repeat them, and always commend the gentleman, if there were room for it; and one good word of his was of more advantage to a young man, than all the favour of the court could be.[2]

[2] Williams, in his life of Hale, gives the following account of his introduction to a student of law, taken from a manuscript formerly in the possession of Bennet Langton, the friend of Dr. Johnson, and found in the handwriting of Mr. Langton's great grandfather, who studied law with Lord Hale:

“ Dec. 18, 1672.—I was sent to by Mr. Barker, to come to him to my Lord Chief Justice Hale's lodgings, at Sergeant's Inn. I was informed by

Upon the promotion of lord chief justice *Rainsford*, who succeeded him in that office, the then lord chancellor expressed himself thus: (i) "The vacancy of the seat of the chief jus-

(i) *Burnet*, p. 213, 217.

Mr. Godolphin, about a month ago, that my Lord Chief Justice had declared, at supper, at Mr. Justice Twisden's, that if he could meet with a sober young man, that would entirely addict himself to his lordship's directions, he would take delight to communicate to him, and discourse with him at meals, and at leisure times; and, in three year's time, make him perfect in the practice of the law. I discoursed several times with Mr. Godolphin, of the great advantage that a student would make by his lordship's learned communications, and what influence it would have on a practiser, as well as honour, to be regarded as my lord's friend; and persuaded him to use his interest, and the offers of his friends, to procure his lordship's favour. But his inclinations leading him to travel, and his design afterwards, to rely upon his interest at court, he had no thoughts to pursue it, but offered to engage friends on my behalf, which I refused, and told him, I would make use of no other person than my worthy friend, Mr. Barker, whose acquaintance with my lord, I knew, was very particular. After I had often reflected upon the nobleness of my lord's proposition, and the happiness of that person that should be preferred by so learned and pious a man, to whose opinion every court paid such a veneration that he was regarded as the oracle of the law, I made my application to Mr. Barker to intercede with my lord in my behalf, who assented to it with much readiness, as he always had been very obliging to me since I had the honour to be known to him. He made a visit to my lord, and told him that he heard of the declaration my lord made at Mr. Justice Twisden's. My lord said it was true, and he had entertained the same resolution a long time; but, not having met with any body to his purpose, he had discarded those thoughts, which Mr. B. did beg of his lordship to resume, in behalf of a person that he would recommend to him, and would be surety for his industry, and diligent observation of his lordship's directions. My lord then inquired who it was, and he mentioned me. Then he asked how long I had been at the law, of what country I was, and what estate I had; which he told him, and that I was my father's eldest son. To which he replied, that he might talk no farther of it, for there was no likelihood that I would attend to the study of the law as I ought. But Mr. B. gave him assurances that I would; that his lordship might rely upon his word; and that I had not taken this resolution without deliberation; that I had often been at Westminster Hall, where I had heard his lordship speak, and had a very great veneration for his lordship, and did earnestly desire this favour; that my father had lately purchased the seat of the family, which was sold by the elder house, and by that means had run himself into five or six thousand pounds debt.

" 'Well then,' said my lord, 'pray bring him to me.'

" Dec. 13.—I went to my lord and Mr. B. (for till that time my lord was either busy or out of town) about four in the afternoon. My lord prayed us to sit, and after some silence, Mr. B. acquainted my lord, that I was the person on whose behalf he had spoken to his lordship. My lord then said, that he understood I had a fortune, and, therefore, would not so strictly engage myself in the crabbed study of the law, as was necessary for one that must

tice of this court, and that by a way and means so unusual, as the resignation of him, that lately held it, and this too proceeding from so deplorable a cause as the infirmity of that body, which began to forsake the ablest mind that ever

make his dependence on it. I told his lordship, that if he pleased to admit me to that favor I heard he designed to such a person he had inquired after, that I should be very studious. My lord replied quick, that Mr. B. had given him assurances of it; that Mr. B. was his worthy friend, with whom he had been acquainted a long time, and that, for his sake, he should be ready to do me any kindness; for which I humbly gave his lordship thanks, as did, likewise, Mr. B. My lord asked me, how I had passed my time, and what standing I was of. I told him that I was almost six years of the Temple; that I had travelled into France about two years ago, since when I had discontinued my studies of the law, applying myself to the reading French books, and some histories. My lord discoursed of the necessity of a firm, uninterrupted prosecution of that study which any man designed, in the midst of which Mr. Justice Twisden came in, so that his lordship bid us come to him again in two hours after.

“About eight the same evening, we found his lordship alone. After we sat down, my lord bid me tell him, what I read in Oxford, what here, and what in France. I told him I read Smith’s *Logic*, *Burgersdicius’ Natural Philosophy*, *Metaphysics*, and *Moral Philosophy*; that in the afternoons I used to read the classic authors; that, at my first coming to the inns of court, I read *Lyttleton*, and *Doctor and Student*, *Perkins*, my *Lord Coke’s Institutes*, and some cases in his *Reports*; that after I went into France, I applied myself to the learning of the language, and reading some French memoirs, as the *Life of Mazarin*, *Memoirs of the D. of Guise*, the *History of the Academie Francoise*, and others; that since I came away, I continued to read some French books, as the *History of the Turkish government* by ———, the account of the last Dutch war, the *State of Holland*, &c.; that I read a great deal in *Heylin’s Geography*, some of *Sir Walter Rawleigh*, my *Lord Bacon of the Advancement of Learning*, *Tully’s Offices*, *Rushworth’s Collections*.

“My lord said, that the study of the law was to one of two ends; first, to fit a man with so much knowledge as will enable him to understand his own estate, and live in some repute among his neighbours in the country; or secondly, to design the practice of it as an employment to be advantaged by it; and asked which of them was my purpose. I acquainted his lordship, that when I first came to the temple I did not design to prosecute the study of the law, so as to make advantage by it; but now, by the advice of my father and my uncle, and *Dr. Peirse*, in whose college I had my education, and received many instances of his great kindness to me, I had formed resolutions to practise it, and, therefore, made my suit to his lordship, for his directions.

“‘Well,’ said my Lord, ‘since I see your intentions, I will give what assistance I can.’

“My lord said, that there were two ways of applying one’s-self to the study of the law; one was to attain the great learning and knowledge of it, which was to be had in all the old books, but that did require great time, and

presided here, hath filled the kingdom with lamentations, and given the king many and pensive thoughts how to supply that vacancy again." And then addressing himself to his successor: "The very labours of the place, and that

would be at least seven years before a man would be fit to make any benefit by it; the other was, by fitting one's-self for the practice of the court, by reading the new reports, and the present constitution of the law; and, to this latter my lord advised me, having already passed so much time, a great many of the cases seldom coming in practice, and several of them antiquated.

"In order to which study, his lordship did direct that I should be very exact in Lyttleton, and after, read carefully my lord Coke's Lyttleton, and then his Reports. After which Plowden, Dyer, Croke and Moore. That I should keep constantly to the exercises of the house, and, in term, to Westminster Hall, to the King's Bench, because the young lawyers began their practice there; that I should associate with studious persons, rather above, than below my standing; and, after next term, get me a common place book, and that I must spoil one book, binding Rolle's Abr. with white paper between the leaves, and according to those titles insert what I did not find there before, according to the preface to that book, which my lord said came from his hands, and that he did obtain of Sir Francis Rolle to suffer it to be printed, to be a platform to the young students. My lord said that he would, at any time that I should come to him, shew me the method he used, and direct me, and that if he were busy he would tell me so.

"He said that he studied sixteen hours a day, for the first two years that he came to the inns of court, but almost brought himself to his grave, though he were of a very strong constitution, and afterwards reduced himself to eight hours; but that he would not advise anybody to so much; that he thought six hours a day, with attention and constancy, was sufficient; that a man must use his body as he would use his horse, and his stomach—not tire him at once, but rise with an appetite. That his father did order in his will that he should follow the law; that he came from the university with some aversion for lawyers, and thought them a barbarous sort of people, unfit for any thing but their own trade; but having occasion to speak about business with Serjeant Glanvil, he found him of such prudence and candour, that from that time he altered his apprehensions, and betook himself to the study of the law, and oft told Serjeant Glanvil that he was the cause of his application to the law.

"That constantly, after meals, every one in his turn, proposed a case, in which every one argued.

"That he took up a resolution, which he punctually observed ever since, that he would never more see a play, having spent all his money at Oxford, and having experienced that it was so great an alienation of his mind from his studies, by the recurring of the speeches and actions into his thoughts, as well as the loss of his time when he saw them; that he had often had disputes with Mr. Selden, who was his great friend, and used to say he found so great refreshment by it; but my lord told him, he had so much knowledge of the inconvenience of them, that he would not see one for a hundred pounds. But he said he was not one of Mr. Prynne's judgment (which I

weight and fatigue of business, which attends it; are no small discouragements; for what shoulders may not justly fear that burden, which made him stoop, that went before you? Yet I confess you have a greater discouragement than the mere burden of your place, and that is the unimitable example of your predecessor. *Onerosum est succedere bono principi* was the saying of him in the panegyric, and you will find it so too, that are to succeed such a chief justice, of so indefatigable an industry, so invincible a patience, so exemplary an integrity, and so magnanimous a contempt of worldly things, without which no man can be truly great;

minded him of,) for he did not think it unlawful, but very fit for gentlemen sometimes, but not for students.

“My lord said, at the beginning of his discourse, that my friends might expect that I should marry, to take off the present debt from the estate, which else would increase, and then there could be no thoughts of a very earnest prosecution of study; to which Mr. B. said, that my father, when he made this purchase that put him into debt, did resolve to sell other land, and by that might either discharge, or lessen it.

“My lord said that his rule of health was, to be temperate, and keep himself warm. He never made breakfasts, but used, in the morning, to drink a glass of some sort of ale. That he went to bed at nine, and rose between six and seven, allowing himself a good refreshment for sleep. That the law will admit of no rival, nothing to go even with it; but that sometimes one may, for diversion, read in the Latin historians of England, Hoveden, and Matthew Paris, &c.; but after it is conquered, it will admit of other studies.

“I asked whether his lordship read the same law in the afternoon, as he did in the morning. He said no: he read the old books in the morning, and the new in the afternoon, because of fitting himself for conversation. I asked if he kept constantly to one court, which he said he did.

“He said, a little law, a good tongue, and a good memory, would fit a man for the chancery; and he said it was a golden practice, for the lawyers there got more money than in all the other courts of Westminster Hall. I told his lordship what my lord chancellor lately said, that he would reduce the practice of the court to another method, and not suffer above one counsel, or two at the most, in one cause.

“My lord said, that 1000*l.* a year was a great deal for any common lawyer to get; and Mr. B. said that Mr. Winnington did make 2000*l.* per year by it. My lord answered, that Mr. W. made great advantage by his city practice, but did not believe he made so much of it. I told his lordship of what Mr. W. had said before the counsel on Wednesday, on the behalf of stage coaches, which were then attempted to be overthrown.

“At our coming away, my lord did reiterate his willingness to direct and assist me; and I did beg of his lordship, that he would permit me to consult his lordship in the reason of any thing that I was ignorant of; and that his lordship would be pleased to examine me in what I should read, that he might find in what measure I did apply myself to the execution of his commands.”

and to all this a man that was so absolute a master of the science of the law, and even of the most abstruse and hidden parts of it, that one may truly say of his knowledge of the law, what St. *Austin* said of St. *Hierom's* knowledge in divinity. *Quod Hieronymus nescivit, nullus mortalium unquam scivit.* And therefore the king would not suffer himself to part with so great a man, till he had placed upon him all the marks of bounty and esteem, which his retired and weak condition was capable of."

To this the new chief justice, speaking of his predecessor, answered in the following words.

"——— A person in whom his eminent virtues and deep learning have long managed a contest for the superiority, which is not decided to this day, nor will it ever be determined, I suppose, which shall get the upper hand: A person that has sat in this court many years, of whose actions there I have been an eye and ear witness; that by the greatness of his learning always charmed his auditors to reverence and attention: A person of whom I think I may boldly say, that as former times cannot show any superior to him, so I am confident succeeding and future time will never shew any equal. These considerations, heightened by what I have heard from your lordship concerning him, made me anxious and doubtful, and put me to a stand how I should succeed so able, so good, and so great a man. It doth very much trouble me, that I, who, in comparison of him, am but like a candle lighted in the sun-shine, or like a glow-worm at mid-day, should succeed so great a person, that is and will be so eminently famous to all posterity; and I must ever wear this motto in my breast to comfort me, and in my actions to excuse me,

"Sequitur, quamvis non passibus æquis."

Mr. *Baxter*, with whom our author was very intimate towards the latter part of his life, describes him in these words:(*k*) "Sir *Matthew Hale*, that unwearied student, that prudent man, that solid philosopher, that famous lawyer, that pillar and basis of justice, who would not have done an unjust act for any worldly price or motive, the ornament of his majesty's government, and honour of England, the highest faculty of the soul of *Westminster-Hall*, and pattern to all the reverend and honourable judges; that godly serious

(*k*) *Baxter's* Notes on Lord *Hale's* Life, p. 48.

practical christian, the lover of goodness and all good men, a lamenter of the clergies selfishness and unfaithfulness and discord and of the sad divisions following hereupon; an earnest desirer of their reformation, concord and the church's peace, and of a reformed act of uniformity, as the best and necessary means thereto; that great contemner of the riches, pomp and vanity of the world; that pattern of honest plainness and humility, who while he fled from the honour that pursued him, was yet lord chief justice of the king's bench, after being long lord chief baron of the Exchequer; living and dying, entring on, using, and voluntarily surrendering his place of judicature with the most universal love, honour and praise, that ever did *English* subject in this age, or any that just history doth acquaint us with," &c. &c. &c.

Thus far for the author.

As to the work itself, if any of our author's performances might challenge the precedence of the rest, this seems to have the justest claim to it, as being a favourite work, which he often reviewed, and was at vast pains and charge in furnishing himself with proper materials for it.

His compassionate concern for the lives and liberties of mankind on the one hand, and for preserving the public peace and tranquility on the other, had possessed him with an opinion of the high importance, that the pleas of the crown, especially those relating to capital offenses, should be reduced to certain rules, and those rules clearly and plainly understood, that so there might be as little room left as possible either for erring in, or perverting of judgment.

It was this led him to make the crown law his principal study, to which he applied himself with great assiduity; for as bishop *Burnet* speaking of this treatise informs us, *(l)* "It was by much search and long observation he composed that great work concerning it." The same author acquaints us, *(m)* that he had begun his collections relating hereto in the reign of King *Charles* I. "But after the king was murdered he laid them by; and that they might not fall into ill hands, he hid them behind the wainscotting of his study, for he said, *there was no more occasion to use them, till the king should be again restored to his right*; and so upon his majesty's restoration he took them out, and went on in his design to perfect that great work."

(l) p. 90.

(m) p. 39.

Hence it appears highly probable, that he intended this work for the public, altho the business of his station did not afford him leisure to publish it during his life; however, about four years after his death, the house of Commons took singular notice of it, and thought it a work of such consequence, as to pass a vote,⁽ⁿ⁾ desiring his executors to print it; and appointed a committee to take care thereof: but that parliament being soon after dissolved,^(o) this design dropt.

Some years since there was published a treatise, intituled, *Pleas of the Crown by Sir Matthew Hale*; but this was only a plan of this work, containing little more than the heads or divisions thereof, concerning which the editor in his preface expresses himself thus, "He [our author] hath written a large work upon this subject, intituled, *An History of the Pleas of the Crown*, wherein he shews what the law anciently was in these matters, what alterations have from time to time been made in it, and what it is at this day. He wrote it *on purpose to be printed*, finished it, had it all transcribed *for the press* in his life-time, and had revised part of it after it was transcribed."

It is therefore to be hoped, the publication hereof will not be thought any way to interfere with the direction of his will, *That none of his MSS. should be printed after his death, except such as he should give order for during his life*, his intention for printing it being so apparent, as may well amount to an order for so doing.

Besides, as bishop *Burnet* observes,^(p) this prohibitory clause in the will seems in some measure to be revoked by his codicil, wherein he orders, *that if any book of his writing should be printed, then what should be given as a consideration for the copy should be divided, &c.* a kind of implication, that he had left the printing thereof to the discretion of his executors.

The above-mentioned writer further observes,^(q) that his unwillingness to have any of his works printed after his death, proceeded from an apprehension, lest they should undergo any expurgations or interpolations in the licensing them; for *this*, he said, *might in matters of law prove to be of such mischievous consequence, that he was resolved none of his writings should be at the mercy of the licensers.*

(n) Nov. 29, 1680.

(p) p. 185.

(o) Jan. 18, 1680.

(q) p. 186.

But as there is no such thing required by the laws now in being, that reason is at an end, and the reader may be assured, that the edition here offered to the public is printed faithfully from the author's original manuscript.

This manuscript consists of one thick folio volume, all in our author's own hand-writing, from whence it was transcribed in his life-time, and the transcript has since been bound up in seven small volumes in folio.

It had been by him revised as far as *Chap.* 27. in the first part, *viz.* about the middle of the third volume, as appears from many interlineations and additions in his own hand; the corrections in the remaining part are in another (very modern) hand, and in some places not very agreeable to the scope of the argument.

This transcript, therefore, so far as revised and corrected by our author (and no farther), may be deemed the original finished and perfected; but since even in this part there are in some places leaves taken out, and others inserted in their room in a different hand, unauthenticated by our author, and sometimes quite disturbing the coherence and connexion of the discourse, it was not thought warrantable to consider such interpolations as a part of this treatise; for as it cannot be doubted but great regard will be always paid to the performance of so esteemed an author, it is a piece of justice due both to the author and the public, that nothing should be herein inserted, but what is undeniably his, and carries evident marks of being by him intended as part of this work.

The title hereof was named by our author himself *Historia Placitorum Cornæ*; for he intended, as appears from the *Proemium*, to have taken in the whole body of the crown-law, as well in relation to matters civil, as matters criminal; for which purpose he once designed to have added two more books upon this subject, the one concerning offenses not capital, the other touching franchises and liberties; but to the great detriment of the public, neither of these appears ever to have been composed by him; so that, as it now stands, it treats only of offenses capital, which is indeed the most important branch of the crown-law, being what most nearly affects the life and liberty of the subject; besides, in treating hereof, he has unavoidably explained many incidental matters equally applicable to offenses not capital.

The *first* part of this work relates to the nature of the

offenses, *viz.* the several kinds of *treason*, *heresy* and *felony*, the second of these, heresy, being an offense of a spiritual nature, of which it was not our author's purpose to treat, was at first wholly omitted by him; but afterwards considering, as I suppose, that by its being circumscribed by act of parliament, *viz.* 1 *Eliz.* it became an offense of temporal cognizance, he thought proper to insert a chapter upon that head.

The *second* part relates to the manner of proceeding against offenders; wherein are considered the jurisdiction of the several courts; the manner of apprehending, committing, bailing, and arraigning offenders; their several pleas, bringing them to trial, judgment, and execution.

Having thus given some general account of the author and the work, it will be proper, in the next place, to acquaint the reader with the part I have had in this addition, which has been to supervise the printing thereof, that it be agreeable to our author's manuscript, which being written in a very obscure hand, might, by one wholly unacquainted with the law, have been frequently mistaken.

To make this work the more authentic, the several references herein made to the records have been compared with the originals at the respective offices in the *Tower* and *Westminster*.

I have also carefully examined the several quotations from the year-books, reports, &c. many of which being quoted without folio or page, or else mis-quoted, have with no small trouble been supplied and rectified; for our author, not having always had leisure to consult the books themselves, has frequently copied from the mis-printed quotations in the margin of lord *Coke's* third volume of his *Institutes*.

As it cannot be expected, but in the writing so large a manuscript, some words must, *currente calamo*, have been omitted or wrong written, I have in some few places taken the liberty to add or alter a word or two to preserve the sense; but have been particularly careful to distinguish such addition or alteration within crotchets, that I might not impose my judgment on the reader, but leave him to judge for himself, whether the drift of our author's reasoning do not require it.

I have likewise subjoined a few notes, containing some observations from the records; as also remarking, where the law hath been since explained by later resolutions, or altered

by subsequent acts of parliament; but as these acts are sometimes very long, consisting of many clauses, the reader is desired to use the same caution here, which is recommended by our author(*r*) with regard to those recited in the work itself, *viz.* "that he rely not barely upon the abstracts thereof here given, but peruse the statutes themselves in the books at large."

I am sensible many slips and omissions must needs have happened in the supervising so large a work of so critical a nature, but hope that will plead my excuse, at least to those, who consider the wide difference between perusing it in a fair print and in a difficult manuscript.

(*r*) *Part I. p. 261.*

MARCH 30, 1736.

(C) For Table of Cases (cited in the notes,) and Table of Abbreviations, see the beginning of Vol. II.

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THE PROEMIUM.

THE METHOD OF THE WORK INTENDED.

HAVING an intention to make a full collection of the *Pleas of the Crown*, I shall divide those Pleas into two general Tracts.

The *first*, concerning pleas of the crown in matters *criminal*.

The *second*, concerning pleas of the crown in matters *civil*; namely, concerning franchises and liberties.

The former will be the subject of the first and second books, the latter of the third book.

First, therefore, I shall begin with the several kinds of *crimes*, that make up the subject matter of my first and second book.

Crimes that are punishable by the laws of *England*, are for their matter of two kinds,

1. *Ecclesiastical*.

2. *Temporal*.

The *former* of these, namely, such crimes as I call *Ecclesiastical*, are of ecclesiastical cognizance; and though all external jurisdiction, as well ecclesiastical as temporal, is derived from the Crown of *England*, and all criminal proceedings in the ecclesiastical courts, are in some kind *Placita Coronæ* suits for the king, and such as he may pardon or discharge, as being his own suits, yet these I shall not meddle with at this time.

The *second* sort, *viz.* *Temporal* crimes, which are offenses against the laws of this realm, whether the common law or acts of parliament, are divided into two general ranks or distributions in respect of the punishments that are by law appointed for them, or in respect of their nature or degree:

and thus they may be divided into capital offenses, or offenses only criminal; or rather, and more properly, into

Felonies and

Misdemeanors,

because there is no capital offense but hath in it the crime of felony: and yet there be some felonies, that are not in their nature capital, whereof hereafter.

Crimen capitale, or felony, in this acceptation is of two kinds, namely,

That which is complicated, and hath a greater offense joined with it, namely *Treason*, and

That which is simple *Felony*.

Touching the former of these, namely *Treason*, it is that capital offense, which is committed against some special civil obligation, of subjection and faith more than is found in other capital offenses, and therefore it hath the denomination of *proditio*, and the offense is laid to be done *proditorie*.

This offense of *Treason* is of two kinds, namely,

That which is against the highest civil obligation, namely, against the king, his crown and dignity, which is called *High-treason*.

Or against some other, to whom a civil obligation of faith is made or implied, which is called *Petit-treason*.

The offenses of high-treason are of two kinds, *viz.*

Such as were treasons by the *common law*, or,

Such as were made so by special *acts of parliament*.

The offenses of simple felony are likewise of the same distribution, namely,

Such as were felonies at *common law*, and,

Such as are by *act of parliament* put into the degree, or under the punishment of felony.

And the same distribution is to be made touching *misdemeanors*, namely they are,

Such as are so by the *common law*, or

Such as are specially made punishable as misdemeanors by *acts of parliament*.

This is the general order and distribution of the first and second book of this tractate, namely, concerning the matters of the Pleas of the Crown in criminals; or those crimes, which come under the cognizance of the laws of this kingdom, wherein the prosecution is *pro rege*, or in his name or right, as the common *vindex* of public injuries or crimes.

The particular enumeration of these several offenses is

much of the business of those charges, that are given to the grand jury by the justices in their several sessions; and they were for the most part heretofore contained in certain articles or heads of inquiry delivered out in writing to the several inquests, and were often stiled *Capitula Placitorum Coronæ*; such were those of *R. 1.* mentioned by *Hoveden*, p. 744, 783. which were delivered to the inquisitors in every wappentach or hundred, and to the justices itinerant to make inquiry upon, and by them to the grand inquests; and such were those *Articuli itineris* declared by *Bracton*, *Lib. III. de corona, cap. 1.* and printed in the old *Magna Charta* for the justices in *eyre* to make inquiry upon, which I shall not here repeat at large, but shall take them up as I shall have occasion to use them.

The order which I shall observe in these *Pleas of the Crown* will be this:

- I. In the first book I will consider of *capital* offenses, *Treason* and *Felonies*; which book will be divided into two parts:
 1. The *enumeration of the kinds* of treasons and felonies as well by common law, as by acts of parliament.
 2. The whole *method of proceedings* in or upon them.
- II. The second book will treat of matters criminal, that are *not capital*; and
- III. The third book will be touching *franchises* and *liberties*.(*)

(*) That which is here offered to the public, is only the first of these books, consisting of two parts; the other two books having, as I have been credibly informed, never been composed by our author.

HISTORIA PLACITORUM CORONÆ.

PART I.

CHAPTER I.

CONCERNING CAPITAL PUNISHMENTS.

BEING to treat concerning capital offences; it will not be amiss to premise something touching capital punishments.

Laws, that are introduced by custom, or instituted by the legislative authority for the good of civil societies, would be of little effect, unless they had also their sanctions, imposing penalties upon the offenders of those laws.

These penalties are various according to the several natures of the offences, or the detriment that comes thereby to civil societies; some are only pecuniary; some corporal, but not capital, such as imprisonment, stigmatizing, banishment, servitude, and the like; others are capital, *ultimum supplicium*, or death; and that death sometimes accompanied with greater, sometimes with less degrees of severity.

So that, although offences against the good of human society be many of them prohibited by the laws of God and nature, yet the punishments of all such offences are not determined by the law of nature to this or that particular kind, but are for the most part, if not altogether, left to the positive laws and constitutions of several kingdoms and states.

And therefore, although most certainly the penalties instituted by God himself among his ancient people upon the breach of their laws were with the highest wisdom fitted to that state, and all laws and instituted punishments should come up as near to [2] that pattern, as may be; yet as to the degrees and kinds of punishments of offences *in foro civili vel judiciario* they are not obliging to all other kingdoms or states, but all states, as well christian as heathen, have varied from them.

And therefore it will not be amiss to instance in the various kinds of punishments inflicted by the several laws of several countries, especially in those two offences of *homicide* and *theft*, which are the most common and obvious offences in all countries.

By the ancientest divine law, that we read, the punishment of homi-

cide was with death. Gen. ix. 6. "Whosoever sheds man's blood, by man shall his blood be shed."(*a*)

And the judicial law given by *Moses* was pursuant to it, with some temperaments and explanations. Exod. xxi. 12, 13, 14. "He, that smiteth a man, so that he die, shall surely be put to death. And if a man lie not in wait, but God deliver him into his hand; then I will appoint thee a place, whither he shall flee. But if a man come presumptuously upon his neighbour to slay him with guile; thou shalt take him away from mine altar, that he may die." And v. 18, 19. "And if men strive together, and one smite another with a stone, or with his fist, and he die not, but keepeth his bed; if he rise again, and walk abroad upon his staff, then shall he that smote him, be quit; only he shall pay for the loss of his time, and for his cure."

And what this delivery by God of a man into his neighbour's hand is, is best expounded Deut. xix. 4, 5, 6, 11, 12. "Whoso killeth his neighbour ignorantly, whom he hated not in time past, as where a man cleaveth wood, and the ax flieth from the hêlve, and killeth a man, he shall fly to the city of refuge;(*b*) lest the avenger(*c*) [3] of blood pursue, and slay him while his heart is hot; whereas he was not worthy of death, in that he hated him not in time past: But if any man hate his neighbour, and lie in wait for him, and rise up against him, and smite him mortally, that he die, and he fleeth to one of those cities, the elders of his city shall send and fetch him thence, and deliver him into the hand of the avenger of blood, that he may die."(*d*)

Again; Exod. xxii. 2. "If a thief be found breaking-up, and be smitten, that he die, there shall no blood be shed for him; if the sun

(*a*) This law being given to *Noah*, from whom all men are derived, is not peculiar to the *Israelites*; but, as our author observes below, is binding on all mankind.

(*b*) Concerning these cities of refuge, see Exod. xxi. 13. Numb. xxxv. Deut. iv. 41 & seq. Josh. xx. xxi. *Selden: de jure naturali, &c. Lib. IV. cap. 2.*

(*c*) Who this avenger of blood was, is no where expressly said, it is generally supposed that he was the next heir to the person slain. See *Selden: de jur. nat. Lib. IV. cap. 1, & de successionibus in bona defuncti*: but the truth is, the Hebrew words *Goel ha dam*, here rendered *the avenger of blood*, should be rendered *the next of blood*, for *Goel* properly signifies one of the same kindred; it is so rendered Ruth ii. 20. and iii. 9, 12. and is usually expressed in the Septuagint by *αγγελλον*, which denotes *one near of kin*.

(*d*) If there was no avenger of blood, or if he would not or could not kill the slayer, the slayer was capitally punished by a judicial sentence; and no ransom or recompense was admitted. Numb. xxxv. 31. *Selden: de jur. nat. Lib. IV. cap. 1. in fine*; even though the person slain should before his death desire that the slayer should be forgiven. *Maimonides More Nevochim, Pars III. c. 41.* for all voluntary homicide was inexpressible, as appears from Numb. xv. 27. 31. and the case of *David* in the matter of *Uriah*, Ps. li. 16. There was one case indeed of capital homicide, wherein a ransom was allowed, viz. If an ox were wont to push with his horn, and it had been testified to his owner, and he had not kept him in, so that he had killed a man or a woman, the owner was to be put to death, he being looked on as the author of the murder, who would not prevent it, when he had warning, and might have done it; however, this being a case of gross negligence, rather than wilful malice, he was permitted to redeem his life by paying the ransom, which was laid upon him. Exod. xxi. 29, 30. the price of a servant was thirty shekels of silver. *Ibid. v. 32*, and that of a freeman was generally double, viz. sixty shekels. *Maimon. More Nevochim, Pars III. cap. 40.*

This was also felony by the common law of *England*, for by such sufferance the owner seemed to have a will to kill. *Stenf. P. C. 17. Fitz. Cor. 311. Vide post c. 33 note.*

be risen upon him there shall be blood shed for him; for he should make full restitution; if he have nothing, then he shall be sold for his theft."

Upon these judicial laws, these things are observable; 1. That by these laws the killing of a man by malice forethought, or upon a sudden falling out, were both under the same punishment of death.(e) 2. That the killing of a man by misfortune was not liable to the punishment of death, by the sentence of the judge; but yet [4] the avenger of blood might kill him, before he got to the city of refuge.(f) 3. The killing of a thief in the night was not liable to punishment of death; but if it were in the day-time, it was punishable with death. 4. Though there is no express law touching killing a man in his own defence,(g) yet it seems the custom of the *Jews*, and the interpretation of the *Jewish* doctors, excused that fact from the punishment of death.(h) 5. That the usual manner of the execution of the sentence of death was stoning, and sometimes strangulation.(i)

Now I will consider some of the laws of other nations in reference to *homicide*; wherein though there is a great analogy in many things between the laws of the *Jews*, and the laws of other countries; so that a man may reasonably collect, that these judicial laws of the *Jews* were taken up by other nations, as the grand exemplar of their judicial laws; yet in some things they departed from them in the particular constitutions and customs of other countries.

Among the *leges Atticæ* collected by Mr. *Petit*, *Lib. VII. tit. 1.* these were many of the laws concerning homicide.

(e) The law was general, "That whoever smiteth a man, so that he die, shall surely be put to death." Exod. xxi. 12. There were indeed some exceptions from this general law, but setting aside the case of a house-breaker in the night, they all related to casual involuntary homicides; there is not one exception of a voluntary designed killing, whether sudden or premeditated, whatever interpretations might be afterwards made by the *Jewish Rabbis*, who made the commandments of God of none effect through their traditions, (Matt. xv. 6.) so that there is nothing in the *Jewish* law to countenance the distinction made by the laws of *England* between murder and manslaughter; a distinction, which serves to show, that though the laws of *England* be much severer than the other in the case of *theft*, yet they are much milder in the case of *homicide*.

(f) Unless he fled to the altar, which was also looked on as a place of refuge, it being probable from Exod. xxi. 13, 14. that the altar was the place of refuge before the cities of refuge were appointed. (See *Bracton* of the English Law of Asylum.) See *Selden: de jur. nat. Lib. IV. cap. 2.* If he did escape to the city of refuge, he was obliged to remain there till the death of the high priest, for the avenger of blood might kill him wherever he found him out of the borders of the city. Numb. xxxv. 25—32. *Selden: ubi supra & de Synedriis, Lib. II. cap. 7.* But after the death of the high-priest, he was at liberty to go where he would; for the reason hereof see *Maimonides More Nevochim, Pars III. cap. 40.* and *Ainsworth* on Numbers xxxv. 25.

(g) This was a case so plainly justifiable by the law of nature, that it needed no positive law; however, the permission to kill a thief, who should be found breaking up in the night, seems to be an express allowance of killing in one's own defence; for the reason of that law is manifestly founded on the principle of self-preservation. *Nam adversus periculum naturalis ratio permittit se defendere. Digest. Lib. 9. Tit. 2. l. 4.*

(h) When done in defence of life or chastity; because, when lost, they are irreparable, see *Selden: de jur. natur. Lib. IV. cap. 3.* *Maimon. More Nevochim, Pars III. cap. 40.*

(i) Sometimes the execution was by burning; as in the case of a priest's daughter, who had played the whore. *Levit. xxi. 9.* Sometimes by *decollation*, which was the usual way for murder. *Selden: de Synedriis, Lib. II. cap. 13. De jur. natur. Lib. IV. cap. 1.*

Senatus Areopagiticus jus dicito de cæde, aut vulnere, non casu, sed voluntate inflicto; de incendio item, & malo veneno hominis necandi causa dato.

Thesmothetæ in homicidas animadvertunt.

Si quis hominem sciens morti duit, capital esto.

Qui alium casu fortuito necâssit, in annum deportator, donec aliquem è cognatis occisi placârit; revertitor vero peractis sacris & lustrationibus.

Si quis imprudens in certaminibus alium necâssit, aut insidiantem aut ignotum in prælio, aut in uxore, vel matre, vel sorore, vel filiâ, vel concubinâ, vel eâ, quam infuis liberis, habet deprehensum, cædis ergo nè exulato.

Si quis alium injuste vim inferentem incontinenti necâssit, jure cæsus esto.

Si quis homicidam foro, urbis territorio, publicis certaminibus & sacris Amphictyonicis abstinentem occiderit, aut mortis causam prebuerit, perinde ac si Atheniensem civem necâssit, capital esto, & Ephetæ jus dicunt. So that by this law a man conscious to himself of homicide might, before he was apprehended, undertake a voluntary exile, and during such an exile was privileged from the penalty of homicide.(k)

Homicidas morte multato in patria occisî terra, et abduçunt, ut lege cautum est; in eos ne sæviunt, neve pecuniam(l) exigunt.

Before judgment the kindred of the party slain that prosecuted the manslayer might compound the offence, and release the offender, but after judgment once given, neither the judge nor prosecutor could remit it.(m)

Cædis ne postulator unquam is qui homicidam exulantem & redeuntem quo non licet, in jus ad magistratum rapuerit aut detulerit.

And eodem libro tit. 5. si nox furtum faxit, si in ali-
[6] quis occisit, jure cæsus esto, according to the *Mosaical* law, and from thence transcribed into the *Attic* laws, and from thence by the *Decemviri* into the *Roman* laws of the twelve tables in totidem verbis.

Among the *Romans* the laws concerning homicide differed in some things both from the *Jews* and *Greeks*, as appears *Digest. Lib. XLVIII. tit. 8. Ad legem Corneliam de sicariis & veneficiis.*

Qui hominem occiderit puñitor non habitâ differentiâ cujus conditionis hominem(n) interemit.

Qui hominis occidendi furtive faciendi causâ cum telo ambulave-

(k) This was the case of *Theoclymenus* in *Homer Odyss. a. v. 224, 270. j. v. 117.*

(l) The *Greek* word ἀποινα here rendered *pecuniam*, properly signifies a ransom. *Hom. Iliad. a. v. 13, 20, 23, 95*, for by the ancient law of *Greece* the punishment of homicide was redeemable by the payment of a sum of money to the relations of the slain, which recompense was termed ἀποινα or ποινή. *Homer. Iliad. l. γ. 628. ε. v. 498.*

(m) That this was the meaning of the foregoing law, see *Petit in leges Atticas, Lib. VII. tit. 1. p. 509.* See also the *Oration of Demosthenes against Aristocrates*, wherein most of the *Athenian* laws relating to homicide are explained.

(n) l. 1. §. 2.

rit(o) qui hominem non occidit sed vulneravit ut occidat, ut homicida damnandus, nam si gladium strinxerit & cum eo percusserit, indubitatē occidendi animo admissit, sed si clavi aut cucuma in rixa, quamvis ferro, percusserit, tamen non occidendi animo leniendæ pæna ejus, qui in rixa casu magis, quam voluntate, homicidium admisit.(p)

But if it were merely by misfortune, it was not punished.(q)

Qui stuprum sibi vel suis per vim inferentem occidit, dimittendus est,(r) sed is, qui uxorem in adulterio deprehensam occidit, humiliori loco positus in exilium perpetuum dandus, in aliqua dignitate positus ad tempus relegandus.(s)

Furem nocturnum qui occiderit, impune feret, si parcere ei sine periculo suo non potuit;(t) which law, though like to that of the *Jews* and *Greeks*, the *Roman* lawyers have construed,(u) that it is lawful to kill furem nocturnum recedentem & [7] fugientem cum rebus, licet se non defendat telo, sed non diurnum, nisi se defendat telo.

The punishment of homicide, unless it were merely casual, among the *Romans* was deportatio in insulas & omnium bonorum ademptio, sed solent hodie capite puniri, nisi honestiore loco positi fuerint, ut pœnam legis sustineant; humiliores enim solent bestiis subjici;(x) altiores vero deportantur in insulas.(y)

Some temperaments they added in other cases of homicide, as banishment for five years,(z) deportation, &c. but regularly the punishment of homicide, unless in case of simple misfortune,(a) or defence of life,(b) was death, viz. *bestiis subjiciantur*.

Among the *Saxons*(c) the punishment of homicide was not always,

(o) l. 1. pr. & Cod. eod. tit. Lib. IX. tit. 16. l. 7.

(p) l. 1. §. 3.

(q) l. 1. §. 3. c. g. If a man, who was cutting a tree, should without calling out throw down a great branch of it upon one who was passing by, and kill him, he was to be acquitted, that is to say, he was not to be proceeded against criminally by the *lex Cornelia de sicariis*; for so is the expression in l. 7, *ad hujus legis coercionem non pertinet*; but still he was liable by the *lex Aquilia* to make a pecuniary satisfaction for the damage. *Instit. Lib. IV. tit. 3. §. 5.* And though that law mentions only the case of killing a slave, yet there lay an *utilis actio* in the case of killing a freeman. See *Noodt ad Leg. Aquil. cap. 2.*

(r) l. 1. §. 4.

(s) l. 1. §. 5.

(t) l. 9.

(u) This was not a mere construction of the *Roman* lawyers, but is expressly provided by the law of the twelve tables, as appears from *Digest. Lib. IX. tit. 6. ad leg. Aquil. l. 4. §. 1. Cic. pro Milone, cap. 3. A. Gell. Lib. 18. cap. Macrob. saturnal. Lib. 1. cap. 4.* The reason of this distinction between a night-thief and a day-thief, see in *Grot. de jur. bel. ac. pac. Lib. II. cap. 1. §. 12.*

(x) *Dig. Lib. XLVIII. tit. 19. de pœnis. l. 28. §. 15.*

(y) *Dig. ad leg. Cornel. de sicariis l. 16.*

(z) l. 4. §. 1.

(a) Cod. eod. tit. l. 1.

(b) Cod. eod. tit. l. 2. & 3.

(c) It seems to have been the general practice of most of the northern nations to commute the punishment of the most heinous crimes for a pecuniary mulct. *Lindembrogii Codex Leg. Antiq. Lib. IV. cap. 36.* *Tacitus* speaking of the ancient *Germans*, says, it was customary among them to punish homicide with a certain number of sheep and oxen, out of which the relations of him that was slain received satisfaction. *Tac. de mor. Germ. cap. 21.* From hence probably our *Saxon* ancestors brought the custom into *Britain*.

nor for the most part capital; for it might be redeemed by a recompense which went under the name of *Wera* and *Weregild*, [8] *gild*, (d) which was a rate set down upon the head of persons of several ranks; and if any of them were killed, the offender was to make good that rate, or *Weregild* or *capitis æstimatio*, to the kindred of the party slain; or, as some think, part to the king, part to the lord of the fee and part to the relations of the party slain; which if he could not do, he was to suffer death. (e) *Vide Spelm. in Gloss. ad verba Wera & Weregild.*

This custom continued long, even to the time of *Hen. I.* here in *England*, as appears by his laws in *libro rubro*, sect. 11. (f) but shortly after grew obsolete, as being too much contradictory to the divine law. (g) *Vide Covarr. Tomo 2 Lib. 11. cap. 9. sect. 2.*

(d) This *Weregild* or *capitis æstimatio*, according to the laws of *Ethelbert*, was usually 100s. *Leg. Ethelbert*, l. 21. though in some particular cases it was more, l. 5. 6. 22. If the slayer escaped, the relations were to pay half the ordinary *Weregild*, l. 23.

By the laws of *Ina* the *Weregild* was different according to the rank and degree of the person killed, of a man worth 200s. was 30s. of a man worth 600s. was 80s. of a man worth 1200s. was 120s. *Leg. Ina*, l. 70. This rule admitted of some exceptions, l. 34. l. 74.

By the laws of *Alfred*, the bare attempt on the king's life was punished with death, unless the offender redeemed it by the payment of the king's *weregild*: the same law was in case a slave attempted the life of his lord, unless he redeemed it by paying his lord's *weregild*. *Leg. Alfred*, l. 4. the *weregilds* were of the same value, as under *Ina*. *Leg. Alfred*, l. 9. l. 26.

By the league between *Alfred* and *Guthrun*, l. 2. the value of a common person was 200s. the same by the league between *Edward* and *Guthrun* in *fine*.

By the laws of *Athelstan*, whoever should attempt his lord's life, was to be put to death, and there is no mention made of any ransom. *Leg. Athelstan*, l. 4. but at the end of his laws, and of the *Judicia Civitatis Lundoniæ*, there is a particular account of the *weregilds* of all orders and degrees, from the king to the peasant, for which see *Wilkin's Leg. Anglo-Sax.* p. 64. p. 71. *Turner's Anglo-Saxons*.

By the laws of *Ethelred*, l. 5. the *weregild* of a common person was increased to 25 pounds. By l. 8. *Gul. Conq. apud Wilkins's*, p. 221. it was twenty pounds.

By the laws of *Cnute*, whoever should lie in wait for the life of the king, or of his lord, was to suffer death, and forfeit all he had. *Leges Cnuti*, l. 54. Whoever committed a public notorious murder, was likewise to suffer death, without redemption: for in l. 61. *Cædes publica & domini proditio* are reckoned amongst the *scelera inexpiabilia*; but it should seem that common homicide was redeemable; for in l. 6. it is said, *Homicidæ inclinent, vel emendent, vel scienter in peccatis moriantur*.

(e) The *weregild* was usually divided into three parts: the first, which was called *Frith Bote*, was paid to the king for the loss of his subject; the lord had another for the loss of his man, which was called *Man-bote*, and the kin of the slain for their loss had the third part, which was called *Mag-bote*. See *Spelm. life of Alfred*, Book II. § 11. In the case of killing the king, besides the *weregild*, which was to be paid to the king's relations, there was also another payment called *cynbot* or *cynegild*, to be made to the public for the loss of their king.

(f) And § 12, see *Wilkin's leges Anglo Sax.* p. 244. But it appears from the same laws, l. 71. *ibid.* p. 267. that a malicious murder, by poison or the like, was *factum mortiferum nullo modo redimendum*. The genuineness of these laws is justly questioned, for that they not only are in the nature of commentaries rather than laws; but also in l. 5. *Gregory's decretals* are cited, which were not compiled till fifteen years after the death of *Henry I.*, however, they are allowed to be very ancient, and to contain the usages of the *Anglo-Saxons*. See *Hickesii Dissert. Epist.* p. 96.

(g) It cannot but seem strange to us at this time of day, that the wilful murder of any one, much more of the king, should be punished only with a pecuniary mulct; to solve this difficulty, *Mr. Rapin* supposes that this commutation was allowed only in the case of simple homicide; or at most what is now known by the name of manslaughter;

But although the custom of *Weregild* is abrogated here in *England*, and by the laws of this kingdom the punishment of homicide is regularly death,^(h) as shall hereafter be shown; [9] yet since there are in *England* two kinds of proceedings in punishing of homicide, the one at the suit of the heir or wife by appeal,[1] the other at the suit of the king by indictment, the capi-

but not in the case of a premeditated murder: See *Rapin's Histoire d'Angleterre*, Vol. I. p. 520. This notion is in itself reasonable, and seems to be favoured by l. 4. of *Athelstan*, and l. 54. of *Cnut*, which makes it capital barely *insidiari regi vel domino*, much more to take away the life of the king or his lord; but on the other hand it seems somewhat hard to suppose, that among so many laws against homicide, they should all be levelled against casual or sudden killing only, and scarce any against wilful murder.

(h) The offender is to be hanged by the neck till he be dead; and in case he was convicted on an appeal, the ancient usage was, that all the relations of the slain should drag him with a long rope to the place of execution. 3 *Co. Inst.* 131. *Plowd.* 306, b. 11 *Hen.* 4. 12. a.

[1] Many cases of appeal are to be found in the old books, but by the 59 *Geo.* 3, c. 46, it is enacted, that it shall thenceforth not be lawful for any person to sue an appeal for treason, murder, felony, or other offence; any law or usage to the contrary, notwithstanding. 4 *Step. Comm.* 385..

In 1818, 58 *Geo.* 3, the case of *Ashford v. Thornton*, 1 *B. & Al.* 405, was argued and determined in the King's Bench. The writ of Appeal, and the return thereto, were annexed to the sheriff's return of the writ of Habeas Corpus, and will be found printed on p. 406. The count in appeal will also be found on p. 407. Some curious proceedings are recorded; thus, "The appellee being brought into court and placed at the bar, and the appellant being also in court, the count was read over to him, and he was called upon to plead. He pleaded as follows: 'Not guilty; and I am ready to defend the same by my body.' And thereupon taking his glove off, he threw it upon the floor of the Court." The pleadings are fully stated in the Report, in which all the facts and circumstances are narrated and set forth, until the parties reach a general demurrer. This demurrer was argued by the most distinguished special pleaders of the time. Chitty supported the demurrer, in an elaborate and exhausting argument; and Tyndal, (then Special Pleader under the Bar, afterwards Lord Chief Justice of the Common Pleas,) opposed him in an argument equally elaborate and learned. Lord Ellenborough, C. J., delivering the opinion of the Court, said, "The general law of the land is in favour of the wager of battel, and it is our duty to pronounce the law as it is, and not as we may wish it to be. Whatever prejudices, therefore, may justly exist against this mode of trial, still, as it is the law of the land, the court must pronounce judgment for it."

Sir Samuel Shepherd, the Attorney General, immediately introduced a Bill in Parliament, to abolish appeals of murder and *wager of battel*, which may be found in the 25 *Vol. Statutes at Large*, 59 *Geo.* 3. c. 46. 22d June, 1819.

It may be mentioned in connexion with this case of *Thornton's Appeal*, that it was the first occasion on which the late Chief Justice, Sir Nicholas Tyndal, of the Court of Common Pleas, greatly distinguished himself. His very learned argument gave rise to the Act mentioned above for abolishing that barbarous and absurd mode of trial. *Lon. Law Review* for Aug. 1846, p. 436. *MS. Sum.*, Tit. *Appeal of Death*.*

* This reference is to a MS. interleaved copy of *Hale's Summary*, from the library of the late SIR WILLIAM ALEXANDER, Chief Baron of the Exchequer, furnished to the editors by HENRY J. WILLIAMS, Esq., of Philadelphia. Mr. EAST, in the Introduction to the first edition of his *Pleas of the Crown*, mentions his reference to this work among other authorities of like character—"Lord Hale's Summary, interleaved with MS. corrections and additions. This MS. compilation, though began before, (probably by Mr. Stow, a gentleman of the bar,) was put into its present form by Mr. Justice Yates, whose son is now in possession of it. Copies of it were communicated to different judges, who have contributed, from time to time, the fruits of their own experience. My own copy was taken from one in the possession of the late Mr. Justice Buller. The work was bound up in three volumes, according to which I have cited it by the description 1, 2 & 3 *MS. Sum.*" 1 *East P. C. Introduction*, p. 15, London ed. 1803.

tal punishment of the offender may be discharged by all parties interested, namely by the appellant by release, and by the king by his pardon.

And thus far touching the punishment of homicide.

Now I shall consider somewhat also of the punishment of *theft*, and the various laws and usages concerning the same in several kingdoms and states, and at different times in the same state or kingdom.

By the *Jewish* law, *Exod.* xxii. 1, 4. "If a man steal an ox or a sheep, and sell or kill it, he shall restore five oxen for an ox, and four sheep for a sheep: If the theft be found in his hands alive, whether ox, ass, or sheep, he shall restore double;" and the like for other goods;(i) so that there was no capital punishment in case of theft, though it were accompanied with *burglary*, as breaking a house, but men-stealers were punished with death;(k) but it seems by the civil constitutions of that state the punishment thereof was sometimes enhanced, at least in some circumstances, sometimes to a seven-fold restitution, *Prov.* vi. 31, and also to death, *2 Sam.* xii. 5.(l)

Now as to the *Attic* laws: *Samuel Petit de Legibus Atticis, Lib.* VII. tit. 5. gives us an account of their laws concerning theft, in some things differing, in some things agreeing with the *Jewish* [10] laws, *furem cujuscunque modi furti supplicio capitis puni- nito*. This was *Draco's* law; but it was thought too severe, and therefore *Solon* corrected it;(m) Si furtum factum sit, & quod furto perierat receperit dominus, duplione luito furtum qui fecit & quorum ope consilioque fecit; decuplione vindicator, ni dominus rem furtivam receperit, in nervo quoque habetor dies ipsos quinque totidemque noctes, si heliastæ pronunciârint; pronunciato autem, cum de pœna illius agitur.

Si lucri furtum cujus æstimatio sit supra 50 drachmas faxit, ad undecim viros rapitor; si nox furtum faxit, si im aliquis occisit, jure cæsus esto:—Manifestum hujusmodi furtum qui faxit, etiamsi vades dederit, non noxæ factæ sarcitione, sed morte luito. Si quis item ex aliquo gymnasio vestis aut lecythi aut alicujus vel minimæ rei, aut supellectilis è gymnasio, aut ex balineo, aut è portubus, quod excedat 10 drachmarum æstimationem, furtum faxit, morte luito.

Manifesti saccularii(n) morte luunto.

Vecticularii(o) manifesti morte luunto.

(i) *Exod.* xxii. 7, 9. The reason why the restitution of an ox was more than of a sheep is supposed by *Maimonides more Nevochim Par.* III. cap. 41, to be because sheep are more easily guarded against thieves than oxen, who feed at a greater distance one from another.

(k) *Exod.* xxi. 16.

(l) This passage from the book of *Samuel* does by no means prove what it is brought for, viz. that theft was punishable with death by the *Jewish* law; for the case there put of taking away a poor man's lamb, was attended with violence and other aggravating circumstances, which provoked king *David* to say, *The man that hath done this shall surely die*; and some render the words, *Does deserve to die*; but at most it only proves the vehemence of *David's* anger at the man, and not what was the law of the *Israelites*.

(m) See *A. Gellium, Lib.* XI. cap. 18. & *Plutarch. in Vita Solonis*.

(n) Βαλαντιοτομιον, A cut-purse.

(o) Τοιχευχας, A house-breaker.

Plagiarii(p) manifesti morte launto.

In hortos irrumperere ficosque deligere capital esto ;(q) So that the quantity of the thing stolen, the place, the season, the manner and other circumstances heightened theft into a capital punishment, that otherwise by Solon's laws was only pecuniary and imprisonment.(r)

Now as to the *Roman* laws: For a theft that was not *furtum manifestum*, there is given *actio in duplum*; but if [11] it were *furtum manifestum*, *actio in quadruplum*;(s) *furtum autem manifestum est, cum fur deprehenditur in furto.*(t)

But now as to punishments among the *Romans*, there were these degrees or orders: I. Capital punishments, (*viz. ultimum supplicium*)(u) which were, 1. *Damnatio ad furcam*. 2. *Vivi crematio*. 3. *Capitis amputatio*. 4. *Damnatio ad feras*. II. Others, that were in the next degree, were, 1. *Coercitio ad metalla*. 2. *Deportatio ad insulas*. III. Others again of a lower allay were, 1. *Relegatio ad tempus vel in perpetuum*. 2. *Datio in publicum opus*. 3. *Fustigatio*.(x)

I find not among the *Romans* any greater punishment of theft, than four-fold restitution(y) unless in these cases:

1. Si quis ex metallo principis vel ex monetâ sacrâ furatus est, pœna metalli & exilii punitor.(z)

(p) 'Ἀρπαγιστοὶ, Sive Plagiarius, is est, qui sine vi, dolo malo sciens abducit homines liberos & ingenuos, venditque pro servis, aut suppremit: vel is est, qui alienos servos abducit sine vi, & plerumque sine furto, & fugam persuadet, aut fugitivos celat. *Petit. Comment. ad Lib. VII. tit. 5, de furtis*.

(q) But this was a temporary law, made in a time of dearth, when it was thought necessary to prohibit the exportation of figs. However, prosecutions of offenders against this law soon grew odious: from hence all malicious informers were called *Sycophants*. Vide. *Athenai Deipnosophist. Lib. III. & Schollast. in Aristophanis Plutum ad v, 31. & 874*.

(r) Among the *Lacedæmonians* all manner of theft was permitted, as a practice which tended to instruct their youth in the stratagems of war. *A. Gel. Lib. XI. cap. 18*. It was also unpunished among the ancient *Egyptians*. *A. Gel. ubi supra*. But we learn from *Diodor. Sic. Lib. I*. that it was allowed only on certain conditions, for it was provided by a law, that whoever was minded to follow the trade of thieving, should first enter his name with the captain of the gang, and should bring in all his booty to him, that so the right owner might know where to apply for the recovery of his goods, which were restored to him on paying the quarter of the value.

(s) *Inst. Lib. IV. tit. 6. §. 5. Diges. Lib. XLVII. tit. 2. de furtis, l. 46. §. 2*. Herein the *Roman* law greatly resembled the *Jewish*, with this difference that by the *Jewish* law the punishment of fourfold was to be instead of restitution; whereas by the *Roman* law the thing stolen was recoverable over and above the pœna quadrupli. *Dig. eod. tit. l. 54. §. 3*.

(t) *Dig. eod. tit. l. 2. l. 3. pr.* By this was meant not only if he was taken in the fact, but also if he was apprehended with the goods upon him before he had carried them to the place, where they were to remain that night, and answers to the expression in our law, of being taken in the *mauvais*.

(u) *Dig. Lib. XLVIII. tit. 19. de pœnis. l. 21*.

(x) *Dig. eod. tit. l. 28. pr. §. 1. l. 11. §. 3*.

(y) So far were the *Romans* from inflicting capital punishments for theft, that on the contrary it was expressly forbidden by *Justinian*, that any person should be put to death, or suffer the loss of member for theft. *Novel CXXXIV. cap. ult.*

(z) *Dig. Lib. XLVIII. tit. 13. ad leg. Jul. peculatus, l. 6. §. 2. Lib. XLVIII. tit. 19. de pœnis l. 38*.

2. Grassatores qui cum ferro aggredi & spoliare institunt, capite puniuntor.(a)

3. Famosi latrones ad bestias vel furcas damnantor. *Digest. de pœnis.*(b)

If we come to the laws and customs of our own kingdom, we shall find the punishment of theft in several ages to vary according as the offence grew and prevailed more or less.(c)

Among the laws of king *Athelstan*, mentioned by *Brampton*, p. 849, 852, 854. *Non parcatur alicui latroni supra 12 annos & supra 12d. quin occidatur.*(d) *Edmund* his successor,* *præcepit nè infra 15 annos, vel pro latrocinio infra 12d. occidatur, nisi fugerit, vel se defenderit: Malmesbury* tells us, that in the time of *William I.* theft was punished with castration, and loss of eyes;(e) but in the time of *Henry I.* the ancient law, which continues to this day, was *ut siquis in furto vel latrocinio deprehensus fuerit suspenderetur.*(f)[2]

(a) *Dig. eod. tit. l. 28. §. 10.*

(b) *Dig. eod. tit. l. 28. §. 15.*

(c) By the laws of *Ethelbert*, if one man stole any thing from another, he was to restore three fold, besides a fine to the king, l. 9. If he stole any thing from the king, he was to restore nine-fold, l. 4.

By the laws of *Ina*. a thief was punished with death, unless he redeemed his life *capitis estimatione l. 12.* which was 60s. l. 7. but if a villain, who had been often accused, should be taken in a theft, he was to have a hand or foot cut off, l. 18.

By the laws of *Alfred* whoever stole a mare with the foal, or a cow with the calf, was to pay 40s. besides the price of the mare or cow, l. 16. Whoever stole any thing out of a church, was to pay the value, and a fine according to the value; and also was to have that hand cut off, which committed the fact, l. 6. If any person committed a theft *die Dominico*, or any other great festival, he was to pay double l. 5.

(d) By the first law of *Athelstan* it was but 8d. *Wilkins leges Anglo-Sax. p. 56.* but afterwards by the laws of the same king, enacted at *London*, and thence called *judicia civitatis Lundoniæ*, no one was to be put to death for a theft under 12d. *Ibid. p. 65.* But in case the thief fled, or made resistance, then he might be put to death, though it were under that value, *Ibid. p. 70.* By the law of *Cnut* theft was punished with death, *Ibid. p. 134. l. 4. and p. 143. l. 61.*

(*) This is a mistake, for no such law is found among the laws of that king, but it is among the later laws of king *Athelstan*, *Vide Judicia Civ. Lond. Wilk. leg. Anglo-Sax. p. 70.*

(e) By the laws of *William I.* it was expressly prohibited, that any should be hanged or put to death for any offence, but that his eyes should be pulled out, his testicles, hands or feet cut off, according to the degree of his crime, l. 67. *apud Wilkins Leg. Anglo-Sax. p. 229. p. 218.*

(f) In former times, though the punishment of theft was capital, yet the criminal was permitted to redeem his life by a pecuniary ransom; but in the 9th year of *Hen. I.* it was enacted, that whoever was convicted of theft (or any other felony, 3 *Co. Instit. 53.*) should be hanged, and the liberty of redemption was entirely taken away. *Wilk. leg. Anglo-Sax. p. 304.* This law still remains at this day; but considering the alteration in the value of money, the severity of it is much greater now than then, for 12d. would then purchase as much as 40s. will now; and yet a theft above the value of 12d. is still liable to the same punishment; upon which *Sir Hen. Spelman* justly observes, that while all things else have rose in their value and grown dearer, the life of man is become much cheaper. *Spelm in verbo larcinium*; from hence that learned author takes occasion to wish, that the ancient tenderness of life were again restored *Justum certè est, ut collapsa legis æquitas restauretur, & ut divinæ imaginis vehiculum, quod superiores pridem ætates ob gravissima crimina nequaquam tollerent, levioribus hodie ex delictis non perderetur.*

[2] This is no longer the Law of England. *Mr. Welsby* in his notes to 4th *Blac. Comm. Appendix A.* gives the following statement of offences, (now 1844,) punishable with death.

High Treason, at Common Law.

Murder, 9 *Geo. IV. c. 31. s. 3.*

And although many of the schoolmen and canonists are of opinion that death ought not to be inflicted for theft(g), yet the necessity of the peace and well ordering of the kingdom hath [13] in all ages and in almost all countries prevailed against that opinion, and annexed death as the punishment of theft, when the offence hath grown very common and accompanied with enormous circumstances, though in some places more is left herein to the *Arbitrium Judicis* to give the same or a more gentle sentence according to the quality of the offence and offender, than is used in *England*, where the laws are more determinate, and leave as little as may be to the *Arbitrium Judicis*. See the case disputed learnedly by *Covarruvias Tomo 2. Lib. II. cap. 9. §. 7.*

This I have therefore mentioned, that it may appear, that capital punishments are variously appointed for several offences in all kingdoms and states: and there is a necessity it should be so; for regularly the true, or at least, the principal end of punishments is to deter men from the breach of laws, so that they may not offend, and so not suffer at all; and the inflicting of punishments in most cases is more for example and to prevent evils, than to punish. When offences grow enormous, frequent and dangerous to a kingdom or state, destructive or highly pernicious to civil societies, and to the great insecurity and danger of the kingdom and its inhabitants, severe punishments, even death itself, is necessary to be annexed to laws in many

(g) *Scotus Sentent. 4. distinct 154. quest. 3. Sylvester in Verbo furtum 3.* Not only the schoolmen and canonists were of this opinion, but by what has been above said, it appears likewise to have been the sense both of the *Jewish* and *Roman* laws, and though, as our author says, the principal end of punishment is to deter men from offending, yet it will not follow from thence, that it is lawful to deter them at any rate, and by any means; for even obedience to just laws may be enforced by unlawful methods. *Cic. Epist. 15. ad Brutum. Est pœnæ modus, sicut rerum reliquarum;* and again, *Lib. I. de officiis. Est enim ulciscendi & puniendi modus.* Besides, experience might teach us, that capital punishments do not always best answer that end. See *Grot. de jur. bel. &c. Lib. II. cap. 20. §. 12. n. 3.*

Administering or causing to be taken poison or other destructive thing with intent to commit murder. 1 *Vict. c. 85. s. 2.*

Stabbing, cutting or wounding with intent to commit murder. *Id. ibid.*

Causing any bodily injury dangerous to life, with intent to commit murder. *Id. ibid.*

Buggery. 9 *Geo. IV. c. 31. s. 15.*

Robbery, accompanied with stabbing, cutting or wounding of the person robbed. 1 *Vict. c. 87. s. 2.*

Piracy, accompanied with an assault with intent to murder any person on board of, or belonging to the ship, or with stabbing, cutting, or wounding of such person, or with any act whereby the life of such person may be endangered. *Id. c. 88. s. 2.*

Burglary, accompanied with an assault with intent to murder, or with stabbing, cutting, wounding, beating or striking any person being in the dwelling house. *Id. c. 86. s. 2.*

Maliciously setting fire to a dwelling-house, any person being therein. *Id. c. 89. s. 2.*

Maliciously setting fire to, casting away or destroying any ship or vessel with intent to murder any person, or whereby the life of any person shall be endangered. *Id. s. 4.*

Exhibiting any false light or signal with intent to bring any ship into danger, or maliciously doing any thing tending to the immediate loss or destruction of a ship in distress. *Id. s. 5.*

Principals in the second degree, and accessories before the fact to the felonies above mentioned, except the offence of buggery, (see 9 *Geo. IV. c. 31. s. 31.*) are alike punishable with death. See 9 *Geo. IV. c. 31. s. 3.* 1 *Vict. c. 85. s. 7; c. 86. s. 6; c. 87, s. 9; c. 88, s. 4; c. 83. s. 11.*

cases by the prudence of law-givers, though possibly beyond the single demerit of the offence itself simply considered.

Penalties therefore regularly seem to be *juris positivi*, & *non naturalis*, as to their degrees and applications, and therefore in different ages and states have been set higher or lower according to the exigence of the state and wisdom of the law-giver. Only in the case of murder there seems to be a justice of retaliation, if not *ex* [14] *lege naturali*, yet at least by a general divine law given to all mankind, Gen. ix. 6. And although I do not deny but the supreme king of the world may remit the severity of the punishment, as he did to *Cain*, yea, and his substitutes, sovereign princes, may also defer or remit that punishment, or make a commutation of it upon great and weighty circumstances, yet such instances ought to be very rare, and upon great occasions.

In other cases, the *lex talionis* in point of punishments seems to be purely *juris positivi*; and although among the *Jewish* laws we find it instituted, Exod. xxi. 24, 25. "Eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe;" yet in as much as the party injured is living and capable of another satisfaction of his damage, (which he is not in case of murder,) I have heard men greatly read in the *Jewish* lawyers and laws affirm, that these *taliones* among the *Jews* were converted into pecuniary rates and estimates to the party injured, so that in penal proceedings the rate or estimate of the loss of an eye, tooth, hand or foot was allowed to the person injured, *viz.* the price of an eye for an eye, and the price of a hand for a hand, &c. (h)

CHAPTER II.

CONCERNING THE SEVERAL INCAPACITIES OF PERSONS, AND THEIR EXEMPTIONS FROM PENALTIES BY REASON THEREOF.

MAN is naturally endowed with these two great faculties, understanding and liberty of will, and therefore is a subject properly capable of a law properly so called, and consequently obnoxious to guilt and punishment for the violation of that law, which in respect of these two great faculties he hath a capacity to obey: The consent of the will is that, which renders human actions either com- [15] mendable or culpable; as where there is no law, there is no transgression, so regularly where there is no will to commit an offence, there can be no transgression, or just reason to incur the penalty or sanction of that law instituted for the punishment of crimes or offences. And because the liberty or choice of the will presupposeth an act of the understanding to know the thing or action chosen by the will, it follows that, where there is a total defect of the understanding, there is no free act of the will in the choice of things or

(h) Maimonides More Nevochim, Para. III. cap. 41.

actions. But general notions or rules are too extravagant and undeterminate, and cannot be safely in their latitude applied to all civil actions; and therefore it hath been always the wisdom of states and law-givers to prescribe limits and bounds to these general notions, and to define what persons and actions are exempt from the severity of the general punishments of penal laws in respect of their incapacity or defect of will.

Those incapacities or defects, that the laws, especially the laws of *England*, take notice of to this purpose, are of three kinds.

I. Natural.

II. Accidental.

III. Civil incapacities or defects.

The natural is that of *Infancy*.

The accidental defects are,

1. *Dementia*.

2. *Casualty*, or *Chance*.

3. *Ignorance*.

The civil defects are,

1. *Civil Subjection*.

2. *Compulsion*.

3. *Necessity*.

4. *Fear*.

Ordinarily none of these do excuse those persons, that are under them, from civil actions to have a pecuniary recompense for injuries done, as *trespasses*, *batteries*, *woundings*; because such a recompense is not by way of penalty, but a satisfaction for [16] damage done to the party: but in cases of crimes and misdemeanors, where the proceeding against them is *ad pœnam*, the law in some cases, and under certain temperaments takes notice of these defects, and in respect of them relaxeth or abateth the severity of their punishments.

CHAPTER III.

TOUCHING THE DEFECT OF INFANCY AND NONAGE.

THE laws of *England* have no dependence upon the civil law, nor are governed by it, but are binding by their own authority; yet must it be confessed, the civil laws are very wise and well composed laws, and such as have been found out and settled by wise princes and law-givers, and obtain much in many other kingdoms so far as they are not altered, abrogated, or corrected by the special laws or customs of those kingdoms, and therefore may be of great use to be known, though they are not to be made the rules of our *English* laws; and therefore though I shall in some places of this book, and here particularly mention them, yet neither I, nor any else may lay any weight or stress upon them, either for discovery or exposition

of the laws of *England*, farther than by the customs of *England* or Acts of Parliament they are here admitted.

As to this business touching infancy, and how far they are capable of the guilt or punishment for crimes, I will consider, 1. What the civil laws tell us concerning the same. 2. What the common laws of *England* have ordained touching it, and wherein these agree, and wherein they differ touching this matter.

The civil law distinguishes the ages into several periods [17] as to several purposes.

First, The complete full age as to matters of contract is according to their law twenty-five years,(a) but according to the law of *England* twenty-one years.(b)

Secondly, But yet before that age, viz. at seventeen years, a man is said to be of full age, to be a procurator,(c) or an executor;(d) and with that also our law agrees. 5 *Co. Rep. Pigot's case*.(e).

Thirdly. As to matrimonial contracts, the full age of consent in males is fourteen years, and of females twelve;(f) till that age they are said to be *impuberes*,(g) and are not bound by matrimonial contracts; and with this also our law agrees.(h).

Fourthly. As to matter of crimes and criminal punishments, especially that of death, they distinguish the ages into these four ranks.

1. *Ætas pubertatis plena*.
2. *Ætas pubertatis*.
3. *Ætas pubertati proxima*.
4. *Infantia*.

1. *Pubertas plena* is eighteen years.(i)

[18] 2. *Pubertas* generally, in relation to crimes and punishments, is the age of fourteen years and not before;(k) and it seems as to this purpose there is no difference between the

(a) *Institut. Lib. I. tit. 2, 3. De Curatoribus. Dig. Lib. IV. tit. 4. de Minoribus; l. 1. &c.*

(b) *Lit. §. 104. Co. Lit. §. 103.*

(c) *Institut. Lib. I. tit. 6. Quibus ex causis manumittere non licet, §. 5. & 7. Dig. Lib. III. tit. 1. De Postulando, l. i. §. 3.* At this age it was the custom among the Romans to lay aside the habits of children, and put on the garments of men. *Val. Max. Lib. V. cap. 4. §. 4. Sueton. August. cap. 8.*

(d) See *Swinb. of Wills, par. V. §. 1. n. 6.*

(e) It is quoted in *Prince's case, 5 Co. Rep. 29. b. Office of Executors, p. 307.*

(f) *Instit. Lib. I. tit. 10. de nuptiis pr. Dig. Lib. XXIII. tit. 2. de ritu nuptiarum, l. 4.*

(g) *Institut. Lib. I. tit. 22. Quibus modis tutela finitur, pr. Dig. Lib. XXVIII. tit. 6. de vulg. & pupil. substitut. l. 2. Macrob. Saturn. Lib. VII. cap. 7.*

(h) *Co. Lit. §. 104.* At the same age they were permitted by the civil law to make a Testament. *Digest. Lib. XXVIII. tit. 1. Qui testamenta facere possunt, l. 5. Institut. Lib. II. tit. 12. Quibus non est permissum facere testamentum, §. 1, Cod. Lib. VI. tit. 22. Qui testamenta facere possint, vel nol. l. 4.* The common law seems not to have determined precisely at what age one may make a testament of a personal estate, it is generally allowed that it may be made at the age of eighteen. *Office of Executors, p. 305. Co. Lit. 89. b.* and some say under, for the common law will not prohibit the spiritual court in such cases, *Sir. Thos. Jones, Rep. 210. 1 Vern. 255. 2 Vern. 469.*

(i) *Dig. Lib. I. tit. 7. de adoption. l. 40. §. 1. Instit. eod. tit. §. 4. Dig. Lib. XLII. tit. 1. de re judicat. l. 57. Lib. XXXIV. tit. 1. De alimentis, l. 14. §. 1.*

(k) *Dig. Lib. XXIX. tit. 5. de Senatusconsulto Silaniano, &c. l. 1. §. 32.*

male and female sex; at this age they are supposed to be *doli capaces*, and therefore for crimes although capital, committed after this age they shall suffer as persons of full age; (l) only by the constitutions of some kingdoms, in favour of their age, the ordinary punishments were not inflicted upon such young offenders; as in *Spain*, not unless he were of the age of seventeen years. *Vide Covar. de Matrimonio, cap. 5. §. 8. (m)* *In Relectione ad Clement. cap. Si Furiosus. (n)* By the ancient law among the *Jews*, he that was but a day above thirteen years, was, as to criminals adjudged *in virili statu*, but not if under that age. (†)

3. *Ætas pubertati proxima*, herein there is great difference among the *Roman* lawyers; and though they make a disparity herein between males and females, yet I think as to point of crimes the measure is the same for both: Some assign this *Ætas pubertati proxima* to ten years and a half; others to eleven years. (o) If they be under the age which they call *Ætas pubertati proxima*, they are presumed *incapaces doli*, (p) and therefore regularly not liable to a capital punishment for a capital offence: but this holds not always true; for according to the opinion of very learned civilians, before ten years and a half they may be *doli capaces*, and therefore it must be left *ad arbitrium judicis* upon the circumstances of the case; yet with this caution, *Judex, qui ante illam ætatem arbitrari debet puerum esse proximum pubertati, maximis adducendus est conjecturis, & cautissime id aget, ac tandem raro. Covarr. ubi supra. (q)*

And with this agrees our law, as shall be showed. But if [19] the offender be in *ætate pubertati proxima*, viz. according to some ten years and a half, according to others eleven years old, he is more easily presumed to be *doli capax*, and therefore may suffer as another man, unless by great circumstances it appear, that he is *incapax doli*. But this hath also its temperaments, 1. By express provision of the constitution in *Codice de falsâ Monetâ*: “*Impuberes, si conscii fuerint, nullum sustineant detrimentum, quia ætas eorum, quid videat ignorat;*” but a penalty is laid upon the tutor. (r)

2. Though *ætas pubertati proxima* is regularly presumed *Capax doli*, and so may be guilty of a capital offence.—*Digest De regulis juris. (s)* *Pupillum, qui proximus est pubertati, capacem esse furandi*, yet as it is *in arbitrio judicis* to judge an infant within ten

(l) *Dig. Lib. IV. tit. 4. de minoribus, l. 37. §. 1. Lib. XLVIII. tit. 5. ad leg. Jul. de adult. l. 36. Cod. Lib. 2. tit. 35. Si adversus delictum. l. 1.*

(m) *Tom. 1. p. 157.*

(n) *Par. III. §. 5. Tom. 1. p. 558.*

(†) *Seld. de Synedriis, Lib. II. cap. 13. §. 132.*

(o) The prevailing opinion is, that the males are *pubertati proximi* at ten and a half, and the females at nine and a half, because when they had passed the middle distance between infancy and puberty, they might then be properly said to be *ætatis pubertati proxime*.

(p) *Dig. Lib. XLVII. tit. 12. de sepulchro violato, l. 3. §. 1.*

(q) *Tom. 1. p. 157.*

(r) *Lib. IX. tit. 24. l. 4.*

(s) *Lib. L. tit. 17. l. 111, Lib. XXIX. tit. 5. de Senatusconsulto Siliano. l. 14. Lib. XLIV. tit. 4. de doli mali exceptione, l. 4. §. 26. Instit. Lib. IV. tit. 1. de obligat. quæ ex delicto, §. 18. Dig. Lib. XLVIII. tit. 2. de furtis, l. 23.*

years and a half *capax doli*, as before; so it is in *arbitrio judicis* upon consideration of circumstance to judge one above ten years and a half, nay of twelve, thirteen years, or but a day within fourteen years, to be *incapax doli*, and so privileged from punishment, as appearing upon the circumstances of the fact not yet *constitutus in ætate proximâ pubertati*, or at least not *doli capax*; and with this our law doth in a great measure agree.

3. That if he be above ten years and a half, and appears *doli capax*, yet if under fourteen years, he is not to be punished *pœnâ ordinatâ*, but it may have some relaxation *ex arbitrio judicis*.^(t) But although our law indulges a power to the judge to reprieve before or after judgment an infant convict of a capital offence in order to the King's pardon, yet it allows no arbitrary power to the judge to change the punishment that the law inflicts; and thus far for the third age or period, *Ætas pubertati proxima*.

4. The fourth age or period is *infantia*, which lasts till seven years; within this age there can be no guilt of a capital offence; the infant may be chastised by his parents or tutors, but cannot be capitally punished, because he cannot be guilty;^(u) and if [20] indicted for such an offence as is in its nature capital, he must be acquitted; and therefore the severity of the gloss upon the decretal *De delictis puerorum, cap. 1.*^(x) is justly rejected in this case;^(y) and with this agrees the law of *England*.

But now let us consider the laws of *England* more particularly touching the privilege of infancy in relation to crimes and their punishments, and that in relation to two kinds of crimes, 1. Such as are not capital. 2. Such as are capital.

First, As to misdemeanors and offences that are not capital: in some cases an infant is privileged by his non-age, and herein the privilege is all one, whether he be above the age of fourteen years or under, if he be under one and twenty years; but yet with these differences:

If an infant under the age of twenty-one years be indicted of any misdemeanor, as a *riot* or *battery*, he shall not be privileged barely by reason that he is under twenty-one years,[1] but if he be convicted thereof by due trial, he shall be fined and imprisoned; and the reason is, because upon his trial the court *ex officio* ought to consider and examine the circumstances of the fact, whether he was *doli capax*, and had discretion to do the act wherewith he is charged; and the same law is of a *femme covert*. 2. But if the offence charged by the indictment be a mere non-feasance, (unless it be of such a thing as he is bound to by reason of tenure, or the like as to repair a bridge, &c.)^(z) there in some cases he shall be privileged by

(t) *Dig. Lib. IV. tit. 4. de minoribus, l. 37. §. In delictis.*

(u) *Dig. Lib. XLVII. tit. 2. de furtis, l. 23. Lib. XLVIII. tit. 8. ad leg. Cornel. de sicariis l. 12.*

(x) *Decretal. Lib. V. tit. 23.*

(y) *Tom. 1. p. 157.*

(z) *2 Co. Inst. 703.*

[1] See 4 *Bl. Com.* 23. 1 *Russ. on Crimes* 2. *Co. Litt.* 274. b.

his nonage, if under twenty one, though above fourteen years, because *Laches* in such a case shall not be imputed to him.(a)

36 *E. 3. Assis.* 443. 4 *H. 7. 11. b.* If an infant in *Assise* vouch a record, and fail at the day, he shall not be imprisoned,(b) nor it seems a *feme covert*. 13 *Assis.* 1.(c) and yet the statute of *Westminst. 2. cap. 25.* that gives imprisonment in such a case, is general.

8 *E. 2. Corone* 395. If *A.* kills *B.* and *C. & D.* are present, and do not attach(d) the offender, they shall be fined [21] or imprisoned; yet if *C.* were within the age of twenty-one years, he shall not be fined nor imprisoned.

3. Where the corporal punishment is but collateral, and not the direct intention of the proceeding against the infant for his misdemeanor, there, in many cases, the infant under the age of twenty-one shall be spared, though possibly the punishment be enacted by parliament. 14 *Ass.* 17.(e) If an infant of the age of eighteen be convict of a disseisin with force, yet he shall not be imprisoned. *Vide* 26 *Ass.* 9. 43 *E. 3. Imprisonment* 16. 40 *E. 3. 44. a.(f)* and yet a *feme covert* shall be imprisoned in such case. 16 *Ass.* 7.

If an infant be convict in an action of trespass *vi & armis*, the entry must be *nihil de fine, sed pardonatur, quia infans*; for if a *capiatur* be entered against him, it is error, for it appears judicially to the court, that he was within age when he appears by guardian. *P. 8. Jac. B. R. Holbrooke v. Dogley, Croke, n. 3.;*(g) the like law is that he shall not be *in misericordia pro falso clamore.*(h)

B. Coverture 68. General statutes that give corporal punishment are not to extend to infants, and therefore *Pl. Com.* 364, a *per Walsh*, if an infant be convict in ravishment of ward, he shall not be imprisoned, though the statute of *Merton cap. 6.* be general in that case:(i) but this must be understood where it is, as before said, a punishment as it were collateral to the offence, as in the cases before-mentioned: but where a fact is made felony or treason, it extends as well to infants, if above fourteen years,(k) as [22] to others, as shall be said. And this appears by several acts of parliament, and particularly by 1 *Jac. cap. 11. of felony for marrying two wives, &c.* where there is a special exception of marriages within the age of consent, which in females is twelve, in males

(a) *B. Saver default*, 50. *Cro. Jac.* 465, 466. *Pl. Com.* 364. a. *Co. Lit.* 246. b.

(b) 2 *Co. Instit.* 414.

(c) *B. Coverture* 35. *Resceit* 87.

(d) The words of the book are *ne leve le main d'attach.*

(e) *F. Imprisonment* 8.

(f) "Et le cause est, pur ceo que la ley entend', que un enfant ne poit my constr' bien & mal' ne le quel soit advantage pour luy, ou nemy; ne nul soly serra adjudge en un enfant." *Mes.* 12. *H. 4. 22. b. Hank.* dit que enfant d'age de 18 ans poit estre disseisor ove-force & estre emprison per cella.

(g) *Cro. Jac.* 274.

(h) *Co. Lit.* 127. a. yet this was not a settled point, for 2. *E. 3. 5.* the court doubted of it; and in 17 *E. 3. 75. b.* and 41 *Assis.* 14. the plaintiffs, though infants, were amerced *pro falso clamore*; but though they were amerced, yet it appears from the same cases that they were entitled on account of their infancy to a pardon of course. See 1 *R. A.* 214.

(i) Another like case is there put, if an infant be a receiver and account before auditors, and be found in arrears, the auditors cannot commit him to prison notwithstanding the general words of the statute of *W. 2. cap. 11.*

(k) *Co. Lit.* 247. b.

fourteen years; so that if the marriage were above the age of consent, though within the age of twenty-one years, it is not exempted from the penalty.

So by the statute of 21 *H. 8. cap. 7. concerning felony by servants that embezzle their master's goods delivered to them*, there is a special proviso, that it shall not extend to servants under the age of eighteen years, who certainly had been within the penalty, if above the age of discretion, viz. fourteen years, though under eighteen years, unless a special provision had been to exclude them.^(l)

I come therefore to consider the privilege of infancy in cases of capital offences and punishments according to the laws of *England*, wherein I shall examine, 1. How the ancient law stood. 2. How it stands at this day in relation to infants.

I. As to the ancient law :

1. By what has been before said it appears that the Civil law was very uncertain in defining what was that *ætas pubertati proxima*, and consequently such as might subject the offender to capital guilt or punishment; some taking it to be ten years and a half, some eleven years, others more, others less. The laws of *England* therefore, that always affect certainty, determined anciently the *ætas pubertati proxima* to be twelve years for both sexes; under that age none could be regularly guilty of a capital offence, and above that age and under fourteen years, he might or might not be guilty according to the circumstances of the fact that might induce the court and jury to judge him *doli capax, vel incapax*.^(m)

This appears by the laws of king *Athelstan* mentioned [23] in the first chapter, "Non parcatur alicui latroni super 12 annos & supra 12 d. quin occidatur." And although his successor *Edmund*⁽ⁿ⁾ reduced it to fifteen years, unless he fled, yet it will appear that the standard of twelve years obtained in after ages.^(o)

2. It appears that an infant of twelve years was compellable to take the oath of allegiance in the leet, and under that age none were to take the oath, or to do suit to the leet. *Bract. Lib. III.(p) cap.*

^(l) The like exception there is in the 12 *Ann. cap. 7.* where apprentices under the age of fifteen years, who shall rob their masters, are excepted out of the act.

^(m) By the laws of *Ina*, l. 7. an infant of ten years of age might be guilty of being accessory to a theft, and was punished accordingly with servitude. *Wilk. Leg. Anglo-Sax. p. 16.*

⁽ⁿ⁾ This is a mistake, for it was not *Edmund* but king *Athelstan* himself, who thinking it a pitiable case that a youth but twelve years old should be put to death, as was permitted by the former law, changed the time from twelve years to fifteen, and ordered that none who was but fifteen years of age should be put to death, unless he resisted or fled; if he surrendered himself, he was only to be imprisoned until some of his relations or friends would become security for him *juxta plenam capitis æstimationem, ut semper ab omni malo abstineat*: if he could not get any such security, then he was to take an oath to the same purpose in such manner as the bishop should direct him, and was to remain in servitude pro capitis sui æstimatione; but if after this he should be again guilty then he was to be put to death without any regard to his age. See *Wilk. Leges Anglo-Sax. p. 70.*

^(o) In the time of king *Henry I.* the old law of king *Athelstan* took place, viz. twelve years of age, and 8d. value. *Ibid. p. 259.*

^(p) *De Corona.*

1.(q) *Britton*, cap. 29. in fine, *Calvin's case*, 7 Co. Rep. 6. b. So that at that age, and not before, he was taken notice of by the law to be under the obligation of an oath, and consequently capable of discretion.

3. The ordinary process against capital offenders was and is by *Capias* and *Exigent*, and *Utlary* thereupon; but against an infant under twelve, process of utlary in cases of indictment was not awardable, and if awarded, it was error; but if above that age, that process was awardable; and *Bract. Lib. III.(r) cap. 11. sect. 4 & 5.* gives the reason, "Minor vero, qui infra ætatem 12 annorum fuerit utlegari non debet, quia ante talem ætatem non est sub lege aliquâ nec in decenna;" and *ibidem cap. 10 sect. 1*, he mentions an old law of king *Edward*,(s) "Omnis, qui ætatis 12 annorum fuerit, facere debet sacramentum in visu franciplegii, quod nec latro vult esse, nec latroni consentire;" and *Stamf. Lib. I. cap. [24] 19.* cites out of a book of *Bracton*, *De Visu Franci plegii*, "Quod quilibet duodecim annorum potest felonie judicium sustinere." which implies also that within that age, regularly at least, he could not be a felon.

4. Again, *T. 32. E. 1. Rot. 32.* "Eboracum, coram rege. Adam filius Adæ de Arnhale captus noctanter in domo Johannis Somere coram rege ductus cognovit, quod furtive cepit, &c. 9s. per preceptum & missionem Richardi Short:" *Richard Short* had his clergy, "Et prædictus Adam commissus fuit custodie mariscalli custodiend', quia infra ætatem; postea habito respectu ad imprisonment, quod prædictus Adam habuit, & etiam ad teneram ætatem ejusdem Adæ, eo quod non est nisi ætatis 12 annorum, qui talis ætatis judicium ferre non potest, ideo de gratiâ regis deliberetur, &c." Upon this record these things are observable, viz. 1. The court recorded his confession; but regularly that ought not to be, for if an infant under the age of twenty-one shall confess an indictment, the court in justice ought not to record the confession, but put him to plead *not guilty*, or at least ought also to have inquired by an inquest of office of the truth and circumstances of the fact. 2. That here he was twelve years old, and yet judgment spared, and the reason given, *Qui talis ætatis judicium ferre non potest.* Yet 3. There is somewhat still of *gratia regis* interposed, as it seems, in respect he was past the old standard of twelve years.

II. But now let us come to the Common law as it stood in after-

(q) This seems to be a mistake, for cap. 11. sect. 4. for the oath mentioned in cap. 1. was to be taken by knights and others of the age of fifteen years and upwards.

(r) *De Corona.*

(s) There is no such law extant among those of king *Edward*, but the law here quoted is a law of *Cnut*, *Leg. Cnuti*, l. 19. which is in these words, *Volumus ut quilibet homo 12 annos natus jusjurandum præstet se nolle furem esse neque furi consentaneum*, which oath is to the same purpose with that mentioned by *Bracton*, *Lib. iii. de corona*, cap. 1. to be taken at the age of fifteen; and though there be a difference as to the age, yet probably it is the same oath, for it is very easy and natural to mistake xii for xv. See the statute of *Marlbridge*, cap. 10 & 25. and lord *Coke's* comment thereon, 2 *Instit.* 147. where he takes notice that the old books are misprinted. See also 2 *Instit.* 72. *Mirror*, cap. 1. §. 3. *Britton*, cap. 12.

times; for in process of time, especially in and after the reign of king *Edward III.* the Common law received a greater perfection, not by the change of the Common law, as some have thought, for that could not be but by act of parliament; but men grew to greater learning, judgment and experience, and rectified the mistakes of former ages and judgments, and the law in relation to infants and their punishments for capital offences was and to this day is as followeth.

1. It is clear that an infant above fourteen and under twenty-one is equally subject to capital punishments, as well as others of full age; for it is *præsumptio juris*, that after fourteen years they are *doli capaces*, and can discern between good and evil; and if the law should not animadvert upon such offenders by reason of their nonage, the kingdom would come to confusion. Experience makes us know that every day murders, bloodsheds, burglaries, larcenies, burning of houses, rapes, clipping and counterfeiting of money, are committed by youths above fourteen and under twenty-one; and if they should have impunity by the privilege of such their minority, no man's life or estate could be safe.(t) In my remembrance at *Thetford* a young lad of sixteen years old was convict for successive wilful burning of three dwelling houses, and in the last of them burning a child to death, and yet had carried the matter so subtilly, that by a false accusation of another person for burning the first house an innocent person was brought in danger, if it had not been strangely discovered: he had judgment to die, and was accordingly executed.(u)

Fourteen years of age therefore is the common standard, at which age both males and females are by the law obnoxious to capital punishments for offences committed by them at any time after that age; and with this agrees *Fitz. N. B.* 202. b.(x) *Co. Litt.* § 405.(y) *Vide Mr. Dalton's Justice of Peace*, cap. 95. and 104.(z)

2. An infant under the age of fourteen years and above [26] the age of twelve years is not *primâ facie* presumed to be *doli capax*, and therefore regularly for a capital offence committed under fourteen years he is not to be convicted or have judgment as a felon, but may be found not guilty.[2]

(t) Our author's argument concludes very strongly against their escaping with impunity, but loses much of its force when urged in behalf of capital punishments, for there is no necessity that if they be not capitally punished they must therefore go unpunished; so that whatever severity may be needful in cases of murders and acts of violence, yet in the common instances of larceny and stealing, some other punishment might be found, which might leave room for the reformation of young offenders.

(u) At *Abingdon* assizes, *Feb.* 23, 1629, before *Whitlock* justice, one *John Dean*, an infant, between eight and nine years, was indicted, arraigned, and found guilty of burning two barns in the town of *Windsor*; and it appearing upon examination that he had malice, revenge, craft, and cunning, he had judgment to be hanged, and was hanged accordingly. *MS. Report.*

(x) *N. Edit.* p. 450.

(y) p. 247. b.

(z) The first edition, but in the last edition, cap. 147 and 157.

[2] "By the ancient *Saxon* law, the age of twelve years was established for the age of possible discretion when first the understanding might open; and from thence until the offender was fourteen, it was *ætas pubertati proxima*, in which he might or might

But though *primâ facie* and in common presumption this be true, yet if it appear to the court and jury that he was *doli capax*, and could discern between good and evil at the time of the offence committed, he may be convicted and undergo judgment and execution

not be guilty of a crime, according to his natural capacity or incapacity. This was the dubious stage of discretion; but under twelve it was held that he could not be guilty in will, neither after fourteen could be supposed to be innocent, of any capital crime which he in fact committed. By the law as it now stands, and has stood at least since the time of *Edward* the Third, the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment. For one lad of eleven years old may have as much cunning as another of fourteen, and in these cases our maxim is, '*malitia supplet ætatem.*' Under seven years of age, indeed, an infant cannot be guilty of felony, for then a felonious discretion is almost an impossibility in nature; but at eight years old he may be guilty of felony. Also under fourteen, though an infant, shall be *primâ facie* adjudged to be *doli incapax*; yet if it appear to the court and jury that he was *doli capax*, and could discern between good and evil, he may be convicted and suffer death." 4 *Stephen's Comm.* 75, 76. 4 *Black. Comm.* 23. 2 *Stephen's Comm.* 331, 332. *Lond. Ed.*

The case cited by *Blackstone* from *Foster*, 70, is *YORKE's* case, and is deemed an important one by Sir *William Russell*, (1 *Russ. on Crimes*, 4.) It was this. At *Bury Summer Assizes*, 1748, *William Yorke*, a boy of ten years of age, was convicted before Lord Chief Justice *Willes* for the murder of a girl of about five years of age, and received sentence of death; but the Chief Justice out of regard to the tender years of the prisoner, respited execution till he should have an opportunity of taking the opinion of the rest of the judges whether it was proper to execute him or not upon the special circumstances of the case; on which he reported to the judges at *Sergeant's Inn* in *Michaelmas Term* following. The boy and girl were parish children, put under the care of a parishioner at whose house they were lodged and maintained; on the day the murder happened, the man of the house and his wife went out to their work early in the morning, and left the children in bed together: when they returned from work, the girl was missing, and the boy being asked what was become of her, answered that he had helped her up and put on her clothes, and that she had gone he knew not whither. Upon this, strict search was made in the ditches and pools of water near the house, from an apprehension that the child might have fallen into the water. During this search, the man under whose care the children were, observed that a heap of dung near the house had been newly turned up, and upon removing the upper part of the heap, he found the body of the child about a foot's depth under the surface, cut and mangled in a most barbarous and horrid manner. Upon this discovery, the boy, who was the only person capable of committing the fact, that was left at home with the child, was charged with the fact, which he stiffly denied. When the coroner's jury met, the boy was again charged, but persisted still to deny the fact. At length being closely interrogated, he fell to crying, and said he would tell the whole truth. He then said that the child had been used to foul herself in bed; that she did so that morning, (which was not true, for the bed was searched and found to be clean,) that thereupon he took her out of bed and carried her to the dung heap, and with a large knife which he found about the house, cut her in the manner the body appeared to be mangled, and buried her in the dung heap, placing the dung and straw that was bloody under the body, and covering it up with what was clean; and having so done, he got water and washed himself as clean as he could. The boy was the next morning carried before a neighbouring justice of the peace, before whom he repeated his confession, with all the circumstances he had related to the coroner and his jury. The justice of the peace very prudently deferred proceeding to a commitment until the boy should have an opportunity of recollecting himself. Accordingly he warned him of the danger he was in if he should be thought guilty of the fact he stood charged with, and admonished him not to wrong himself, and then ordered him into a room where none of the crowd that attended should have access to him. When the boy had been some hours in this room, where victuals and drink were provided for him, he was brought a second time before the justice, and then he repeated his former confession, upon which he was committed to jail. On the trial, evidence was given of the declarations before mentioned to have been made before the coroner and his jury, and before the justice of the peace; and of many declarations to the same purpose,

of death, though he hath not attained *annum pubertatis*, viz. fourteen years; though according to the nature of the offence and circumstances of the case the judge may or may not in discretion reprieve him before or after judgment, in order to the obtaining the

which the boy made to other people after he came to jail, and even down to the day of his trial: for he constantly told the same story in substance, commonly adding that the devil put him upon committing the fact. Upon this evidence, with some other circumstances tending to corroborate the confessions, he was convicted.

Upon this report of the Chief Justice, the judges, having taken time to consider of it, unanimously agreed, 1. That the declarations stated in the report were evidence proper to be left to the jury. 2. That supposing the boy to have been guilty of this fact, there were so many circumstances stated in the report which were undoubtedly tokens of what Lord *Hale* calls mischievous discretion, that he was certainly a proper subject for capital punishment, and ought to suffer; for it would be of very dangerous consequence to have it thought that children may commit such atrocious crimes with impunity. That there are many crimes of the most heinous nature, such as (in the present case) the murder of young children, poisoning parents or masters, burning houses, &c., which children are very capable of committing, and which they may in some circumstances be under strong temptations to commit; and therefore, though the taking away the life of a boy of ten years old might savour of cruelty, yet, as the example of that boy's punishment might be a means of deterring other children from the like offences, and as the sparing the boy, merely on account of his age, would probably have a quite contrary tendency; in justice to the public, the law ought to take its course, unless there remained any doubt touching his guilt. In this general principle, all the judges concurred; but two or three of them, out of great tenderness and caution, advised the Chief Justice to send another reprieve for the prisoner, suggesting that it might possibly appear, on further inquiry, that the boy had taken this matter upon himself at the instigation of some person or other who hoped by this artifice to screen the real offender from justice.

Accordingly the Chief Justice granted one or two more reprieves; and desired the justice of the peace who took the boy's examination, and also some other persons in whose prudence he could confide, to make the strictest inquiry they could into the affair and report to him. At length he, receiving no farther light, determined to send no more reprieves, and to leave the prisoner to the justice of the law at the expiration of the last: but, before the expiration of that reprieve, execution was respited till further order, by warrant from one of the secretaries of state: and at the Summer Assizes, 1757, the prisoner had the benefit of His Majesty's pardon, upon condition of his entering immediately into the sea service. *Yorke's Case. Post. R. 70.*

Two remarkable cases of commission of the crime of murder by boys under fourteen years of age, have occurred in *New Jersey*. In April, 1818, *Aaron*, (a coloured boy,) was tried for the murder of a child, *Stephen Conelly*, little more than two years old, by throwing him over the curb into a well. The whole material testimony in the case was a confession made by the boy. The Chief Justice, (*Kirkpatrick*,) in the course of his opinion, holds the following language: "With respect to the liability of infants to punishment, and to the giving of their confessions in evidence against them, much might be said, and ought to be said with great caution. It is perfectly settled, that an infant within the age of seven years cannot be punished for any capital offence, whatever circumstances of mischievous intention may be proved against him, for by the presumption of law, he cannot have discretion to discern between good and evil, and against this presumption no averment can be admitted. It is perfectly settled also, that between the age of seven and the age of fourteen years, the infant shall be presumed to be incapable of committing crime upon the same principle, the presumption being very strong at seven, and decreasing with the progress of his years; but then this presumption, in this case, may be encountered by proof; and if it shall appear by *strong* and *irresistible* evidence that he had sufficient discernment to distinguish good from evil, to comprehend the nature and consequences of his acts, he may be convicted and have judgment of death." *The State v. Aaron*, 1 *South. R.* 231. 238. 247. Mr. Justice *Southard*, in the same case, holds much the same language. "The distinctions which have been taken in the books, as to age, when crimes may be committed and the criminal punished, are in no inconsiderable degree arbitrary. The great subject of inquiry in all cases ought to be, the legal capacity of the prisoner: and this is found in some much earlier than

king's pardon. 12 *Ass.* 30. *Corone* 118 & 170. *Alice de Waldborough* of the age of thirteen years was burnt by judgment for killing her mistress; and it is there said, that by the ancient law none shall be hanged within age which is intended the age of discretion, viz.

others. The real value of the distinctions, is, to fix the party, upon whom this capacity lies. There is, indeed, an age so tender, that the nature and consequences of acts cannot be comprehended, and every uncorrupted feeling of the heart, as well as every moral and legal principle forbids punishment. But after we pass this age and progress towards maturity, there have been periods settled, which ascertain the presumption of law, as to the existence of this capacity. If under fourteen, especially under twelve years, the law presumes that it does not exist, and if the State seek to punish, it must conclusively establish it. If above the age of fourteen, the law presumes its existence, and if the accused would seek to avoid punishment, he must overcome that presumption by sufficient evidence. But wherever the capacity is established, either by this presumption of law or the testimony of witnesses, punishment always follows the infraction of the law. If the intelligence to apprehend the consequences of acts; to reason upon duty, to distinguish between right and wrong; if the consciousness of guilt and innocence be clearly manifested, then this capacity is shown; in the language of the books, the accused is *capax deli*, and "as a rational and moral agent must abide the results of his own conduct." *Id.* 245, 246. The prisoner, in this case, was ten years and ten months old. From the printed report it only appears that a new trial was granted; but the Editor has been informed by one of the counsel for the defendant, that the prisoner was acquitted by the jury on the second trial.

In 1828, *James Guild*, a coloured boy, of the age of twelve years and five months, was indicted for the murder of *Catharine Beakes*, and found guilty. On a motion for a new trial made to the Court of Oyer and Terminer, the Supreme Court in an advisory opinion, held themselves bound to advise the Court of Oyer and Terminer not to grant a new trial, but to proceed to discharge their duty by pronouncing the sentence of the law on the crime of murder. After an elaborate examination of the authorities, the then Chief Justice (*Ewing*,) re-iterated the opinions of Chief Justice *Kirkpatrick*, and Mr. Justice *Southard*, in *The State v. Aaron*, cited *supra*. "The age of the prisoner was earnestly pressed on our consideration by his counsel, who strenuously insisted he was too young to be exposed to punishment on such evidence, (his own confession.) At the perpetration of the offence he was aged twelve years and somewhat more than five months. The sound, sensible, and legal rule on this head is, in our opinion, judiciously as well as lucidly stated by Justice *Southard* in the case of *Aaron*, (*supra*.) In *Leach's* edition of *Hawkins*, B. I. c. 1, page 1, in note, it is said, "from the supposed imbecility of mind, the protective humanity of the law, will not, without anxious circumspection, permit an infant to be convicted on his own confession. Yet if it appear by strong and pregnant evidence and circumstances, that he was perfectly conscious of the nature and malignity of the crime, the verdict of a jury may find him guilty, and judgment of death be given against him." *The State v. Guild*, 5 *Halst. R.* 189. 1 *Greenl. on Ev.* § 217. 219. 221. 222. 223.

If a child more than seven and under fourteen years of age, is indicted for felony, it will be left to the jury to say whether the offence was committed by the prisoner, and, if so, whether at the time of the offence, the prisoner had a guilty knowledge that he or she was doing wrong. The presumption of law is, that a child of that age has not such guilty knowledge, unless the contrary be proved by the evidence. *Rex v. Owen*, 4 *Carr. & Pay. R.* 236, per *Littledale, J.* See *Rex v. Groomridge*, 7 *Carr. & Pay. R.* 582, per *Gaselee, J.* *Best on Presump.* 22, citing a *MS. Report of the S. C.* 2 *M. C. C. R.* 122. *S. C.* 1 *Greenl. on Ev.* § 28. *The People v. Davis*, 1 *Wheeler's Crim. Cas.* 230. *The People v. Teller*, 1 *Id.* 231, & note. *Com. v. Lanigan*, 2 *Boston Law Rep.* 49, per *Thatcher, J.* *Wharton's Am. Crim. Law*, 17. 19. Case of *Moses Chapman Elliot*, 4 *Boston Law Rep.* 329. *Com. v. French*, *Thatcher's Crim. Cas.* 163. *Burn's Just. tit. Children*, 29, ed. by *Chitty & Bere.* *Com. v. Keagy*, 1 *Ashmead R.* 256, per *King, Pres.* *Ward v. The Com.* 3 *Leigh. R.* 743.

In Massachusetts it has been decided that an infant under the age of fourteen years, may be indicted for an assault with intent to commit a rape. *Commonwealth v. Green*, 2 *Pick.* 380. This case conflicts with *Reg. v. Phillips*, 8 *Car. & P.* 736, in which it was

fourteen years; but before *Spigurnel* an infant within age^(a) that had killed his companion, and hid himself (*se mucha*) was presently hanged; for it appeared by his *muching* he could discern between good and evil, and *malitia supplet ætatem*.

25 E. 3. 85. *Corone* 129. One within age was found guilty of larceny, and by reason of his nonage judgment was respited, but afterwards he was brought to the bar and had his judgment; though this book be generally *one within age*, it must be intended within the age of discretion, *viz.* fourteen years, for it was never made a doubt, whether if above that age he might not have judgment.

3. But yet farther, if an infant be above seven years old, and under twelve years, (which according to the ancient law was *Ætas pubertati proxima*, and commit a felony, in this case *prima facie* he is to be judged not guilty, and to be found so, because he is supposed not of discretion to judge between good and evil; ^(b) yet even in that case if it appear by strong and pregnant evidence and circum-

[27] stances, that he had discretion to judge between good and evil, judgment of death may be given against him. 3 H. 7. 1. b. & 12. b. An infant of the age of nine years killed an infant of the like age; he confessed the felony, and upon examination it was found he hid the blood and the body; the justices held he ought to be hanged. ^(c)

But in cases of this nature, 1. It is necessary that very strong and pregnant evidence ought to be to convict one of that age, and to make it appear he understood what he did; for if the law require such an evidence where the offender is above twelve, and under fourteen, much more if he were under twelve at the time of the fact committed. 2. The circumstances must be inquired of by the jury, and the infant is not to be convicted upon his confession. 3. It is prudence in such a case even after conviction to respite judgment, or at least execution; ^(d) but yet I do not see how the judge can discharge him if he be convicted, but only reprieve him from judgment, and leave him in custody till the king's pleasure be known.

And therefore the book of 35 H. 6. 11. & 12. *per Moyle & Billing*, "*That though a jury should find such an infant guilty, the court ex officio must discharge him,*" must be understood either *first* only of a reprieve before judgment, or *secondly* at least, that the jury find

(a) Ten years old, according to *Fitzherbert's Report Corone* 118.

(b) *B. Corone* 133.

(c) But however they respited the execution that he might get a pardon. *F. Corone* 57. *B. Corone* 133. *Dalton* says that an infant of eight years of age may commit homicide, and shall be hanged for it. See *Dalton's Justice*, cap. 147.

(d) *Dalt. Justice*, p. 505.

held, (*Patteson, J.*) that a boy who at the time of the commission of the offence of rape, was under fourteen years of age, could not, in point of law, be guilty of an assault with intent to commit a rape; and if he was under that age no evidence is admissible to show that, in point of fact, he could commit the offence of rape. See also to the same effect, *Regina v. Jordan*, 9 Car. & P. 118. *Regina v. Brimlow*, 9 Car. & P. 366. Under the Statute, 1 Vict. c. 85, s. 11, he might be convicted of an assault.

the fact, and that he was either within the age of infancy, *viz.* seven years old, or that he did the fact, but was under fourteen, and not of discretion to judge between good and evil; in which case the court *ex officio* ought to discharge him, because it is not felony.

4. And lastly, If an infant within age be *infra ætatem infantia*, *viz.* seven years old, he cannot be guilty of felony, ^(e) whatever circumstances proving discretion may appear; for *ex* [28] *presumptione juris* he cannot have discretion, ^(f) and no averment shall be received against that presumption: and although the laws of *England*, as well as the Civil and Canon law, assign a difference between males and females as to their age of consent to marriage, *viz.* fourteen to the male, twelve to the female; yet it seems to me, that as to matters of crimes, especially in relation to capital punishments, the females have the same privilege of nonage as the males; and therefore the regular *Ætas pubertatis* in reference to capital crimes and punishments of both is fourteen years, with those various temperaments and exceptions above assigned.

And it is to be observed, that in all cases of infancy, insanity, &c. if a person incapable to commit a felony be indicted by the grand inquest, and thereupon arraigned, the petit jury may either find him generally *not guilty*, or they may find the matter specially, that he committed the fact, but that he was *non compos*, or that he was under the age of fourteen, [3] *scilicet ætatis 13 annorum*, and had not discretion to discern between good and evil, & *non per feloniam*; and thereupon the court gives judgment of acquittal. 21. H. 7. 31. ^(g) But if a man be arraigned in such a case upon an indictment of murder or manslaughter by the coroner's inquest, there if the party committed the fact, regularly the matter ought to be specially found, because if the jury find the party not guilty, they must inquire how he came by his death, *viz.* "Et juratores prædicti quæsitæ per curiam, quomodo is ad mortem suam devenit dicunt super sacramentum suum, quod prædictus A. B. die——anno——apud D. dum non fuit compos mentis, *or* dum fuit *infra ætatem discretionis*, scilicet 9 annorum, nec scivit discernere inter bonum & malum, prædictum J. S. cum gladio, &c. percussit & ipsum ad tunc & ibidem occidit, sed non ex malitiâ pre-cogitatâ neque per feloniam, vel felleo animo; & sic idem J. S. ad mortem suam devenit." But if he be first arraigned, and acquitted upon the indictment by the grand inquest, and [29] found not guilty, he may plead that acquittal upon his arraignment upon the coroner's inquest, and that will discharge him; and the petit jury shall inquire farther how the party came by his death.

(e) And yet there is a precedent in the register, fol. 309. b. of a pardon granted to an infant within the age of seven years, who was indicted for homicide; in this case the jury found, that he did the fact before he was seven years old.

(f) *Plowd.* 19. a.

(g) *B. Corone* 61.

[3] See *Com. v. Lanigan*, 2 (Boston) *Law Rep.* 49.

CHAPTER IV.

CONCERNING THE DEFECT OF IDIOCY, MADNESS AND LUNACY, IN REFERENCE TO CRIMINAL OFFENCES AND PUNISHMENTS.

AND thus far touching that natural defect of *infancy*. Now concerning another sort of defect or incapacity, namely *idiocy*, *madness* and *lunacy*. For though by the law of *England* no man shall avoid his own act by reason of these defects, (a) though his heir or executor may, yet as to capital offences these have in some cases the advantage of this defect or incapacity; (b) and this defect comes under the general name of *Dementia*, which is thus distinguished:

I. *Idiocy*, or *fatuity à nativitate vel dementia naturalis*; [1] such a one is described by *Fitzherbert*, who knows not to tell 20s. nor knows who is his father or mother, nor knows his own age; but if he knows letters, or can read by the instruction of another, then he is no idiot. *F. N. B.* 233. b. These, though they may be evidences, yet they are too narrow, and conclude not always, for *idiocy or not* is a question of fact triable by jury, and sometimes by inspection.

II. *Dementia accidentalis vel adventitia*, which proceeds [30] from several causes; sometimes from the distemper of the humours of the body, as deep melancholy or adust choler; sometimes from the violence of a disease, as a fever or palsy; sometimes from a concussion or hurt of the brain, or its membranes or

(a) For it is said to be a maxim in law, that no man of full age shall be permitted to stultify himself. 4 *Co. Rep.* 123. b. *Beberly's case*, *Co. Lit.* 247. a. The reason hereof is, because a man cannot know or remember what acts he did when he was of *non sane memory*. 35 *Assis. pl.* 10. See *contra F. N. B.* p. 449. *Show. Ca. Parl.* 153. 2. *Salk.* 576. [2]

(b) *Co. Lit.* 247. b *Plowd.* 19. a.

[1] See *Wheller v. Alderson*, 3 *Hagg. R.* 602. *Ray on Insanity*, c. 2. p. 69. 2d. Ed.

[2] *Black. Comm.* 291, 292; 1 *Fonbl. Eq. B.* 1. ch. 2. § 1 and note (d); *Co. Litt.* 247. *Yates v. Boen*, 2 *Str. R.* 1104. See *Shelford on Lunatics*, ch 6. § 2. p. 263. ch. 9. § 2. p. 407, &c. *Baxter v. Portsmouth*, 7 *Dowl. & Ryl.* 618; *S. C.* 5 *Barn. & Cressw.* 170; *Brown v. Joddrell*, 3 *Carr. & Payne*, 30; *Newland on Contracts* ch. 1. p. 15 to 21. The subject is a good deal discussed by Mr. Justice Blackstone, in his Commentaries, who does not attempt to disguise its gross injustice, (2 *Black. Comm.* 191, 292.) It is fully discussed by Mr. Fonblanque in his learned notes, (1 *Fonbl. Eq. B.* 1 ch. 2. § 1 and notes (a) to (k), and by Lord Coke in his commentary on Littleton, (*Co. Lit.* 247. a. and b.) who adheres firmly to it as a maxim in the common law. In America this maxim has not been of universal adoption, in the State Courts, if indeed it has ever been recognized as binding in any of the Courts of Common Law. See *Somes v. Skinner*, 16 *Mass. R.* 348; *Webster v. Woodford*, 3 *Day, R.* 90-100; *Mitchell v. Kingman*, 5 *Pick. R.* 431. In modern times, the English Courts of Law seem to be disposed, as far as possible, to escape from the maxim. *Ball v. Mannin*, 3 *Bligh. R.* (new series) 1. And even in England, although the party himself could not set aside his own act, yet the King as having the general custody of idiots and lunatics, might by his attorney general, on a bill set aside the same acts. *Buller, N. Prius*, 172; 1 *Story's Eq. Jur.* § 255, note (4); 2 *Greenl. Ev.* § 369; 3 *Bacon's Ab.* Idiots and Lunatics, F.

The ancient rule of the common law must now be considered as entirely exploded.

organs; and as it comes from several causes, so it is of several kinds or degrees; which as to the purpose in hand may be thus distributed: 1. There is a partial insanity of mind; and 2. a total insanity.

The former is either in respect to things *quoad hoc vel illud insanire*; some persons, that have a competent use of reason in respect of some subjects, are yet under a particular *dementia* in respect of some particular discourses, subjects, or applications; or else it is partial in respect of degrees: and this is the condition of very many, especially melancholy persons, who for the most part discover their defect in excessive fears and griefs, and yet are not wholly destitute of the use of reason; and this partial insanity seems not to excuse them in the committing of any offence for its matter capital; for doubtless most persons that are felons of themselves, and others are under a degree of partial insanity, when they commit these offences: it is very difficult to define the indivisible line that divides perfect and partial insanity; but it must rest upon circumstances duly to be weighed and considered both by the judge and jury, lest on the one side there be a kind of inhumanity towards the defects of human nature, or on the other side too great an indulgence given to great crimes: the best measure that I can think of is this; such a person as labouring under melancholy distempers hath yet ordinarily as great understanding, as ordinarily a child of fourteen years hath, is such a person as may be guilty of treason or felony.

Again, a total alienation of the mind, or perfect madness; this excuseth from the guilt of felony and treason: (d) *de quibus infra*. This is that, which in my lord Coke's *Pleas of the Crown*, p. 6. is called by him absolute madness, and total deprivation of memory.

Again, this accidental *dementia*, whether total or partial, is distinguished into that which is permanent or fixed, and [31] that which is interpolated, and by certain periods and vicissitudes: the former is *phrenesis* or madness; the latter is that, which is usually called *lunacy*, for the moon hath a great influence in all diseases of the brain, especially in this kind of *dementia*; such persons commonly in the full and change of the moon, especially about the equinoxes and summer solstice, are usually in the height of their distemper; and therefore crimes committed by them in such their distempers are under the same judgment as those whereof we have before spoken, namely, according to the measure or degree of their distemper; the person that is absolutely mad for a day, killing a man in that distemper, is equally not guilty, as if he were mad without intermission. But such persons as have their lucid intervals, (which ordinarily happens between the full and change of the moon) in such intervals have usually at least a competent use of reason, and crimes committed by them in these intervals are of the same nature, and subject to the same punishment, as if they had no such deficiency; (e) nay, the alienations and contracts made by them in such intervals are obliging to their heirs and executors. (f)

(d) 21 H. 7. 31. b.

(e) F. Corone, 324.

(f) 4 Co. 125. a.

Again, this accidental *dementia*, whether temporary or permanent, is either the more dangerous and pernicious, commonly called *furor*, *rabies*, *mania*, which commonly ariseth from adust choler, or the violent inflammation of the blood and spirits, which doth not only take away the use of reason, but also superadds to the unhappy state of the patient, rage, fury, and tempestuous violence; or else it is such as only takes away the use and exercise of reason, leaving the person otherwise rarely noxious, such as is a deep *delirium*, *stupor*, memory quite lost, the phantasy quite broken, or extremely disordered. And as to criminals these *dementes* are both in the same rank; if they are totally deprived of the use of reason, they cannot be guilty ordinarily of capital offences, for they have not the use of understanding, and act not as reasonable creatures, but their actions are in effect in the condition of brutes.(g)

[32] III. The third sort of *dementia* is that, which is *dementia affectata*, namely *drunkenness*. [3] This vice doth deprive men of the use

(g) *Bract.* 420. b. *F. Corone*, 193, 351.

[3] With regard to drunkenness, it is now settled that a man cannot avail himself of his own gross misconduct and vicious acts, to shelter himself from the legal consequences of crime. But to make him criminally responsible, the act must take place and be the *immediate result* of the fit of intoxication, and *while it lasts*; and not the result of insanity remotely occasioned by previous habits of gross indulgence in spirituous liquors. The law looks to the immediate, and not to the remote cause; to the actual state of the party, and not to the causes which remotely produced it. 2 *Greenl. on Ev.* § 374. Drunkenness, it was said in an early case, can never be received as a ground to excuse or palliate an offence: this is not merely the opinion of a speculative philosopher, the argument of counsel, or the *obiter dictum* of a single judge, but it is a sound and long established maxim of judicial policy, from which perhaps a single dissenting voice cannot be found. But if no other authority could be adduced, the uniform decisions of our own Courts from the first establishment of the government, would constitute it now a part of the common law of the land. *Wharton's Am. Crim. Law*, 13, 14; 2 *Rice's Dig.* Tit. Murder and Manslaughter, p. 105; 1 *Story's Eq. Jur.* § 230, 231, and cases there cited in notes, which, though mostly civil cases, are still valuable for the analogies in principle there to be found.

"If a person that is drunk kills another, this shall be felony, and he shall be hanged for it, and yet he did it through ignorance, for when he was drunk he had no understanding or memory; but inasmuch as that ignorance was occasioned by his own act and folly, and he might have avoided it, he shall not be privileged thereby. And Aristotle says, such a man deserves double punishment, because he has doubly offended, viz: in being drunk to the evil example of others, and in committing the crime of homicide." Per *Pollard, Serg.*, arguendo in *Reniger v. Fogossa*, *Plowd. R.* 19; *Beverley's Case*, 4 *Rep.* 125.

"The prisoner's being intoxicated does not alter the nature of the offence. If a man chooses to get drunk, it is his own voluntary act; it is very different from a madness which is not caused by any act of the person. That voluntary species of madness which it is in the party's power to abstain from, he must answer for." Per *Alderson, B.*, in *Rex v. Meakin*, 7 *C. & P.* 297.

"If a man makes himself voluntarily drunk, that is no excuse for any crime he may commit whilst he is so: he must take the consequence of his own voluntary act, or most crimes would otherwise go unpunished. But drunkenness may be taken into consideration in cases where what the law deems sufficient provocation has been given, because the question is, in such cases, whether the fatal act is to be attributed to the passion of anger excited by the previous provocation, and that passion is more easily excitable in a person when in a state of intoxication than when he is sober. So, when the question is, whether words have been uttered with a deliberate purpose, or are merely low and idle expressions, the drunkenness of the person uttering them is proper to be considered. But if there is really a previous determination to resent a slight affront in a barbarous

of reason, and puts many men into a perfect, but temporary phrenzy; and therefore, according to some Civilians, (h) such a person committing *homicide* shall not be punished simply for the crime of homicide, but shall suffer for his drunkenness answerable to the nature of the

(h) *Bertholinus* and others. See *Covarruvias*, Tom. 1. p. 557. in *relect. ad Clem. Si furiosus*. Par. iii. §. 3. & 4.

manner, the state of drunkenness in which the prisoner was, ought not to be regarded, for it would furnish no excuse." Per *Payke, B.*, in *Rex v. Thomas*, 7 C. & P. 820.

"It is a maxim of law, that, if a man gets himself intoxicated, he is liable to the consequences, and is not excusable on account of any crime he may commit when infuriated by liquor, provided he was previously in a fit state of reason to know right from wrong. If, indeed, the infuriated state at which he arrives should continue and become a lasting malady, then he is not amenable." Per *Holroyd, J.* in *Burrow's Case*, 1 Lew. C. C. 75.

"If either the insanity has supervened from drinking, without the panel's having been aware that such an indulgence in his case leads to such a consequence, or if it has arisen from the combination of drinking, with a half crazy or infirm state of mind, or a previous wound, or illness which rendered spirits fatal to his intellect, to a degree unusual in other men, or which could not have been anticipated, it seems inhuman to visit him with the extreme punishment which was suitable in the other case. In such a case, the proper course is to convict; but in consideration of the degree of infirmity proved, recommend to the royal mercy." *Alison's Princ. of the Crim. Law of Scotland*, 654, quoted in *Guy's Med. Jur.* 277. Moreover there seems to be little doubt, that in these cases, the occasional thirst for spirituous drinks, is, itself, but one of the symptoms or effects of the diseased condition of the brain, as we see it occurring in persons who are not habitually intemperate, and who even abstain for weeks or months from all use of intoxicating liquors. If this be so, which we think none will dispute, then the intoxication itself is but an accidental and involuntary consequence of a maniacal state of the mind, depending on cerebral disorder, and can, by no means, impart a character of criminality to any action to which it may give rise. *Guy's Med. Jur.* 277; *Ray on Insanity*, c. 25.

The following cases are given by the American Editor of *Guy*, (Dr. Lee) in a note to page 277, above cited.

I. *N. M. Thomas* was tried May 13, 1840, for the murder of *Hallet Greenman*, at *Florida, Montgomery Co., N. Y.*, Nov. 24, 1839. The homicide was committed during a fit of intoxication, and the prisoner was found guilty. The Judges of the Supreme Court and the Attorney General certified to the legality of the conviction and the sufficiency of the evidence. The sentence was commuted to imprisonment for life.

II. *John Smock* was tried in Dec. 1839, for the murder of his wife in the city of *New York, Tuesday, June 25, 1839*. They were both very intemperate, and in a fit of drunkenness the wound was inflicted, of which she died, a few days after. The physician of the city prison testified that he was labouring under *delirium tremens* at the time. He was found guilty, with a recommendation to mercy; in accordance with which the sentence was commuted to imprisonment for life.

III. *Robert Miller* was tried in Oct. 1839, for the murder of *Barney Leddy*, at *Utica, April, 1839*. On the trial it was proved that the killing grew out of a drunken quarrel and fight, (without previous animosity,) brought on by a jug of liquor which the deceased brought to *Miller's* house. The accused was convicted and hung.

IV. *Jabez Fuller* was tried in March, 1840, for the murder of his wife at *Somerstown, Westchester Co., May 26, 1839*. They were both very intemperate, and in a fit of intoxication, prompted by jealousy, he injured her so severely by stamping upon her, that she died four days afterward from the effect of her bruises. It appeared from the testimony, that he was of intemperate habits, and quick tempered; but when sober, of a civil and quiet demeanour. He was convicted, and hung, May 22, 1840.

V. *John Johnson* was tried in Nov. 1840, for the murder of his wife at *Buffalo, Aug. 19, 1840*. It was proved on the trial that he was much intoxicated on the day of the murder, though several witnesses gave him a good character, as a quiet and peaceable man, industrious and trusty. He was convicted and hung on the 19th of June, 1841.

The law will be found fully discussed in the following cases.

Penn v. McFall, Add. 257. *U. S. v. Drew*, 5 Mason R. 29, 30. 3 Am. Jur. 7. S. C.

crime occasioned thereby; so that yet the formal cause of his punishment is rather the drunkenness, than the crime committed in it: but by the laws of *England* such a person(i) shall have no privilege by this voluntary contracted madness, but shall have the same judgment as if he were in his right senses. *Plowd.* 19. a. *Crompt. Just.* 29. a.

But yet there seems to be two allays to be allowed in this case.

1. That if a person by the unskilfulness of his physician, or by the contrivance of his enemies, eat or drink such a thing as causeth such a temporary or permanent phrenzy, as *aconitum* or *nux vomica*, this puts him into the same condition, in reference to crimes, as any other phrenzy, and equally excuseth him.

2. That although the *simplex* phrenzy occasioned *immediately* by drunkenness excuse not in criminals, yet if by one or more such practices, an *habitual* or fixed phrenzy be caused, though this madness was contracted by the vice and will of the party, yet this habitual and fixed phrenzy thereby caused puts the man into the same condition in relation to crimes, as if the same were contracted involuntarily at first.

Now touching the trial of this incapacity, and who shall be adjudged in such a degree thereof to excuse from the guilt of capital offences, this is a matter of great difficulty, partly from the easiness of counterfeiting this disability, when it is to excuse a nocent, and partly from the variety of the degrees of this infirmity,
[33] whereof some are sufficient, and some are insufficient to excuse persons in capital offences.

Yet the law of *England* hath afforded the best method of trial, that is possible, of this and all other matters of fact, namely, by a jury of twelve men all concurring in the same judgment, by the testimony

(i) 4 Co. 125. a.

Bennet v. The State, Mart. & Yerg. 136, 137. *Cornwell v. The State*, Mart. & Yerg. 155. 159. Per Crabb, J. delivering the majority opinion of the S. C. of Tennessee. *The State v. Toohy*, cited from MS. Dec. 1819, 2 Rice's S. C. Dig., Tit. Murder & Manslaughter, p. 104, 105. *The State v. Turner*, 1 Ohio Rep. 29, 30. *The State v. Thompson*, Id. 617. 622. 625. *Burroughs v. Rickman*, 1 Green's N. J. Rep. 238. *John Burrow's Case*, 1 Lewin C. C. 75. Per Holroyd, J. *Rennie's Case*, Id. 76. Per Holroyd, J. *Marshall's Case*, Id. 76. Per Parke, J. *Goodier's Case*, Id. 76. Per Parke, J. *Rex v. Carroll*, 7 Carr & Payne, 145. Per Park & Littledale, J. J. overruling *Rex v. Gundley*, 1 Russ. on C. & M. 8. 2d Ed. *Rex v. Meakin*, 7 Carr & Payne, 297. Per Alderson, B. *Rex v. Thomas*, Id. 817. Per Parke, B. *Reg. v. Cruse*, 8 Id. 546. Per Patteson, J. *Pearson's Case*, 2 Lewin C. C. 144. *William McDonough's Case*, Ray on Insanity, § 398. 2d ed. *Vatelut's Case*, Id. § 299. 2d Ed. *Wilson's Case*, Id. § 405. 2d Ed. *Budsell's Case*, Id. § 406. 2d ed. *Western Jour. Med. Science*, Vol. 3. *Thiel's Case*, Ray on Insanity, § 409. 2d ed. *Abbott's Case*, Id. § 416. 2d ed.

For an ample discussion of the criminal responsibility of the drunkard, the reader is referred to the Treatise of Dr. Ray (of Maine) on the *Medical Jurisprudence of Insanity*, c. 24, 25. § 375 to § 418. *Macnisk's Anatomy of Drunkenness* (passim.) *Hoffbauer's Psychologie*, § 195. *Georget Des Maladies Mentales*, Vol. 2. p. 80, cited by Dr. Ray. *Mittermarie on the Effect of Drunkenness upon Criminal Responsibility*, § VI. VII. VIII. IX. *American Jur.* Vol. 3. p. 7, 9. Id. Vol. 21. p. 6. Id. *Paley's Mor. Phil.* B. IV. c. 2.

of witnesses *viva voce* in the presence of the judge and jury, and by the inspection and direction of the judge.

There are two sorts of trials of idiocy, madness, or lunacy; the first, in order to the commitment or custody of the person and his estate, which belongs to the king, either to his own use and benefit, as in case of *idiocy*; or to the use of the party, in case of accidental madness or *lunacy*; and in order hereunto there issues a writ (*k*) or commission to the sheriff or escheator, or particular commissioners, both by their own inspection and by inquisition to inquire, and return their inquisition into the Chancery; and thereupon a grant or commitment of the party and his estate ensues; and in case the party or his friends find themselves injured by the finding him a lunatic or idiot, a special writ may issue to bring the party before the chancellor, or before the king to be inspected. *Vide Fitz. N. B.* 239. (*l*)

But this concerns not the purpose in hand; for whether the party that is supposed to commit a capital offence be thus found an idiot, madman or lunatic, or not, yet if really he be such, he shall have the privilege of his idiocy, lunacy, or madness, to excuse him in capitals.

Secondly therefore, the trial of the incapacity of a party indicted or appealed of a capital offence is, upon his plea of *not guilty*, by the jury upon his arraignment, who are to inquire thereupon touching such incapacity of the prisoner, and whether it be to such a degree, as may excuse him from the guilt of a capital offence. (*m*)

In presumption of law, every person of the age of discretion is presumed of *sane memory*, unless the contrary be proved; and this holds as well in cases civil as criminal.

Again, if a man be a lunatic, and hath his *lucida interval*, and this be sufficiently proved, yet the law presumes [34] the acts or offences of such a person to be committed in those intervals, wherein he hath the use of reason, unless by circumstances or evidences it appears they were committed in the time of his distemper; and this also holds in civils as well as in criminals.

And although in civil cases, he that goes about to allege an act done in the time of lunacy, must strictly prove it so done, yet in criminal cases (where the court is to be thus far of counsel with the prisoner, as to assist him in matters of law and the true stating of the fact) if a lunatic be indicted of a capital crime, and this appears to the court, the witnesses to prove the fact may and must also be examined, whether the prisoner were under actual lunacy at the time of the offence committed.

A man that is *surdus & mutus a nativitate*, is in presumption of law an idiot, and the rather, because he hath no possibility to understand what is forbidden by law to be done, or under what penalties: (*n*) but if it can appear, that he hath the use of understanding, which many of that condition discover by signs to a very great mea-

* (*k*) See *Stamf. Prerog.* 33. b.

(*m*) *Savil.* 50. 1. *And.* 107.

(*n*) *Vide Leg. Alfredi*, l. 14. *B. Corone* 101 & 217.

(*l*) *N. Edit.* 517.

sure, then he may be tried, and suffer judgment and execution, though great caution is to be used therein.(o)[4]

I come now to apply what has been said to the various natures of capital crimes.

If a man in his sound memory commits a capital offence, and before his arraignment he becomes absolutely mad, he ought not by law to be arraigned during such his phrenzy, but be remitted to prison until that incapacity be removed; the reason is, because he cannot advisedly plead to the indictment; and this holds as well in cases [35] of treason, as felony, even though the delinquent in his sound mind were examined, and confessed the offence before his arraignment: and this appears by the statute of 33 *H. 8. cap. 20.* which enacted a trial in case of treason after examination in the absence of the party; but this statute stands repealed by the statute of 1 & 2 *Phil. & Mar. cap. 10 Co. P. C. p. 6.* And if such person after his plea, and before his trial, become of *non sane memory*; he shall not be tried; or, if after his trial he becomes of *non sane memory* he shall not receive judgment; or, if after judgment he becomes of *non sane memory*, his execution shall be spared; for were he of sound memory, he might allege somewhat in stay of judgment or execution. *Co. P. C. 4.(p)*

(o) According to 43 *Assis. pl. 30.* and 8 *H. 4. 2.* if a prisoner stands mute, it shall be inquired, whether it be wilful or by the act of God; from whence *Crompton* infers, that if it be by the act of God he shall not suffer. *Crompt. Just. 29. a.* But if one who is both deaf and dumb, may discover by signs that he hath the use of understanding, much more may one, who is only dumb, and consequently may be guilty of felony, *sed quære*, how he shall be arraigned.

(p) See Sir *John Hawles's* Remarks on *Bateman's* trial. *State Trials, Vol. 4. p. 205.*

[4] It may be observed that from the humane exertions of many ingenious and able persons, and from the extensive charitable institutions for the instruction of the deaf and dumb, many of these unfortunate people have at the present day a very perfect knowledge of right and wrong. In *Steel's case*, 1 *Leach*, 451, a prisoner who could not hear and could not be prevailed upon to plead, was found mute by the visitation of God, and then tried, found guilty, and sentenced to be transported. And in *Jones's case*, 1 *Leach*, 102, when the prisoner who was indicted for stealing in a dwelling house on being put to the Bar appeared to be deaf and dumb and the jury found a verdict, "Mute by the visitation of God;" after which a woman was examined upon her oath to the fact of her being able to make him understand what others said, which she said she could do by means of signs, such prisoner was arraigned, tried and convicted of the simple larceny. The proper course in such cases is, I. To swear a jury to determine whether the prisoner be mute of malice or by the visitation of God. II. Whether he be able to plead. III. Whether he be sane or not; on which issue the question is, whether he is of sufficient intellect to comprehend the course of the proceedings on the trial so as to be able to make a proper defence. *Rex. v. Pritchard*, 7 *C. & P.* 303. *Rex. v. Dyson*, *Id.* 305. n. (a) *Per Parke, B.* 1 *Lewin, C. C. R.* 64. S. C. In *Rex. v. Pritchard*, the jury were sworn on each of the three issues separately. See *Rex. v. Dyson*, for the form of the oath administered to the interpreter. See *Thompson's case*, 2 *Lewin's, C. C. R.* 137, where the prisoner being deaf and dumb, but able to read, the indictment was handed to him with the usual questions written upon paper and he wrote his plea on paper. The juror's names were then handed to him with the question, "Whether he objected to any of them?" and he wrote for answer "No." The Judge's note of the evidence was handed to him and he was asked in writing if he had any questions to put. 1 *Russ. on Crimes* 7. note. *Snyder v. Nations*, 5 *Blacf. R.* 295. 1 *Green. on Ev.* § 366. *The People v. McGee*, 1 *Denios, N. Y. Rep.* 19. *Com. v. Hill*, 14. *Mass. R.* 207. *The State v. Dewolf*, 8 *Conn. R.* 93.

But because there may be great fraud in this matter, yet if the crime be notorious, as *treason* or *murder*, the judge before such respite of trial or judgment may do well to impanel a jury to inquire *ex officio* touching such insanity, and whether it be real or counterfeit.

If a person of *non sane memory* commit *homicide* during such his insanity, and continue so till the time of his arraignment, such person shall neither be arraigned nor tried, but remitted to gaol, there to remain in expectation of the King's grace to pardon him. 26 *Ass.* 27. 3 *E. 3.* *Corone* 351.

But it seems in such a case it is prudence to swear an inquest *ex officio*, to inquire touching his madness, whether it was feigned; and thus it was done in the case of 3 *E. 3.* and in *Somerville's* case, *Anderson's Rep. par. 1 n. 154.* But in case a man in a phrenzy happen by some oversight, or by means of the gaoler to plead to his indictment, and is put upon his trial, and it appears to the court upon his trial, that he is mad, the judge in discretion may discharge the jury of him, and remit him to gaol to be tried after the recovery of his understanding, especially in case any doubt appear upon the evidence touching the guilt of the fact, and this *in favorem vitæ*; and if there be no colour of evidence to prove him guilty, or if there be a pregnant evidence to prove his insanity at the time of the fact committed, then upon the same favour of life and liberty it is fit it should be proceeded in the trial, in order to his acquittal and enlargement. [36] If a person during his insanity commit *homicide* or *petit treason*, and recover his understanding, and being indicted and arraigned for the same, pleads *not guilty*, he ought to be acquitted; for by reason of his incapacity he cannot act *felleo animo*. 12 *H. 3.* *Dower* 183. *Forfeiture* 33. 21. *H. 7.* 31. *b. il alera quite*, that is, shall be found not guilty.

And it is all one, whether the phrenzy be fixed and permanent, or whether it were temporary by force of any disease, if the fact were committed while the party was under that distemper.

In the year 1668, at *Aylesbury*, a married woman of good reputation being delivered of a child, and having not slept many nights fell into a temporary phrenzy, and killed her infant in the absence of any company; but company coming in, she told them she had killed her infant, and there it lay; she was brought to gaol presently, and after some sleep she recovered her understanding, but marvelled how or why she came thither; she was indicted for murder, and upon her trial the whole matter appearing, it was left to the jury with this direction, that if it did appear, that she had any use of reason when she did it, they were to find her guilty; but if they found her under a phrenzy, though by reason of her late delivery and want of sleep, they should acquit her; that had there been any occasion to move her to this fact, as to hide her shame, which is ordinarily the case with such as are delivered of bastard children and destroy them; or if there had been jealousy in her husband, that the child had been none of his; or if she had hid the infant, or denied the fact, these

had been evidences that the phrenzy was counterfeit; but none of these appearing, and the honesty and virtuous deportment of the woman in her health being known to the jury, and many circumstances of insanity appearing, the jury found her not guilty, to the satisfaction of all that heard it.

Touching the great crime of *treason* regularly the same is to be said, as in case of *homicide*, such a phrenzy or insanity as excuseth from the guilt of the one, excuseth from the guilt of the other: the reason is the same; he that cannot act *felonice* or *animo felonico* cannot act *proditorie*, for being under a full alienation of

[37] mind, he acts not *per electionem* or *intentionem*. This appears by the statute of 33 H. 8. cap. 20. which, though it enact, that a *non compos mentis* shall be tried for treason, yet it expressly declareth, "That if any commit high treason, while they are in good, whole, and perfect memory, and after examination become *non compos mentis* and that it be certified by four of the council, that at the time of the treason they were of good, sound, and perfect memory, and then not mad, nor lunatic, and afterwards became mad; then they shall proceed to trial:" which strongly enforceth, that a treason cannot be committed by a madman, or lunatic, during his lunacy.

And with this agrees my lord *Coke*, *P. C.* p. 6. in these words, "He that is *non compos mentis*, and totally deprived of all compassings and imaginations, cannot commit high treason by compassing or imagining the death of the king; for *furiosus solo furore puniter*; but it must be an absolute madness, and a total deprivation of memory."

This, though it be general, yet the same author tells us, 4 *Rep.* 124. b. *Beverly's* case, in these words, "Mes in ascun cases non compos mentis poit committe hault treason, come si il tua, ou offer a tuer le roy." This is a safe exception, and I shall not question it, because it tends so much to the safety of the king's person: but yet the same author, *P. C.* p. 6. tells us, that though this was anciently thought to be law, yet it is not so now; for such a person as cannot compass the death of the king by reason of his insanity, cannot be guilty of treason within the statute of 25 E. 3. And thus far concerning the incapacity of idiocy, madness, and lunacy.[5]

[5] Insanity is a disease, which causes the patient while awake to mistake the phantoms and operations of imagination for realities, which consequently become the motives of his discourses and actions, while at the time there is an absence of any bodily disorder that can account for the phenomena.

Perhaps the best definition of Insanity is in sir *Alexander Crichton's Commentaries*, p. 165. Insane persons are arranged into classes:

1. MANIACS, who are under a phrenzy.
2. LUNATICS, having lucid intervals.
3. MELANCHOLICS, subject to constant depression.
4. MONOMANIACS, under a delusion upon a particular subject.
5. DEMENTED, deprived of mind by grief, sickness, accidents, or old age. *Chitty's Medical Jurisprudence*, 345.

Lord *Coke* says, "Many times the Latin word expresses the true meaning, and calleth

him not *omens demens furiosus*, lunatics *fatuus stultus*, or the like, but *non compos mentis*." *Co. Litt.* 247, a.

Bracton says, "*furiosus non intelligit quod agit et animo et ratione caret, et non multum distat a brutis*." *Lib.* 5, 420, b.

Lord Hale observes correctly, (*ante* 29, 30,) that "it is very difficult to define the invisible line that divides perfect and partial insanity, but it must rest on circumstances duly to be weighed and considered by judge and jury, lest on the one side there be a kind of inhumanity towards defects of human nature, or, on the other side, too great an indulgence given to crimes."

"The most difficult cases," said *Erskine* in *Hadfield's* trial, "are where reason is not wholly driven from her seat, but distraction sits down upon it along with her, holds her trembling upon it, and frightens her from her propriety. Such patients are victims to *delusion* of the most alarming description, which so overpowers the faculties and usurps so firmly the place of *realities*, as not to be dislodged and shaken by the organs of perception and sense. *Delusion*, therefore, where there is no phrenzy or raving madness, is the true character of insanity, and where it cannot be predicted of a man standing for life or death for a crime, he ought not to be acquitted."

Some rules about freeing a lunatic from criminal responsibility may be found in 1 *Collinson on Lunacy*, 473, 474, 477.

There must be an absolute dispossession of the free and natural agency of the human mind. The prisoner must have been incapable of distinguishing between good and evil, and of *comprehending the nature of what he was doing*. Being a lunatic *before* or *after* the act, is not enough; his madness must be complete and absolute *at the moment* when the offence was committed.

Cooper expresses the same rule. "The insanity must be distinct and manifest at the time the crime was committed." *Cooper's Med. Jur.* 381.

So *Male* says, Where no insanity is proved, and there has been none previously existing, where the delinquent has acted from *facts* and *existing* circumstances, the law does not protect him. *Cooper's Med. Jur.* 255.

Shelford, from a number of adjudged cases, thus deduces the rule of law. If a person liable to partial insanity, which only relates to particular subjects or notions upon which he talks and acts like a madman, still has as much reason as enables him to distinguish between right and wrong, he will be liable to that punishment which the law attaches to his crime. *Shelford on Lunacy*, 458.

He cites *lord Ferrer's* case, 10 *Howell's State Trials*, 947; *Arnold's* case, 16 *Howell's State Trials*, 764; *Parker's* case, 1 *Collinson on Lunacy*, 477; *Bellingham's* case, 1 *Collinson on Lunacy*, 636; *Offord's* case, 5 *Carr and Payne*, 168; *Bowler's* case, 1 *Collinson*, 673, and 54 *Annual Register*, 309.

Sir John Mitford said, in *Hadfield's* trial, 27 *Howell's State Trials*, 1290, "because there is a natural impression on the mind of man of the distinction between good and evil, which never entirely loses hold of the mind whilst the mind has any capacity whatever to exert itself, nothing but total and absolute debility deprives the mind of any man of that. If conscious of the act, as the result of design and contrivance, and of the consequences of the act, is there not a moral sense which indicates criminal responsibility?"

"The true criterion of insanity," said *sir John Nichols*, "is *delusion*," and he cites *Locke on the Human Understanding*, Book 2, ch. 11, § 13. In *Dew v. Clark*, 3 *Addams* 90, 91. Dementation arising from unruly passion, is no excuse.

Mr. Chitty (p. 345) thus expresses the rule of law: "The true test of insanity, where there is no phrenzy or raving, is the absence or presence of *delusion*, and delusion exists whenever an individual once conceives something extravagant to exist which has no existence, and when he is incapable of being reasoned out of that absurd conception. In criminal cases, therefore, the question is simple, adapted to the comprehension of every jurymen, "whether, at the time the act was committed, the prisoner was incapable of judging between right and wrong, and did not know that the particular act was an offence against the laws of God and nature."

He adds, "The law presumes the competency, and therefore the question is always presented to a jury upon the negative, which must be *established* on the part of the prisoner; the burthen of proof is on him."

Mr. Chitty is entirely supported by *Mr. Erskine*, whom he quotes, and the uniform tenor of authoritative decisions shows that no better rule than that which *Erskine* laid down in *Hadfield's* trial has been framed.

To deliver a lunatic from responsibility to criminal justice, said he, above all, in

a case of atrocity, the relation between the disease and the act should be apparent, the delusion and the act must be connected. I cannot allow the protection of insanity to a man who exhibits only *violent passions* and *malignant resentments* acting upon real circumstances, who is impelled to evil from no morbid delusion, but who proceeds upon the ordinary perceptions of the mind. See *Parker arguendo* in *Roger's Trial*, 16-19.

"In criminal cases, in order to absolve the party from guilt, a higher degree of insanity must be shown than would be sufficient to discharge him from the obligations of his contracts. In these cases the rule of law is understood to be this; that 'a man is not to be excused from responsibility, if he has capacity and reason sufficient to enable him to distinguish between right and wrong, as to the particular act he is then doing; a knowledge and consciousness that the act he is doing is wrong and criminal, and will subject him to punishment. In order to be responsible he must have sufficient power of memory to recollect the relation in which he stands to others, and in which others stand to him; that the act he is doing is contrary to the plain dictates of justice, and right injurious to others, and a violation of the dictates of duty. On the contrary, although he may be labouring under partial insanity, if he still understands the nature and character of his act and its consequences, if he has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know that if he does the act he will do wrong and receive punishment, such partial insanity is not sufficient to exempt him from responsibility for criminal acts. If then it is proved to the satisfaction of the jury, that the mind of the accused was in a diseased and unsound state, the question will be, whether the disease existed to so high a degree, that for the time being, it overwhelmed the reason, conscience, and judgment, and whether the prisoner in committing the homicide, acted from an irresistible and uncontrollable impulse; if so, then the act was not the act of a voluntary agent, but the involuntary act of the body without the concurrence of a mind directing it." 2 *Greenl. on Evid.*, § 372.

The question of insanity in a prisoner is a question for the jury, and ought to be clearly made out, in order to exempt the party from punishment. *Rex v. Arnold*, 1 *Russ. C. & M.* 9.

To justify the acquittal of a prisoner indicted for murder, on the ground of insanity, the jury must be satisfied that he was incapable of judging between right and wrong; and that, at the time of committing the act, he did not consider that it was an offence against the laws of God and nature. *Rex v. Offord*, 5 *Car. & P.* 168.

If, to an indictment for treason for attempting the life of the sovereign, by shooting at the Queen, the defence be insanity, the question for the jury will be, whether the prisoner was labouring under that species of insanity, which satisfies them that he was quite unaware of the nature, character, and consequences of the act he was committing; or in other words, whether he was under the influence of a diseased mind, and was really unconscious at the time he was committing the act, that it was a crime. If the jury in such a case are of opinion that the prisoner did not in fact do all that the law deems essential to constitute the offence charged, they must find him not guilty generally; and the Court have no power to order his detention, under the 39 & 40 *Geo. 3. c. 94, s. 2*, although the jury should be clearly of opinion, that the prisoner was in fact insane. Such a state of circumstances appearing to be a *casus omissus* in the act. *Reg. v. Oxford*, 9 *Car. & P.* 525.

If on a trial the defence is insanity, a witness of medical skill may be asked whether such and such appearances, proved by other witnesses, are in his judgment symptoms of insanity. *Rex v. Wright*, *R. & R. C. C.* 456.

Where a prisoner's defence is insanity, a medical man who has heard the trial, may be asked whether the facts proved, show symptoms of insanity. *Rex v. Searle*, 1 *M. & Rob.* 75.

The prisoner was indicted for shooting at his wife with intent to murder her, &c., and was defended by counsel, who set up for him the defence of insanity. The prisoner, however, objected to such a defence, asserting that he was not insane; and he was allowed by the judge to suggest questions, to be put by his lordship to the witnesses for the prosecution, to negative the supposition that he was insane; and the learned judge also, at the request of the prisoner, allowed additional witnesses to be called on his behalf for the same purpose. They, however, failed in showing that the defence was an incorrect one; and on the contrary, their evidence tended to establish it more clearly, and the prisoner was acquitted on the ground of insanity. *Reg. v. Pearce*, 9 *Car. & P.* 667.

A party having been indicted for a misdemeanor, in uttering seditious words, and upon

his arraignment refusing to plead, and showing symptoms of insanity; and an inquest being forthwith taken under 39 & 40 Geo. 3, c. 94, s. 2, to try whether he was insane or not:—Held, first, that the jury might form their own judgment of the present state of the prisoner's mind, from his demeanor while the inquest was being taken; and might thereupon find him to be insane, without any evidence being given as to his present state:—Secondly, that upon the prisoner showing strong symptoms of insanity in Court during the taking of the inquest, it became unnecessary to ask him whether he would cross-examine the witnesses, or would offer any remark on the evidence. *Reg. v. Goode*, 7 Ad. & E. 536.

A grand jury have no authority by law to ignore a bill for murder on the ground of insanity; it is their duty to find the bill; otherwise the Court cannot order the detention of the party during the pleasure of the crown either on arraignment or trial, under Stat. 29 & 40 Geo. 3, c. 94, ss. 1 & 2. *Reg. v. Hodges*, 8 Car. & P. 195.

In *Massachusetts*, when one indicted for murder would make no distinct plea, and appeared to be deranged, a jury were empanelled to try whether he neglected to plead wilfully, or by the act of God; and on the finding of the jury that it was for the latter reason, the court remanded him to jail. *Commonwealth v. Braley*, 1 Mass. 103.

“The great object of punishment by law, (said Chief Justice Shaw, of *Massachusetts*, in *Roger's case*.) is to afford security to the community against crimes, by punishing those who violate the laws; and this object is accomplished by holding out the fear of punishment, as the certain consequence of such violation. Its effect is to present to the minds of those who are tempted to commit crime, in order to some present gratification, a strong counteracting motive in the fear of punishment. But this object can only be accomplished when such motive acts on an intelligent being capable of remembering that the act about to be committed is wrong, contrary to duty, and such as in any well ordered society would subject the offender to punishment. It might in some respects be more accurate to say that the party thus acting under a temptation, must have memory and intelligence to recollect and know that the act he is about to commit is a violation of the law of the land. But this mode of stating the rule might lead to a mistake of another kind, inasmuch as it would seem to hold up the idea, that before a man can be justly punished, it must appear that he knew that the act was contrary to the law of the land. But the law assumes that every man has knowledge of the laws prohibiting crimes; an assumption not strictly true in fact, but necessary to the security of society, and sufficiently near the truth for practical purposes. It is expressed by the well known maxim, *ignorantia legis neminem excusat*—ignorance of the law cannot be pleaded as an excuse for crime. The law assumes the existence of the power of conscience in all persons of ordinary intelligence—a capacity to distinguish between right and wrong in reference to particular actions: a sense of duty and of right. It may also be safely assumed that every man of ordinary intelligence knows that the laws of society are so framed and administered, as to prohibit and punish wrong acts—violation of duty towards others—by penalties in some measure adapted to the nature and aggravation of the wrong and injurious acts thus done. If, therefore, it happens to be true in any particular case, that a person tempted to commit a crime does not know that the particular act is contrary to positive law, or what precise punishment the municipal law annexes to such act; yet, if the act is palpably wrong in itself; if it be manifestly injurious to the rights of another, as by destroying his life, maiming his person, taking away his property, breaking into or burning his dwelling-house, and the like, there is no injustice in assuming that every man knows that such acts are wrong, and must subject him to punishment by law; and, therefore, it may be assumed for all practical purposes, and without injustice, that he knows the act is contrary to law. This is the ground upon which the rule has been usually laid down by judges, when the question is whether a person has sufficient mental capacity to be amenable for the commission of a crime, that he must have sufficient mental capacity to distinguish between right and wrong; applied to the act he is about to commit, and to be conscious that the act is wrong; instead of saying, that he must have sufficient capacity to know that it is contrary to the law of the land, because this power to distinguish between right and wrong as applied to the particular act—a power which every human being, who is at the same time a moral agent and a subject of civil government, is assumed to possess—is the medium by which the law assumes that he knows that the same act which is a violation of high moral duty is also a violation of the law of the land. Whereas, if it were stated that a person must have sufficient mental capacity to know and understand that the act he is about committing is a violation of the law of the land, it might lead to a wrong conclusion, and raise a doubt in regard to

persons ignorant of the law. There is no doubt that many a man is held responsible for crime, and that rightfully, who might not know that the act he was about committing was contrary to the law of the land, otherwise than as a moral being he knows that it is wrong—a violation of the dictates of his own natural sense of right and wrong.

To recur, then, to what has already been stated. In order that punishment may operate by way of example, to deter others from committing criminal acts when under temptation to do so, by presenting a strong counteracting motive, the person tempted must have memory and intelligence to know that the act he is about to commit is wrong, to remember and understand, that if he commits the act he will be subject to the punishment, and reason and will to enable him to compare, and choose between the supposed advantage or gratification to be obtained by the criminal act, and the impunity from punishment which he will secure by abstaining from it.

A person, therefore, in order to be punishable by law, or in order that his punishment by law may operate as an example to deter others from committing criminal acts under like circumstances, must have sufficient memory, intelligence, reason, and will, to enable him to distinguish between right and wrong in regard to the particular act about to be done, to know and understand that it will be wrong, and that he will deserve punishment by committing it.

This is necessary on two grounds: 1st. To render it just and reasonable to inflict punishment on the accused individual, and 2d. To render his punishment by way of example, of any utility to deter others in like situations from doing similar acts, by holding up a counteracting motive in the dread of punishment which they can feel and comprehend.

With more immediate reference to the case, the Chief Justice proceeded as follows: In order to constitute a crime, a man must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience, or controlling mental power, or if through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts. But these are extremes easily distinguished, and not to be mistaken. The difficulty lies between these extremes in the case of partial insanity, where the mind may be clouded and weakened, but not incapable of remembering, reasoning, and judging, or so perverted by insane delusion, as to act under false impressions and influences. In these cases, the rule of law, as we understand it, is this: A man is not to be excused from responsibility if he has capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he is then doing, a knowledge and consciousness that the act he is doing is wrong and criminal, and will subject him to punishment. In order to be responsible, he must have sufficient power of memory to recollect the relation in which he stands to others, and in which others stand to him; that the act he is doing is contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty. On the contrary, although he may be labouring under partial insanity, if he still understands the nature and character of his act and its consequences; if he has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know that if he does the act he will do wrong and receive punishment, such partial insanity is not sufficient to exempt him from responsibility for criminal acts. If, then, it is proved to the satisfaction of the jury, that the mind of the accused was in a diseased and unsound state, the question will be, whether the disease existed to so high a degree that for the time being it overwhelmed the reason, conscience, and judgment; and whether the prisoner committing the homicide acted from an irresistible and uncontrollable impulse; if so, then the act was not the act of a voluntary agent, but the involuntary act of the body without the concurrence of a mind directing it. The character of the mental disease relied upon to excuse the accused in this case, is partial insanity, consisting of *melancholy*, accompanied by delusion. The conduct may be in many respects regular, the mind acute, and the conduct apparently governed by rules of propriety, and at the same time there may be insane delusion, by which the mind is perverted. The most common in these cases is that of monomania, where the mind broods over *one idea*, and cannot be reasoned out of it. This may operate as an excuse for a criminal act in one of two modes. Either the delusion is such that the person under its influence has a real and firm belief of some fact, not true in itself, but which if it were true, would excuse his act; as where the belief is that the party killed had an immediate design upon his life, and under that belief the insane man killed him in supposed self-defence. A common instance is where he fully

believes that the act he is doing is done by the immediate command of God; and he acts under the delusive, but sincere belief, that what he is doing is by the command of a superior power, which supercedes all human laws, and the laws of nature; or, 2d. This state of delusion indicates to an experienced person that the mind is in a diseased state, that the known tendency of that diseased state of mind is to break out into sudden paroxysms of violence, venting itself into acts of homicide or other violent acts towards friend or foe indiscriminately, so that although there was no previous symptoms and indications of violence, yet the subsequent act connecting itself with the previous symptoms and indications, will enable an experienced person to say that the outbreak was of such a character, that for the time being it must have overborne memory and reason: that the act was the result of the disease, and not of a mind capable of choosing: in short, that it was the result of uncontrollable impulse, and not of a person acted upon by motives, and governed by the will," *Roger's Trial, Boston, 1844, p. 273., Charge of Ch. Just. Shaw.*

A case of great interest and importance has recently occurred in *England, Reg. v. McNaughton, 10 Clark & Fin. 210.* In that case, the following questions were propounded to the judges of *England* by the House of Lords:

"1st. What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons; as, for instance, where at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or avenging some supposed grievance or injury, or of producing some supposed public benefit?

"2d. What are the proper questions to be submitted to the jury, when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime, (murder, for example,) and insanity is set up as a defence?

"3d. In what terms ought the question to be left the jury as to the prisoner's state of mind at the time when the act was committed?

"4th. If a person under an insane delusion as to existing facts, commits an offence in consequence thereof, is he thereby excused?

"5th. Can a medical man, conversant with the disease of insanity, who never saw the prisoner previous to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to law; or whether he was labouring under any or what delusion at the time?"

The joint opinion of all the judges, except Mr. Justice *Maule*, was delivered by Lord Chief Justice *Tindal*, as follows:—"My Lords, her Majesty's Judges, with the exception of Mr. Justice *Maule*, who has stated his opinion to your Lordships, in answering the questions proposed to them by your Lordship's House, think it right in the first place to state that they have forbore entering into any particular discussion upon these questions, from the extreme and almost insuperable difficulty of applying those answers to cases in which the facts are brought judicially before them. The facts of each particular case must of necessity present themselves with endless variety, and with every shade of difference in each case, and it is their duty to declare the law upon each particular case on facts proved before them, and after hearing argument of counsel thereon. They deem it at once impracticable, and at the same time dangerous to the administration of justice, if it were practicable, to attempt to make minute applications of the principles involved in the answers given them by your Lordships' questions; they have therefore confined their answers to the statements of that which they hold to be the law upon the abstract questions proposed by your Lordships; and as they deem it unnecessary in this particular case to deliver their opinions *seriatim*, and as all concur in the same opinions, they desire me to express such their unanimous opinion to your Lordships;

"In answer to the first question, assuming that your Lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion, that notwithstanding the party accused did the act complained of with a view under the influence of insane delusion, of redressing or avenging some supposed grievances or injury, or of producing some public benefit, he is, nevertheless, punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law,—by which expression we understand your Lordships to mean, the law of the land. As the third and fourth questions appear to us to be more conveniently answered together, we have to

submit our opinion to be, that the jury ought to be told in all cases, that every man is presumed to be sane and to possess a sufficient degree of reason, to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved, that at the time of committing the act, the party accused was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know that he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act, knew the difference between right and wrong; which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law was essential in order to lead to a conviction; whereas the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused were conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course, therefore, has been to leave the question to the Jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong; and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require. The answer to the fourth question must, of course, depend on the nature of the delusion; but, making the same assumption as we did before, namely, that he labours under such a partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility, as if the facts with respect to which the delusion exists were real. For example, if under the influence of delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self defence, he would be exempt from punishment. If his delusion was, that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment. In answer to the last question, we state to your Lordships, that we think the medical man, under the circumstances supposed, cannot, in strictness, be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed, on which it is for the jury to decide; and the questions are not mere questions upon a matter of science, in which case, such evidence is admissible. But where the facts are admitted, or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right." Per *Tindal, C. J.* delivering the opinion of the Judges in *McNaughten's Case*, 10 Cl. & Fin. 200. 208. *Maule, J.*, diss. p. 204—208. See also *Hansard's Parl. Debates*, Vol. 67. pp. 288. 714.

In a late case, (*Commonwealth v. Mosler*), before the Supreme Court of Pennsylvania, the defence of insanity was set up on an indictment for murder, and discussed at great length. Chief Justice *Gibson*, in delivering the charge to the jury, said:

"Insanity is mental or moral—the latter being sometimes called homicidal mania, and properly so. It is my purpose to deliver to you the law on this ground of defence, and not to press upon your consideration, at least to an unusual degree, the circumstances of the present case, on which the law acts. A man may be mad on all subjects; and then, though he may have glimmerings of reason, he is not a responsible agent. This is general insanity; but, if it be not so great in its extent or degree as to blind him to the nature and consequences of his moral duty, it is no defence to an accusation of crime. It must be so great as entirely to destroy his perception of right and wrong; and it is not until that perception is thus destroyed, that he ceases to be responsible. It must amount to delusion or hallucination, controlling his will and making the commission of the act, in his apprehension, a duty of overruling necessity. The most apt illustration of the latter is the perverted sense of religious obligation, which has caused men sometimes to sacrifice their wives and children.

"Partial insanity is confined to a particular subject—the man being sane on every other. In that species of madness, it is plain that he is a responsible agent, if he were not instigated by his madness to perpetrate the act. He continues to be a legitimate subject of punishment, although he may have been laboring under a moral obliquity of

perception, as much so as if he were merely laboring under an obliquity of vision. A man whose mind squints, unless impelled to crime by this very mental obliquity, is as much amenable to punishment as one whose eye squints. On this point, there has been a mistake as melancholy as it is popular. It has been announced by learned doctors, that, if a man has the least taint of insanity entering into his mental structure, it discharges him of all responsibility to the laws. To this monstrous error may be traced both the fecundity in homicides which has dishonored this country, and the immunity which has attended them. The law is that, whether the insanity be general or partial, the degree of it must be so great as to have controlled the will of its subject, and to have taken from him the freedom of moral action.

* But there is a *moral* or *homicidal* insanity consisting of an irresistible inclination to kill, or to commit some other particular offence. There may be an unseen ligament pressing on the mind, drawing it to consequences which it sees, but cannot avoid, and placing it under a coercion which, while its results are clearly perceived, is incapable of resistance. The doctrine which acknowledges this mania is dangerous in its relations, and can be recognized only in the clearest cases. It ought to be shown to have been habitual, or at least to have evinced itself in more than a single instance. It is seldom directed against a particular individual; but that it may be so, is proved by the case of the young woman who was deluded by an irresistible impulse to destroy her child, though aware of the heinous nature of the act. The frequency of this constitutional malady is fortunately small, and it is better to confine it within the strictest limits. If juries were to allow it as a general motive operating in cases of this character, its recognition would destroy social order as well as personal safety. To establish it as a justification in any particular case, it is necessary either to show, by clear proofs, its contemporaneous existence, evinced by present circumstances, or the existence of an habitual tendency developed in previous cases, becoming in itself a second nature."

The jury convicted the prisoner, and the Court was unanimous in refusing a new trial. *Com. v. Masler*. 6 Penn. L. J. 93, 4 Barr. Rep.

The leading works upon the medical jurisprudence of insanity, are *Esquirol on Insanity*; *Marc de la Folie*; *Ray on Insanity*; *Winslow on the Plea of Insanity*; *Collinson on Lunacy*; *Shelford on Lunacy*. *Taylor's Med. Jur.* (London, 1844.) The inquirer will find an article on the value and effect of medical testimony in *The British and Foreign Med. Review* for July, 1843. In *Roger's Trial*, (Boston, 1844,) reported by Messrs. *Bigelow & Bemis*, counsel for the defendant, will be found all the leading authorities, both the text books and the adjudged cases, many of them learnedly and thoroughly examined.

CHAPTER V.

CONCERNING CASUALTY AND MISFORTUNE, HOW FAR IT EXCUSETH IN CRIMINALS.

I COME to the second kind of accidental defects, *viz. casualty* and *misfortune*, and to consider how far it excuseth: and [38] first we are to observe in this, and likewise in some other of the defects before and hereafter mentioned, a difference between civil suits, that are terminated *in compensationem damni illati*, and criminal suits or prosecutions, that are *in vindictam criminis commissi*.

If a man be shooting in the fields at rovers, and his arrow hurts a person standing near the mark, the party hurt shall have his action of trespass, and recover his damages, though the hurt were cas-

ual; (a) for the party is damnified by him, and the damages are but his reparation; but if the party had been killed, it had been *per infortunium*, and the archer should not suffer death for it, though yet he goes not altogether free from all punishment. (b) 6 E. 4. 7. *per Catesby*. (c)

As to criminal proceedings, if the act that is committed be simply casual, and *per infortunium*, regularly that act, which, were it done *ex animi intentione*, were punishable with death, is not by the laws of *England* to undergo that punishment; for it is the will and intention, that regularly is required, as well as the act and event, to make the offence capital.

Now, what shall be said thus simply casual, and what the [39] punishment, will be at large considered, when we come to homicide *per infortunium*; only something will be necessary to be said thereof here.

If a man do *ex intentione* and voluntarily an unlawful act tending to bodily hurt of any person, as by striking or beating him, though he did not intend to kill him, but the death of the party struck doth follow thereby within the year and day; (d) or if he strike at one, and missing him kills another whom he did not intend, this is felony (e) and homicide, and not casualty or *per infortunium*.

So it is if he be doing an unlawful act, though not intending bodily harm of any person, as throwing a stone at another's horse, if it hit a person and kill him; this is felony and homicide and not *per infortunium*; (f) for the act was voluntary, though the event not intended; and therefore the act itself being unlawful, he is criminally guilty of the consequence, that follows:

But if a man be doing a lawful act without intention of any bodily harm to any person, and the death of any person thereby ensues, as if he be cleaving wood, and the axe flies from the helve, and kills another, this indeed is manslaughter, but *per infortunium*; and the party is not to suffer death, but is to be pardoned of course; for it appears by the statute of *Marlbridge*, cap. 26. that it was not done

(a) *Hob.* 134.

(b) For he forfeits all his goods and chattels. 2 H. 3. 18. *F. Corone*. 302. 2 *Co. Instit.* 149. 3 *Co. Instit.* 220. By the ancient law he was liable to make the same recompense or *weregild*, as in any other case of homicide; e. g. if one shooting at a mark should accidentally wound and kill another, he was nevertheless to pay his *weregild*. *Leg. H.* 2. l. 88. l. 90. *Legis enim est placitum, qui inscienter peccat, scienter emendat*; but by the same law, if one, who was standing on a tree or any other place, where he was at work, should chance to fall on another passing by, he was not to pay any thing, but was deemed entirely innocent. See *Wilk. Leg. Anglo-Sax.* p. 277, 279.

(c) *B. Corone* 148. *Trespas* 310. *F. Corone* 354.

(d) The reason of this is, because the law doth presume, that after the year and day it cannot then be discerned, whether he died of the stroke, or a natural death. 3 *Co. Instit.* 53.

(e) The like in the case of *maihem*, if a man strike at one, and missing him *maihem* another, 13 H. 7. 14. a.

(f) 11 H. 7. 23. a. *per Fines* Ch. Just. *B. Corone* 229. *Proclamation* 13. 22. *Assise* pl. 71.

per felonium; (g) yet the laws of *England* are so tender of the life of man, and to make men very cautious in all their [40] actions that the party, though his life be spared, yet forfeits his goods, and must expect the king's grace to restore them.

There happened this case at *Peterborough*: Deer broke into the corn of A. and spoiled it in the night time; A. sets his servant to watch in the night with a charged gun at the corner of the field, commanding him, that, when he heard anything rush into the standing corn, he should shoot at that place, for it was the deer: the master was in another corner of the field; rushed into the standing corn; the servant according to his master's direction shot, and killed his master; it was agreed on all hands, this was neither petit treason, nor murder, but whether it were simple homicide, or *per infortunium*, was a great difficulty: First, the shooting was lawful, when the deer came into the corn, it being no *purlieu*, nor proclaimed, or chased deer; again, the error of the servant was caused by the master's direction, and his own act; but if it had been a stranger that had been killed it had been homicide, and not misadventure; on the other side, the servant was to have taken more care, and not to have shot upon such a token as might have befallen a man as well as a deer; and therefore for the omission of due diligence, and better inspection, before he adventured to shoot, it might amount to manslaughter, and so be capital; and this seems to be the truer opinion.

But in the case of Sir *William Hawksworth*, related by *Baker* in his chronicle of the time of *Edward IV.* p. 223, (h) he being weary of his life, and willing to be rid of it by another's hand, blamed his parker for suffering his deer to be destroyed, and commanded him, that he should shoot the next man that he met in his park, that would not stand or speak; the knight himself came in the night into the park, and being met by the keeper refused to stand or speak; the keeper shot and killed him, not knowing him to be his master; this seems to be no felony, but excusable by the statute of *Malefactores in parcis*, for the keeper was in no fault, but his [41] master; but, had he known him, it had been murder.

As to matter of high treason, where the life of the king is concerned, it is not safe too easily to admit an excuse by chance or misfortune; though such fact cannot be treason, that was purely casual and involuntary, for there must be a *compassing or imagining* to make

(g) Here our author rightly says it *appears* by the statute of *Marlbridge*, that it was not felony, for that statute only supposes it not to be felony, but does not make that not to be felony which was so before, as some have imagined. 2. *Co. Instit.* 148, 315. for it appears by *Magna Charta* cap. 26. which was before the statute of *Marlbridge*, that he who killed another *per infortunium*, was in no danger of death. *Kel.* 123. nor indeed could it be felony, it not being done *felleo animo*, 4 *Co.* 134 b. The design of that statute was quite of another nature, viz. that the country should not be amerced where a man was killed *per infortunium*, for at that time *murdrum* peculiarly signified the secret private killing of a man; as if he was found killed, but it was not known by whom; and thus it is defined by *Bracton*, *Lib. III. de corona*, cap. 1 to be *occulta occisio*; and in the laws of *Henry I.* l. 92. *murdrus homo dicebatur, cujus interfectio nesciebatur*; and in *Dialogo de Souccario*, *Lib. I. cap. 10.* *murdrum idem est, quod absconditum.*

(h) Sub anno 1471.

treason; yet a treasonable intention may be disguised under the color of chance, and the safety of the king's life is of highest concernment.

And therefore when *Waller Tyrrel*; with a glance of an arrow from a tree involuntarily, as *Matthew Paris*(*k*) tells us, killed *William Rufus*, it could not be treason, (*l*) because there was no purpose of any mischief, and he shot at the deer by the king's command; yet the fact was of such a consequence, that he fled for it, which was a circumstance that might probably infer, that there was some ill-intention, which might make him guilty of treason, and not barely accident. *Co. P. C. p. 6.*

History tells us, that upon a solemn just, or tournament appointed by *Henry II.* king of France, upon the marriage of his daughter, the king himself would needs run, and commanded the earl of *Montgomery* to run against him; the earl's lance breaking upon the king's cuirasse, a splinter flew into the king's eye, and hit it, whereof he died; this was not treason, because purely accidental.[1]

[42]

CHAPTER VI.

CONCERNING IGNORANCE, AND HOW FAR IT PREVAILS, TO EXCUSE
IN CAPITAL CRIMES.

IGNORANCE of the municipal law of the kingdom, or of the penalty thereby inflicted upon offenders, doth not excuse any, that is of the age of discretion and *compos mentis*, from the penalty of the breach

(*k*) *p. 54.*

(*l*) *Customier de Normand. cap. 14.*

[1] Whenever death is the consequence of idle, dangerous and unlawful sports, or of heedless, wanton and indiscreet acts, without a felonious intent the party causing the death is guilty of manslaughter. As if a man rides an unruly horse amongst a crowd of people, 1 *East, P. C.* 231; or throws a stone, or shoots an arrow over a wall into a public or frequented street, *post page* 475, or discharging his pistols into a public street upon alighting from his carriage, 1 *Stra.* 481: in any of these cases, though the party may be perfectly innocent of any mischievous intent, still if death ensues he is guilty of manslaughter. So, if the owner suffers to be at large any animal which he knows to be vicious and mischievous, and it kills a man, it has been thought by some that he may be indicted for manslaughter; but it is well agreed that he is guilty of a high misdemeanor. 2 *Hawk. P. C. c.* 13, § 8; and in a very recent case of that kind, *Best, C. J.* laid down as law, "that if a person think proper to keep an animal of this description, (a bull) knowing its vicious nature, and another person is killed by it, it will be manslaughter in the owner, if nothing more; at all events it will be an *aggravated species of manslaughter*: *Blackman v. Simmonds*, 3 *Carr. & Pay.* 140. If workmen in the ordinary course of their business, throw rubbish from a house in a direction in which persons are likely to pass, and any one passing is killed, this is manslaughter: *Ward's case*, 1 *East P. C.* 261, 262, 263, 270; *Rex v. Murphy*, 6 *Carr. & Pay.* 103. As to what are lawful sports, see *Pulton*, title *Riot*, 4 *Steph. Commentaries* 101, 4 *Bl. Com.* 183, note by *Ryland*, 19 *ed. Lond.* 1836. The cases in which the propriety of the act which causes the injury, the manner of doing it, or the circumstances under which it is done, are considered, may be found 1 *Hawk c.* 29 s. 3; *Foster* 262; *Rex v. Martin*, 3 *C. & P.* 211; *Hull's case* 1664, *Kel.* 40; 1 *Russell* 769; *Rex v. Walker*, 1 *C. & P.* 320; *Rex v. Gree*, 7 *C. & P.* 156; *R. v. Allen et al.* 7 *C. & P.* 153; 4 *Inst.* 251; *Rex v. Van Butchell*, 8 *C. & P.* 629; *Rex v. Williamson*, 3 *C. & P.* 635; *Rex v. Spiller*, 5 *C. & P.* 333; see *post. c.* 39 notes.

of it; because every person of the age of discretion and *compos mentis* is bound to know the law, and presumed so to do: *Ignorantia eorum, quæ quis scire tenetur, non excusat.*(a)

But in some cases *ignorantia facti* doth excuse, for such an ignorance many times makes the act itself morally involuntary; and indeed many of the cases of misfortune and casualty mentioned in the former chapter are instances that fall in with this of ignorance: I shall add but one or two more.

It is known in war, that it is the greatest offence for a soldier to kill or so much as to assault his general: suppose then the inferior officer sets his watch, or sentinels, and the general to try the vigilance or courage of his sentinels comes upon them in the night in the posture of an enemy, (as some commanders have too rashly done) the sentinel strikes, or shoots him, taking him to be an enemy; his ignorance of the person excuseth his offence.

In the case of *Levet* indicted for the death of *Frances Freeman*, the case was, that *William Levet* being in bed and asleep in the night, his servant hired *Frances Freeman* to help her to do her work, and about twelve of the clock in the night the servant going to let out *Frances* thought she heard thieves breaking open the door; she therefore ran up speedily to her master, and informed him, that she thought thieves were breaking open the door; the master rising suddenly, and taking a rapier, ran down suddenly; *Frances* hid herself in the buttery; lest she should be discovered; *Levet's* wife, [43] spying *Frances* in the buttery, cried out to her husband, "*Here they be, that would undo us.*" *Levet* runs into the buttery in the dark, not knowing *Frances*, but thinking her to be a thief, and thrusting with his rapier before him hit *Frances* in the breast mortally, whereof she instantly died. This was resolved to be neither murder, nor manslaughter, nor felony. *Vide* this case cited by justice *Jones*, P. 15 Car. 1. B. R. Cro. Car. 538. *Cook's* case.

CHAPTER VII.

TOUCHING INCAPACITIES, OR EXCUSES BY REASON OF CIVIL SUBJECTION.

I COME now to those incapacities, which I have styled civil, and to consider how far they indemnify and excuse in criminals, and criminal punishments.

And first concerning that, which ariseth by reason of civil subjection.

And this civil subjection is principally of the subject to his prince, the servant to his master, the child to his parent, and the wife to her husband. Somewhat I shall say of each of these.

I. As to the *first* of these subjections, the *subject* to his *prince*; it is regularly true, that the law presumes, the king will do no wrong;

(a) *Plowd.* 343. a.

neither indeed can do any wrong; (a) and therefore, if the king command an unlawful act to be done, the offence of the instrument is not thereby indemnified; (b) for though the king is not under the coercive power of the law, [1] yet in many cases his commands are under the directive power of the law, which consequently makes the act itself invalid, if unlawful, and so renders the instrument of the execution thereof obnoxious to the punishment of the law. Vide *Stamf. P. C.* 102. b. (c) yet in the time of peace, if two men combat together at barriers, or for trial of skill, if one kill the other it is homicide; but if it be by the command of the king, it is said (d) it is no felony. 11 *H.* 7. 23. a.

II. As touching the civil subjection of the *child*, or *servant*; if either of them commit an act, which in itself is treason, or felony, it is neither excused nor extenuated as to the point of punishment by the command of his master or parent; for the command is void and against law, and doth not protect either the commander or the instrument, that executes it by such command. (e)

III. As to the civil subjection of the *wife* to the *husband*: though in many cases the command, or authority of the husband, either express or implied, doth not privilege the wife from capital punishment for capital offences; yet in some cases the indulgence of the law doth privilege her from capital punishment for such offences, as are in themselves of a capital nature; wherein these ensuing differences are observable.

1. If a *feme covert* alone without her husband, and without the coercion of her husband, commit treason or felony, though it be but larceny, she shall suffer the like judgment and execution, as if she were sole; this is agreed on all hands. *Stamf. P. C. Lib. I. cap. 19.* 15 *E.* 2. *Corone* 383.

2. But if she commit larceny by the coercion of the husband, she is not guilty. 27 *Ass.* 40; (f) and according to some, if it be by the command of her husband *Ibid.* (g) which seems to be law, if her husband be present; (h) but not if her husband be absent at the time and place of the felony committed.

3. But this command or coercion of the husband doth not excuse in case of treason, nor of murder, in regard of the heinousness of those crimes. *Mr. Dalton's Just. Ca.* 104. (i) And hence it was that

(a) *Co. Lit.* 19. b. 4.

(b) As if one man arrest another merely by the king's commandment, that shall be no excuse to him, but he is nevertheless liable to an action of false imprisonment. 16 *H.* 6. *F. Monstrauns de faits* 182. 1 *H.* 7. 4. *B. Prerogative* 139.

(c) Vide *Bracton Lib. III. De actionibus*, cap. 9.

(d) Per *Fineux* Ch. Just. but *Broke* in his abridgement of this case, *Corone* 229. says, that other justices in the time of *Henry VIII.* denied this opinion of *Fineux*, and held, that it was felony to kill a man in justing and the like, notwithstanding the commandment of the king; for that the commandment is against law. 3 *Co. Inst.* 56. 160.

(e) *Dalt. Just. Cap.* 157. *N. Edit.*

(f) *F. Corone*, 199. *Bracton de Corone. cap.* 32. § 9.

(g) *Quoniam ipsa superiori suo obedire debet. Leg. Inæ*, l. 57. *B. Corone* 108.

(h) Because the law supposes her to be then under the coercion of her husband. *Kel.* 31.

(i) *N. Edit. cap.* 157.

in the cases of the treasons committed by *Arden* and *Somerville*(*k*) against Queen *Elizabeth*, both their wives were attaind of high treason, though their execution was spared; and yet they were only assenters to their husband's treasons, and not immediately actors in it, and so were principals in the second degree; and upon the same account the earl of *Somerset* and his wife were both attaind, as accessaries before, in the murder and poisoning of Sir *Thomas Overbury*.(*l*)[2]

(*k*) 1 *And.* p. 104.

(*l*) *Stat. Trials*, Vol. I. Tr. 28 & 29.

[2] *Somerville's* case, 1 *And.* 104, which is the only case where husband and wife have been convicted of treason, only shows that a wife may be convicted of treason with her husband. There *Arden* and his wife were charged with procuring *Somerville* to destroy the Queen, and both found guilty, but as none of the evidence is stated, it may have been that the wife was the instigator, and both properly convicted. In *Somerset's* case, which is the only case of a wife convicted as well as her husband, as an accessary to a murder, according to 3 *Inst.* 50, the Earl and Countess were indicted as accessaries before the fact, to the murder of Sir *T. Overbury*, the wife was arraigned alone, first, and pleaded guilty, and being asked what she had to say why judgment of death should not be given against her, she said, "I can much aggravate but nothing extenuate my fault." (2 *St. Tr.* 957.) Assuming, therefore, that the indictment was joint against both, the case only proves that the wife may properly be convicted upon her own confession, which indicates that she was the more guilty party; as it is clear she was in this case. See *Hume's Hist. Eng.* vol. 6, p. 68, &c. But as the Earl and Countess were separately arraigned, and on different days, and as the indictment against the Earl, as recited in his pardon, (2 *St. Tr.* 1014,) is against him alone, it may be inferred that the Countess was indicted alone; if so, the case is merely that of a wife pleading guilty to an indictment charging her alone as accessary, and unless in such a case she either pleaded that she committed the offence in company with her husband, (as it seems she may, *Post.* 47, *M.* 37 *Ed.* 3 *Ret.* 34,) or such appeared to be the case upon her trial, no question as to coercion could arise. In *Reg. v. Alison*, 8 *C. & P.* 418, Mr. *J. Patteson* mentions an old case where a husband and wife intending to destroy themselves, took poison together, the husband died but the wife recovered, and was tried for murder, and acquitted solely on the ground that being the wife of the deceased she was under his control, and inasmuch as the proposal to commit suicide had been first suggested by him, it was considered that she was not a free agent; but I know from the best authority, (says Mr. *Greaves*, in a note in *Russell's C. & M.*) that the very learned judge guarded against subscribing to the reason given for this decision. Probably the case referred to is an anonymous one. *Moor*, 754, where it is said the question was, whether it was murder in the woman, and the Recorder caused the special matter to be found, but no decision is stated, nor have I been able, (adds Mr. *Greaves*,) to find the case elsewhere. 1 *Russ. on Crimes*, 18, note.

Before *Somerville's* case, 26 *Eliz.* and *Somerset's* case, A. D. 1615, there seems no exception to the general rule that the coercion of the husband excuses the act of the wife. (See 27 *Ass.* 40; *Stamf. P. C.* 26, 27. 142; *Pulton de Pace Regis.* 130; *Br. Ab. Coron.* 108; *Fitz Ab. Coron.* 130. 160. 199.) But after those cases there are the following exceptions in the books:—*Bac. Max.* 57, excepts treason only; *Dalton*, 147, treason and murder, citing for the latter, *Mar. Lect.* 12, (perhaps some reader of some Inn of Court,) 1 *Hale P. C.* p. 45. 47, treason, murder, and homicide; and p. 434, treason, murder, and manslaughter; *Keyling*, 31, an *obiter dictum*, murder only; *Hawk. b. 1, c. 1, s. 11*, treason, murder, and robbery; *Black. Commentaries*, vol. i. p. 444, treason and murder: vol. iv. p. 29, treason and *mala in se*, as murder and the like. *Hale*, therefore, alone excepts manslaughter, and *Hawkins* introduces robbery without an authority for so doing; and, on the contrary, in *Reg. v. Cruse*, 8 *C. & P.* 545, a case is cited where *Burrough, J.*, held, that the rule extended to robbery. It seems long to have been considered that the mere presence of the husband was a coercion, (see 4 *Black. Com.* p. 28.) and it was so contended in *Reg. v. Cruse*; and *Bac. Max.* 56, expressly states that a wife can neither be principal nor accessary by joining with her husband in a felony, because the law intends her to have no will, and in the next page he says, "If husband and wife join in committing treason, the necessity of obedience doth not excuse the wife's offence, as it does in felony." Now if this means that it does not absolutely excuse as he has stated in the previous page, it is warranted by *Somerville's* case, which shows

4. If the husband and wife together commit larceny or burglary, by the opinion of *Bracton*, *Lib. III. cap. 82. § 10.(m)* both are guilty; and so it hath been practised by some judges. *Vide Dalt. ubi supra, cap. 104.* and possibly in strictness of law, unless the

(m) And *Sect. 9.* and *Fleta, Lib. I. cap. 38. § 12, 13, 14.* especially, *Si furtum inveniat sub Clavibus Uxoris.* *Vide Bracton & Fleta, ibid.* and *L.L. Cnuti, l. 74.*

that a wife *may* be guilty of treason in company with her husband, and which would be an exception to the general rule as stated by *Bacon*. So also would the conviction of a wife with her husband for murder in *any* case be an exception to the same rule. *Dalton* cites the exception from *Bacon*, without the rule, and *Hale* follows. *Dalton* and the other writers follow *Hale*; and it seems by no means improbable that the exceptions of treason and murder, which seem to have sprung from *Somerville's* and *Somerset's* cases, and which were probably exceptions to the rule as stated by *Bacon*, have been continued by writers without advertent to their origin, or observing that the presence of the husband is no longer considered an absolute excuse, but only affords a *prima facie* presumption that the wife acted by his coercion. See the argument of Mr. Carrington, in *Reg. v. Cruse*, 8 C. & P. 541. 1 *Russ. on Crimes*, 18. 24. Mr. Greave's Notes, *Am. ed.* 1845. See *Com. v. Neal*, 10 *Mass. R.* 152. *Marlow v. Com.* 1 *Mass. R.* 347. 391. *Com. v. Lewis*, 1 *Met. R.* 151. *The People v. Townsend*, 3 *Hill's N. Y. R.* 479. *The State v. Harvey*, 3 *N. Hamp. R.* 65. *Com. v. Trimmer*, 1 *Mass. R.* 476. *Jones v. The State*, 5 *Blackf. (Ind.) R.* 141. 492. *Burn's Just. tit. Wife*, 29th *Lond. ed.*

There is no doubt that in all misdemeanors a wife *may* be jointly convicted with her husband, as she may be proved to have acted voluntarily, but there is no authority that the same rule as to coercion, which applies to felonies, does not extend to misdemeanors. On the contrary, *Rex v. Price*, 8. C. & P. 19, and *Anon. Math. Dig. Cr. Law* 262, show that the rule applies to the misdemeanor of uttering base coin, and the reason given in *Rex v. Dixon*, 10 *Mod.* 335, and *Reg. v. Williams*, *Salk.* 384, as to the keeping of gaming and bawdy houses, that the wife may probably have as great, nay a greater share in the criminal management of the house, than the husband, tends to show that in order to convict the wife, she must be acting voluntarily and not under coercion. In *Reg. v. Cruse*, 8 C. & P. 541, the wife had taken a very active part. *Reg. v. Williams*, and *Reg. v. Ingram*, *Salk.* 384, were in arrest of judgment, and therefore the Court would presume if necessary, that the wife had acted voluntarily; and *Reg. v. Dixon*, was on demurrer, and the Court would, and it seems did, hold the indictment good, because it might be proved that the wife was not under coercion. There is no authority, therefore, that the rule does not extend to misdemeanors, and the tendency of the authorities certainly is, that it does. 1 *Russ. on Crimes*, 19 note (i), 5th *Am. Ed.* 1845.

The following positions seem fairly deducible from the cases upon this subject; 1st, There is no objection on demurrer to an indictment which charges husband and wife jointly, with the commission of an offence; for the indictment is joint and several, and both may be convicted, if it appear that the wife was not acting under the coercion of the husband or either of them; 2dly, There is no objection either in arrest of judgment or on error, to the joint conviction of husband and wife of the same offence, for she may have been the instigator, and both guilty; 3dly, Upon the trial of husband and wife, the *prima facie* presumption is, that she acted under his coercion, provided he were actually present at the time the felony was committed. If, therefore, nothing appear but that the felony was committed while they were both together, the jury ought to be directed to acquit the wife; 4thly This presumption is *prima facie* only, and may be rebutted either by showing that the wife was the instigator or more active party, or that the husband though present was incapable of coercing, as that he was a cripple, and bed ridden, or that the wife was the stronger of the two. 1 *Russ. on Crimes*, 21 note (g), 4 *Steph. C.* 81. The English cases will be found in 1 *Russ. cited sup.*, and the American in *Wharton's Am. Crim. Law*, 19, 23.

The following passage is taken from the Report of the Massachusetts Commissioners, appointed "to reduce so much of the Common Law as relates to Crimes and Punishments to a written and systematic code:"

"A married woman is presumed not to act under compulsion by her husband in the commission of treason, murder, or robbery in his presence. In respect to other felonies, and to misdemeanors committed by her, or to which she is accessory before the fact, in presence of her husband, and in which he is concerned, she is presumed to act under

actual coercion of the husband appear, she may be guilty in such a case; for it may many times fall out, that the husband doth commit larceny by the *instigation*, though he cannot in law do it by the *coercion* of his wife; but the latter practice hath obtained, that if the husband and wife commit burglary and larceny together, the wife shall be acquitted, and the husband only convicted; and with this agrees the old book, 2 *E. 3. Corone* 160. And this being the modern practice and *in favorem vitæ* is fittest to be followed; and the rather, because otherwise for the same felony the husband may be saved by the benefit of his clergy, and the wife hanged, where the case is within clergy; (n) though I confess this reason is but [46]

(n) The reason of this is, because a woman cannot by law have the benefit of the clergy. 11 *Co. 29. b.* yet in *Fitz. Corone* 461, it was admitted, that a woman might claim clergy; however, as the law now stands, she may in all cases have the same benefit by the statute of 3 & 4 *W. & M. cap. 9. § 7.* as a man may by his clergy. See *post c. 44 n.*

compulsion by him, unless such presumption is precluded by the kind, nature, or character of the offence, as in case of her being a common scold; but such presumption may be rebutted by the circumstances of the case, or by other evidence. *Archb., P. Q. S. 80. Dick's C., 1 Russ. 16. 1 Hawk, c. 1, s. 12, 7ed. Dixon & Wise's C., 10 Mod. 375. Dalt, 126.*

She is not chargeable with instigating her husband to any crime.

She is not chargeable for receiving goods stolen, embezzled, or extorted by her husband; nor as an accessory after the fact to the commission of a crime by her husband.

The common law holds the wife answerable for treason, murder, and robbery committed by her in presence of her husband, without any presumption that she is under compulsion by him. In respect to other felonies, and to misdemeanors so committed by her, the doctrine of the common law is very obscure. It is most frequently laid down that she is presumed to be under compulsion in the commission of other felonies in his presence. But it is distinctly stated by Mr. *Deacon*, v. 2, p. 1377, and by Mr. *Archbold*, *Pr. Q. S.*, 81, citing 1 *Hale*, 516, that this presumption may be rebutted by evidence to the contrary. And yet in case of its being proved that the wife was the active party in receiving stolen goods in her husband's presence, she has been held not to be chargeable with the offence. *Draper's C., Ry. & M. 234, cited 2 Deac. 178-9. Archer's C., cited Archb., P. Q. S. 80*, which is a direct contradiction of the above doctrine; and see also *Squire's C., 1 Russ. 16, 7ed., cited 2 Deac. 1378*, which was the case of an apprentice being starved to death by the husband and wife. By the *English* law, this presumption, though confined to felonies, has a very wide application, since the catalogue of felonies is in *England* much extended by statutes. It is implied in the *English* law, though no rule is emphatically laid down to that effect, that the presumption is applicable to misdemeanors committed by the wife in presence of her husband. Thus Mr. *Deacon*, v. 2, p. 1378, says, "In inferior misdemeanors, there is another exception to the irresponsibility of the wife, for she may be indicted and punished with her husband for keeping a brothel, this being considered to be an offence touching the domestic economy and government of the house in which the wife has necessarily a principal share." This distinctly implies that the presumption extends to misdemeanors. But there are some other misdemeanors to which the exception seems to apply more obviously than to that of keeping a brothel. In case of perjury by the wife, though the husband might be present at the time of her testifying, the presumption of coercion by him would ordinarily be absurd. The presumption of coercion by the husband is also limited in the code reported by the commissioners, to offences by the wife in which "*the husband is concerned*," for otherwise the law would make the husband guilty of a crime committed by the wife, though he should endeavour to prevent her from committing it. This limitation of the presumption is not known to be stated in the books of the common law, but it can hardly be supposed that it is not part of that law, though the language in which the presumption is usually stated in the books excludes such limitation. 1 *Hawk, c. 1, 7ed. Archb., P. Q. S. 80, 81.* See *Hammond's Project of a Code of Forgery*, a. 633, p. 197. *Six v. Cheeney, Wright's R., 9. Report of the Penal Code of Massachusetts, c. iv. (Boston, 1844.)*

of small value, for in manslaughter committed jointly by husband and wife the husband may have his clergy, and yet the wife is not on that account to be privileged by her coverture.

And accordingly in the modern practice, where the husband and wife, by the name of his wife, have been indicted for a larceny, or burglary jointly, and have pleaded to the indictment, and the wife convicted, and the husband acquitted; merciful judges have used to reprieve the wife before judgment, because they have thought, or at least doubted, that the indictment was void against the wife, she appearing by the indictment to be a wife, and yet charged with felony jointly with her husband.

But this is not agreeable to law, for the indictment stands good against the wife, in as much as every indictment is as well several as joint; and as upon such an indictment the wife may be acquitted, and the husband found guilty, so *è converso* the wife may be convicted, and the husband acquitted; for the indictment is in law joint, or several, as the fact happens; and so is the book of 15 *E. 2 Coronæ* 383, and accordingly has been the frequent practice *Vide Dalt. ubi sup. cap. 104*, where there are several instances of the arraigning of husband and wife upon a joint indictment of felony; which, if by law she could not be any way guilty, had been erroneous, for the indictment itself had been insufficient: therefore, though the former practice be merciful, and cautious, it is not agreeable to law; for, though ordinarily according to the modern practice the wife cannot be guilty, if the husband be guilty of the same larceny or burglary; yet if the husband upon such an indictment be acquitted, and the wife convict, judgment ought to be given against her upon that indictment; for every indictment of that nature is joint or several, as the matter falls out upon the evidence. *Vide 22 E. 4. 7.(o)*

5. But if the husband and wife together commit a treason, [47] murder, or homicide, though she only assented to the treason, they shall both be found guilty, and the wife shall not be acquitted upon the presumption, that it was by the coercion of the husband, for the odiousness, and dangerous consequence of the crime; [3] the same law it is, if she be accessory to murder before the fact.

6. If the husband commit a felony or treason, and the wife knowingly receive him, she shall neither be accessory after as to the felony, nor principal as to the treason, for such bare reception of her husband; for she is *sub potestate viri*, and she is bound to receive her husband; but otherwise it is, of the husband's receiving the wife knowingly after an offence of this nature committed by her. (p)

"*M. 37. E. 3. Rot. 34. Linc. coram Rege. Ricardus Dey & Margeria Uxor ejus indictati, pro receptamento felouum; Margeria dicit, quod indictamentum predict' super predictam Margeriam factum mi-*

(o) *B. Chartre de pardon* 51.

(p) *Co. P. C.* 108.

[3] See note ante p. 47.

nus sufficiens est, eo quod præd' *Margeria* tempore quo ipsa dictos felones receptasse, seu eis consentire debuisset, fuit cooperta præd. *Ricardo* viro suo, & adhuc est, & omnino sub potestate sua, cui ipsa in nullo contradicere potuit; & ex quo non inseritur in indictamento prædicto, quod ipsa aliquod malum fecit, nec eis consentivit, seu ipsos felones receptavit, ignorante viro suo, petit iudicium, si ipsa, vivente viro suo, de aliquo receptamento in præsentia viri sui occasionari possit.—Postea viso & diligenter examinato indictamento prædicto super præfatam *Margeriam* facto, videtur curiæ, quod indictamentum illud minus sufficiens est ad ipsam inde ponere responsuram: Ideo cesset processus versus eam omnino, &c."

Upon which record these things are observable:

1. That the wife, if alone and without her husband, may be accessory to a felony *post factum*. 2. But she cannot together with her husband be accessory to a felony *post factum*; for it shall be entirely adjudged the act of the husband; and this is partly the reason, why she cannot be accessory in receipt of her husband being a felon, because she is *sub potestate viri*. 3. That in this case she was not put to plead to the indictment *not guilty*, but took her exception upon the indictment itself; and so *note* the diversity [48] between an indictment of felony, as principal, and the indictment of her, as accessory after; for in the former case she shall be put to plead *not guilty* to the indictment, though it appear in the body thereof, that she is *covert*. 4. That yet the indictment stood good, as to the husband; and upon this consideration, though it is true the husband and wife may be guilty of a treason, as is before shown, yet it seems, she shall never be adjudged a traitor barely for receiving her husband, that is a traitor, or for receiving jointly with her husband any other person that is a traitor, unless she were also consenting to the treason, for it shall be entirely adjudged the act of her husband.

It is certain a *feme covert* may be guilty of misprision of treason committed by another man than her husband: but whether she can be guilty of misprision of treason, if she knows her husband's treason, and reveal it not, is a case of some difficulty: on the one side, the great obligation of duty she owes to the safety of the king and kingdom, the horridness of the offence of treason, and the great danger that may ensue by concealing it, seems to render her guilty of misprision of treason, if she should not detect it; on the other side, it may be said, she is *sub potestate viri*, she cannot by law be a witness against her husband, and therefore cannot accuse him. *Ideo quære*. But, certainly, if she consented to the treason of her husband, though he were the only actor in it, she is guilty as a principal, and hath no privilege herein by her coverture, as is before shown.

CHAPTER VIII.

CONCERNING THE CIVIL INCAPACITIES BY COMPULSION AND FEAR.

• I JOIN these two incapacities together, because they are much of the same nature, as to many purposes; and how far these give a privilege, exemption, or mitigation in capital punishments, is now to be considered.

First, There is to be observed a difference between the times of war, or public insurrection, or rebellion, and the times of peace; for in the times of war, and public rebellion, when a person is under so great a power, that he cannot resist or avoid, the law in some cases allows an impunity for parties compelled, or drawn by fear of death, to do some acts in themselves capital, which admit no excuse in the time of peace.

M. 21 E. 3. coram Rege. Rot. 101. Linc. “*Walter de Alyngton, and divers of his confederates at St. Botolph’s Regiam potestatem assumentes, & ut de Guerrâ insurgentes’ quendam Thomam de Okeham sutorem in capitaneum, & majorem suum eligerunt,*” seized on two ships, and took away the corn; (a) appointed a bell to be rung; (b) and commanded, that at the ringing thereof *ipsi & eorum quilibet essent parati, &c.* “*Et plures homines villæ prædictæ, qui ad maleficia sua consentire noluerunt, ceperunt, & eos sibi jurare fecerunt ad imprisas suas manutenendas.*” They were arraigned upon the indictment, and committed: “*Illi, qui coacti fuerunt jurare, dimittuntur per manucaptionem; & illi, qui receperunt denarios, petunt quod, ex quo patet per indictamentum prædictum, quod ipsi coacti fuerunt recipere denarios contra voluntatem suam, petunt, quod possint quieti recedere; & consideratum est per curiam, quod nihil mali in* [50] *his reperitur; sed quia curia nondum advisatur, dies datus est per manucaptionem; ideo venit jurata.*” I find no further proceeding against them.

M. 7 H. 5. coram Rege. Rot. 20. Heref. cited Co. P. C. p. 10. Those, that supplied with victuals Sir John Oldcastle, and his accomplices then in rebellion, as is said, were acquitted by judgment of the court; because it was found to be done *pro timore mortis, & quod recesserunt, quàm cito potuerunt*: note, it was only furnishing of victuals, and *pro timore mortis*, which excused them: for after the battle of *Evesham*, in 49 H. 3., when that prudent act was made for the settling of the kingdom, called *Dictum de Kenilworth*, those, that were drawn to assist the barons against the king, though they were not put into the rank of those that paid five years value of their lands for their assistance, *viz.* those, that *gratis, & voluntarie, & non coacti miserunt servitia sua contra regem, & ejus filium*; yet, it seems, they were put to a smaller mulct; for by the 12th, 13th, 14th, and 15th

(a) One hundred and twenty quarters of corn, value 86*l.*

(b) *Quendam communem campanam ordinaverunt pulsari.*

articles: "Coacti, vel metu ducti, qui venerunt ad bella, nec pugnaverunt, nec male fecerunt; impotentes, qui vi vel metu coacti miserunt servitia sua contra regem, vel ejus filium; coacti, vel metu ducti, qui fuerunt deprædatores, & cum principalibus prædonibus prædationes fecerunt, & quando commodè potuerunt, recesserunt, & ad domos redierunt; [emptores scienter rerum alienarum valorem bonorum, quæ emerunt, restituant, & in misericordia domini regis sint, quia contra justitiam fecerunt, quia rex inhibuit, jam dimidio anno elapso;] illi, qui ad mandatum comitis Leycestriæ ingressi sunt Northampton, nec pugnaverunt, nec malum fecerunt, sed ad Ecclesiam fugerunt, quando regem venientem viderunt, & hoc sit attinctum per bonos, solvant, quantum valet terra eorum per dimidium annum; illi, qui ex feodo comitis tenebant, sint solum in misericordia domini regis: impotentes, & alii homines, qui nihil mali fecerunt, statim rehabeant terras suas, & damna recuperent in curia domini regis."

[51]

But even in such cases, if the whole circumstances of the case be such, that he can sufficiently resist, or avoid the power of such rebels, he is inexcusable, if upon a pretence of fear, or doubt of compulsion, he assist them.

Now as to times and places of peace.

If a man be menaced with death, unless he will commit an act of treason, murder, or robbery, the fear of death doth not excuse him, if he commit the fact; for the law hath provided a sufficient remedy against such fears by applying himself to the courts and officers of justice for a writ or precept *de securitate pacis*.(d)

Again, if a man be desperately assualted, and in peril of death, and cannot otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person, then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact; for he ought rather to die himself, than kill an innocent: but if he cannot otherwise save his own life, the law permits him in his own defence to kill the assailant; for by the violence of the assault, and the offence committed upon him by the assailant himself, the law of nature, and necessity, hath made him his own *protector cum debito moderamine inculpatæ tutelæ*, as shall be farther showed, when we come to the chapter of homicide *se defendendo*.(*)

But yet farther, it is true in cases of war between sovereign princes the law of nations allows a prince to begin hostility with such a prince that designs a war against him; and if the fear be real, and upon just ground, *non tantum de potentia sed & de animo*.—*Grot de jure belli & pacis, Lib. II. cap. 22. § 5.* he may prevent the other's actual aggression, and need not expect, till the other actually invade him, when possibly it may be too late to make a safe defence; and the reason is, because they are not under any superior, that may by his process or interposition secure the prince against [52]

(d) See this writ in the *Register, fol. 88. b. F. N. B. Vet. Edit. 79. N. Edit. 177.*

(*) *Postea cap. 33.*

such a just fear; and therefore in such case the law of nations allows a prince to provide for his own safety.

But it is otherwise between subjects of the same prince: If *A.* fears upon just grounds, that *B.* intends to kill him, and is assured, that he provides weapons, and lies in wait so to do; yet without an actual assault by *B.* upon *A.* or upon his house, to commit that fact, *A.* may not kill *B.* by way of prevention; but he must avoid the danger by flight, or other means; for a bare fear, though upon a just cause, and though it be upon a fear of life, gives not a man power to take away the life of another, but it must be an actual and inevitable danger of his own life; for the law hath provided a security for him by flight, and recourse to the civil magistrate for protection by a writ or precept *de securitate pacis*: and thus far touching the privilege by reason of compulsion or fear.[1]

CHAPTER IX.

CONCERNING THE PRIVILEGE BY REASON OF NECESSITY.

ALTHOUGH all compulsion carry with it somewhat of necessity, and abates somewhat of the voluntariness of the act that is done, yet there are some kinds of necessities, that are not by any external compulsion or force.

Touching the necessity of self-preservation against an injurious as-

[1] An apprehension, though ever so well grounded, of having property wasted or destroyed, or of suffering any other mischief not endangering the person, will afford no excuse for joining or continuing with rebels. *Rex v. McGrouther*, 1 *East. P. C.* 71.

But it is otherwise if the party join from fear of death, or by compulsion. *Rex v. Gordon*, 1 *East. P. C.* 71.

On the indictment on the *stat.* 7, and 8 *Geo.* 4, c. 30, s. 4, for breaking a threshing machine, the judge allowed a witness to be asked whether the mob, by whom the machine was broken, did not compel persons to go with them, and then compel each person to give one blow to the machine; and also at the time when the prisoner and himself were forced to join the mob, they did not agree together to run away from the mob the first opportunity. *Rex v. Crutchley*, 5 *Car. & P.* 133.

A., who was insane, collected a number of persons together, who armed themselves, having a common purpose of resisting the lawfully constituted authorities; *A.* having declared that he would cut down any constable who came against him. *A.*, in the presence of *C.* and *D.*, two of the persons of his party, afterwards shot an assistant of a constable, who came to apprehend *A.* under a warrant:—Held, that *C.* and *D.* were guilty of murder, as principals in the first degree, and that any apprehension that *C.* and *D.* had of personal danger to themselves from *A.* was no ground of defence for continuing with him after he had so declared his purpose; and also that it was no ground of defence that *A.* and his party had no distinct or particular object in view when they assembled together and armed themselves. *Reg. v. Tyler*, 8 *Car & P.* 616, *Per Denman, Ch. Just.*

The apprehension of personal danger does not furnish any excuse for assisting in doing any act which is illegal.

The only force that doth excuse, is a force upon the person and present fear of death; and this force and fear must continue all the time the party forced remains with the party forcing. It is incumbent upon men, who make force their defence, to show an actual force, and that they joined *pro timore mortis, et recesserunt quam ceto potuerunt*. *Fost. Dis.* 14, 216; 4 *Steph. Com.* 8384. *The U. S. v. Vigil*, 2 *Dall. R.* 346; *U. S. v. Haskell*, 4 *Wash. C. C. R.* 402.

sault somewhat has been said in the last chapter, and more will be said hereafter in its due place: I shall proceed therefore to other instances.

The necessity of the preservation of the peace of the kingdom by the apprehending notorious malefactors excuseth [53] some acts from being felony, which in the matter of them without such necessity were felony.

If a thief resist, and will not suffer himself to be taken upon hue and cry or pursuit, *justiciari se nobilit. permittere*, if he be killed by the pursuants, it is no felony; (a) *de quo vide latius infra*.

By the statutes of 3 & 4 E. 6 cap. 5 and 1 Mar. cap. 12. If there be a riotous assembly to the number of twelve assembled to commit the disorders mentioned in those acts, the justices of the peace, the sheriff, mayor, or other officer of any corporation, &c. may raise a power to suppress and apprehend them; and, if they disperse not upon proclamation, if any of the rioters be killed, or maimed, or hurt by the justices, &c. or those assembled by them to suppress the riot, it is by this act dispunishable.

It is true, this act (b) continued only during queen *Elizabeth's* life, and is now expired; (c) but although, perchance, as to the killing of such persons, as do not presently return upon proclamation to their homes, it needs the aid of an act of parliament to indemnify them; yet if they attempt any riotous act, and cannot be otherwise suppress, the sheriff, or justice of the peace may make use of such a force upon them for preservation of the peace, as well by the Common law, as by the statute; *quod vide in Anderson's Rep. part 2 n. 49 p. 67. Burton's case in fine*; and the statute of 13 H. 4. cap. 7. in principio, and 2 H. 5. cap. 8, whereby all men are bound, upon warning, to be assistant to the sheriff and justice for the suppressing of riots even by force, if it cannot be otherwise effected; so that the clauses touching this matter in the temporary statutes of 3 & 4 E. 6. and 1 Mar. are but pursuant to the law and former statutes for necessity of preserving the peace.

Some of the casuists, and particularly *Covarruvias*, Tom .1 *De furti & rapinæ restitutione*, § 3. 4. p. 473, and *Grotius de jure belli ac pacis*, Lib. II. cap. 2. § 6. (d) tell us, that in case of extreme necessity, either of hunger, or clothing, the civil distributions of property cease, and by a kind of tacit condition the first community doth return, and upon this, those common assertions are grounded; "*Quicquid necessitas cogit, defendit.*" "*Necessitas est lex temporis & loci.*" "*In casu extremæ necessitatis omnia sunt communia:*" and therefore in such case theft is no theft, or at least not punishable as theft; and some even of our own law-

(a) See *Leg. Ina*, l. 25.

(b) Viz. 1 Mar. cap. 12. for 3 & 4 Ed. 6. cap. 5. was repealed by 1 Mar. cap. 12.

(c) It was at first made to continue only till the end of the next session, but was afterwards by several new acts continued during the life of queen *Mary*; and by 1 *Eliz.* cap. 16. was continued during her life also, and has never since been revived; but in 1 *Geo.* 1. cap. 5. a new act was made to much the same purpose, which is perpetual.

(d) See *Puff. de jure naturæ*, Lib. II. cap. 6. § 6.

yers(e) have asserted the same; and very bad use hath been made of this concession by some of the Jesuitical casuists in *France*, who have thereupon advised apprentices and servants to rob their masters, when they have judged themselves in want of necessaries, of clothes, or victuals; whereof, they tell them, they themselves are the competent judges; and by this means let loose, as much as they can, by their doctrine of probability, all the ligaments of property and civil society.

I do therefore take it, that, where persons live under the same civil government, as here in *England*, that rule, at least by the laws of *England*, is false; and therefore, if a person, being under necessity for want of victuals, or clothes, shall upon that account clandestinely, and *animo furandi* steal another man's goods, it is felony,(f) and a crime by the laws of *England* punishable with death; although the judge, before whom the trial is, in this case (as in other cases of extremity) be by the laws of *England* intrusted with a power to reprieve the offender before or after judgment, in order to the obtaining the king's mercy.

For 1. Men's properties would be under a strange insecurity, being laid open to other men's necessities, whereof no man can possibly judge, but the party himself.

2. Because by the laws of this kingdom(g) sufficient provision is made for the supply of such necessities by collections for the poor, and by the power of the civil magistrate; and consonant [55] hereunto seems to be the law even among the *Jews*, if we may believe the wisest of kings. *Proverbs* vi. 30, 31, "*Men do not despise a thief, if he steal to satisfy his soul, when he is hungry; but if he be found, he shall restore seven-fold, and shall give all the substance of his house.*" It is true, death was not among them the penalty of theft, yet his necessity gave him no exemption from the ordinary punishment inflicted by their law upon that offence.(h)

Indeed this rule, "*in casu extremæ necessitatis omnia sunt communia*," does hold in some measure in some particular cases, where by the tacit consent of nations, or of some particular countries or societies, it hath obtained.

1. Among the *Jews* it was lawful in case of hunger to pull ears of standing corn, and eat, *Matth.* xii. 1. &c.(i) and for one, that passed through a vineyard, or oliveyard, to gather, and eat without carrying away. *Deut.* xxiii., 24, 25.

2. By the *Rhodian* law,(k) and the common maritime custom, if

(e) *Britton. cap.* 10. *Crompt.* 33. *a. Plowd.* 18. *b.* 19. *a. Dalt. Just. cap.* 99.

(f) See *Dalton ubi supra.*

(g) 43 *Eliz. cap.* 2. &c.

(h) But their ordinary punishment being only pecuniary could affect him only when he was in a condition to answer it; and therefore the same reasons, which would justify that, can by no means be extended to a corporal, much less to a capital punishment.

(i) For the *Pharisees* objected against it only on account of its being done on the sabbath day. *Mark* xi. 23. &c. *Luke* vi. 1. &c.

(k) Vide *Dig. Lib.* XIV. tit. 2. *de lege Rhodia de jactu*, l. 2. § 2. in fine. *Leg. Guilielmi Conquest. cap.* 38.

the common provision for the ship's company fail, the master may under certain temperaments break open the private chests of the mariners or passengers, and make a distribution of that particular and private provision for the preseryation of the ship's company.

Vide Consolato del Maré, cap. 256.(l) Les costumes de la Mere, p. 77.

3. Nay, I find, among our *English* voyages to the *West-Indies* described by *Hackluit*, that it was a received custom, that if a ship wanted necessaries, and the inhabitants of the continent would not furnish them for money, they might, by the usage of the sea and nations, take provision by force, making the inhabitants reasonable satisfaction; for in these cases the common consent of nations hath made it lawful, and therefore it is lawful; 1. because necessary in extremity; 2. because there are no other means [56] to obtain it by an application to superiors; but were this done by *English* mariners upon the *English* shore, where both are under the same civil magistrate the case would be otherwise, because capable of another remedy.

It is not lawful voluntarily to assist the king's enemies with money or provision, for it is an adhering to the king's enemies, and so treason within the letter of the statute of 25 *E. 3.* but yet, if the king's enemies come into a county with a power too strong for the county to resist, and will plunder the country, unless a composition be made with them, such a ransoming of themselves is so far from being treason, that it hath been allowed as lawful. 1. In respect of the extreme necessity. 2. Because it is a less detriment to the country, and a less supply to the enemy, than that plunder would be; and for that purpose I shall set down the case at large.

M. 14 E. 2. B. R. Rot. 60. Dunelm. "Placitum de transgress, coram *A. D. de Brome* & sociis suis justiciariis domini Regis in episcopatu *Dunelm.* sede vacante anno decimo regni sui mittitur huc propter errores, &c. Juratores dicunt, quod Scoti inimici & rebelles regis prædict. die Martis in festo Sanctæ *Catharinæ* virginis anno regni regis nunc nono ingressi fuerunt terram episcopatus *Dunelm.* eâ de causâ, ut ipsam destruerent, & quod omnes de communitate episcopatus prædicti tunc apud *Dunelm.* existentes, volentes præcavere dictorum inimicorum malitiam, ordinârunt, quod unusquisque illorum præstarent sacramentum corporale stare ordinationi, quæ pro proficuo communitatis prædictæ contingeret ordinari, qui quidem *Willielmus de Heberne* jurat' fuit cum aliis, &c. Item quod post consuluerunt facere finem cum prædictis inimicis, & cum eis fecerunt finem de mille & sexcent' marc'; quam quidem summam oporteret solvi incontinenti per quod, quia non habuerunt pecuniam prestò, ordinârunt, quod quidam de communitate prædicta irent de domo in domum infra ball.' *Dunelm.* & extra, & perscrutarent ubi denarii essent in deposito, & ubicunq; denarii hujusmodi invenirentur, caperentur ad solutionem dicti finis festinand', quousq; levare possit

(l) Printed at Venice 1584, in 4to.

de communitat. prædict. & satisfieri illis, quorum denarii sic capiendi fuerunt; et quod prædictus *Willielmus de Kellawe* simul cum quodam *David de Rotheber* jurat' ad perscrutandum in formâ prædictâ venit ad prædictas domos, & cistam & 70l. de propriis denariis ipsius *Willielmi de Heberne* in cista prædicta inventas cepit & asportavit, &c. Et juratores requisiti, si prædictus *Willielmus de Heberne* consentiebat captioni prædictorum denariorum, dicunt, quod non, & quia compertum est, &c. quod ubi prædicta ordinatio fuit facta de denariis in deposito perscrutand' & capiend', prædict' *Willielmus de Kellawe* simul, &c. cepit denarios prædict', qui fuerunt in domo & propriâ custodiâ prædicti *Willielmi de Heberne* & contra voluntatem suam, & etiam pro eo, quod videtur curiæ, quod prædict' *Willielmus de Heberne* omninò esset sine recuperare, quoad denar' suos prædict', nisi esset versus præfat' *Willielmum de Kellawe*, &c. qui prædictos denarios in formâ prædictâ cepit & asportavit, consideratum est, quod prædict' *Willielmus de Heberne* recuperet versus prædict' *Willielmum de Kellawe* prædictos denarios & dampna sua, quæ taxantur ad c. s. & idem *Willielmus de Kellawe* committatur gaolæ, &c. prætextu cujus recordi ad sectam prædicti *Willielmi de Kellawe*, asserentis errores & defectus in prædictis recordo and processu interesse, mandatum fuit episcopo *Dunelm.* quod scire fac' prædicto *Willielmo de Heberne*, &c. qui non venit.

“ Ideo processum est ad examinationem recordi per ejus defaultum, & assignat hos errores; primum, quod nihil fecit contra pacem regis, nec denarios illos cepit vi & armis, maximè cum prædictus *Willielmus de Heberne* juratas fuit stare ordinationi prædictæ, & quod ipse *Willielmus de Kellawe* per sacramentum præhibitum injunctus fuit scrutari & denarios prædictos capere; & non est consonum, quod dictus *Heberne* recuperaret prædictos denarios & dampnum contra assensum & juramentum suum proprium, nec quod ipse *Kellawe* committeretur gaolæ.

“ Item in hoc quod justic' fundaverunt judicium suum, quod dictus *Heberne* non posset habere suum recuperare de denariis prædictis, cum illud habere posset directè versus communitatem vir-
[58] tute ordinationis & concessionis prædictarum, &c. ob quos errores hic in judicio recitados consideratum est, quod errone in primo judicio processum est, & quod idem *Kellawe* a gaola deliberetur, & totus processus evacuetur, &c.”

In Pasch. 15 Rot. 17. “ Patet, quod Scoti cum hominibus de *Rippon* similiter concordârunt pro mille marc', nè villa comburetur.”

Nota, this was an act done for the security of the country in a time of actual war and invasion by enemies, and therefore rendered that by-law and the execution thereof justifiable by reason of that necessity, which would hardly have done it in time of peace. 2. But that, which this record principally evidenceth, is, that such a supply of the king's enemies upon such a necessity in a time of war, and to prevent the devastation of the country, was not taken at all to be an adhering to, or treasonable aiding of the king's enemies.”

CHAPTER X.

CONCERNING THE OFFENCE OF HIGH TREASON, THE PERSON AGAINST WHOM COMMITTED, AND THE REASON OF THE GREATNESS OF THE OFFENCE; AND TOUCHING ALLIGEANCE.

HAVING premised these general observations relating to all crimes, that are capital, and their punishments, I shall now descend to consider of capital crimes particularly, and therein first of high treason.

And yet, before I descend to the particulars thereof, I shall premise also some things in general touching alligeance, since the specification of this offence consists principally in this aggravation, that it is *contra ligeantix suæ debitum*.

The offence of high treason is an offence, that more immediately is against the person or government of the king; [59] and the greatness of the offence, and the severity of the punishment is upon these two reasons.

1. Because the safety, peace, and tranquillity of the kingdom is highly concerned in the safety and preservation of the person, dignity, and government of the king; and therefore the laws of the kingdom have given all possible security to the king's person and government under the severest penalties.

2. Because as the subject hath his protection from the king and his laws, so on the other side the subject is bound by his alligeance to be true and faithful to the king; and hence all indictments of high treason run *proditorie*, as a breach of the trust, that is owing to the king; *contra ligeantix suæ debitum*, against that faith and alligeance he owes to the king, and *contra pacem domini regis, coronam, & dignitatem ejus*.

And hence it is, that if an alien enemy come into this kingdom hostilely to invade it, if he be taken, he shall be dealt with as an enemy, but not as a traitor, because he violates no trust nor alligeance: resolved in the lord *Herise's* case. *Co. P. C. cap. 1 p. 11. 7 Co. Rep. 6. a. Perkin Warbeck's case.*

But if an alien, the subject of a foreign prince in amity with the king, live here, and enjoy the benefit of the king's protection, and commit a treason, he shall be judged and executed, as a traitor; for he owes a local allegiance. *7 Co. Rep. 6. the case of Stephano Ferrara(a)* a Portuguese; and the indictment shall not run *contra naturalem dominum*, but *contra dominum suum*, and conclude *contra ligeantix suæ debitum*; and such an alien was compellable to take the oath of alligeance in the leet. *2 Co. Instit. p. 121.(b)*

If a merchant, subject of a foreign prince in hostility with our king, come hither, after the war begun, without the king's license, or safe-conduct, such a person may be dealt with as an enemy, *viz.* taken, and ransomed. *Mag. Chart. cap. 30.(c)*

(a) And *Emanuel Lewis Tinoco. Hill. 36 Eliz. Dyer. 145.*

(b) *Mirroir de justice, cap. 5. § 1. n. 6.*

(c) *Co. Instit. 58.*

By that statute merchants of a hostile country found in [60] this realm at the beginning of the war shall be attached without harm to their body or goods, till it be known, how the *English* merchants are used in the hostile country; and if the *English* merchants be well used there, theirs shall be likewise used here; so that in this case such merchants, though alien enemies, have the benefit of the king's protection, and so owe a local alligance, which, if they violate, they may be dealt with as traitors, not as enemies, for they have the advantage of the king's protection, as well as his other subjects; yea, it seems also, that if the subject of a foreign prince lives here as a private man, and then war is proclaimed betwixt our king and that foreign prince, and yet that alien continues here in *England* without returning to his natural sovereign, but under the cover and protection of the king of *England* commits a treason, he shall be judged and executed as a traitor; for by continuing here he continues the owning of his former local alligance.[1]

Yet for greater security in the times of hostility between this and foreign kingdoms, especially that of *France*, there went out precepts under the great seal to arrest all those of that hostile kingdom, until they gave security, *quod se bene gerent erga regem, & quod sua bona non transferent sine licentiâ regis, & quod literas aut nuncios non mittent ad partes externas, nec aliquid contra pacem attemptabunt. Rot. Vascon. 18 E. II. M. 24, 23 & 21. Dors.* And sometimes those aliens were constrained actually to swear fealty to the crown of *England* in the times of hostility, and thereby to superadd an actual alligance to that local alligance, which they had being under the king's protection as subjects, though in truth they were the natural subjects of the hostile prince. *Pat. 14. H. 6. part. 2. m. 34 & 35.* and

[1] If an alien residing and receiving protection in *England* should, after the commencement of a war between the English king and the alien's sovereign, go over to his native country, but leave his family and effects in *England*, and adhere to her enemies (the alien's countrymen) in acts or purposes of hostility, he may be dealt with as a traitor. This rule was laid down by all the judges assembled at queen *Anne's* command, January 12th, 1707. And they laid in that resolution a considerable stress on the queen's declaration of war, in which she expressly took under her protection the persons and estates of the subjects of *France* and *Spain* (with whom she was at war) residing in *England*, and demeaning themselves dutifully, and not corresponding with the enemy; for by that declaration these aliens were put under a kind of safe-conduct, and enabled to acquire chattels and to maintain actions for the recovery of their personal rights in as full a manner as alien friends may. *Fost. Disc. 1, sect. 4.* See also *Rex v. De la Motte*, 21 *Howell's St. Tr.* 687; 1 *East. P. C.* 53; *Salk.* 46; *Lutw.* 34; *Lord Raym.* 282.

Alien enemies, resident in the country, may sue and be sued as in time of peace; for protection to their persons and property is due, and implied from the permission to them to remain, without being ordered out of the country by the President of the *United States*. The lawful residence does, *pro hac vice*, relieve the alien from the character of an enemy, and entitles his person and property to protection. 2 *Kent's Com.* 63; *Daubigny v. Darrellon*, 2 *Anst.* 462; *Clark v. Marcy*, 10 *Johns. Rep.* 69; *Russel v. Skipwith*, 6 *Binn. Rep.* 241. But it is apprehended that such a person, the moment he quits the country, even though he leaves his family and effects behind, becomes an enemy, and consequently incapable of committing treason against the *United States*, unless perhaps himself, his family, and his effects, were taken expressly under the protection of the *United States*, as in the case above stated from *Foster*.

if they refused, were either imprisoned, or expelled the kingdom.[2]
Vide infra cap. 15.

And upon the same account it is, that though there be an usurper of the crown, yet it is treason for any subject, while the usurper is in full possession of the sovereignty, to practise treason against his person; and therefore, although the true prince regain the sovereignty, yet such attempts against the usurper in compassing his death have been punished as treason, unless they were attempts made in the right of the rightful prince, or in aid or assistance of him, [61] because of the breach of ligeance, that was temporarily due to him, that was king *de facto*; and thus it was done 4 *E. 4.* 9 *E. 4.* 1,(d) though H. 6. was declared an usurper by act of parliament 1 *E. 4.* and therefore king *Edward IV.* punished *Ralph Grey* with degradation, as well as death, not only for his rebellion against himself, but also *pur cause de son perjury & doubleness, qu'il avoit fait al roy H. 6.* 4 *E. 4.* 20.

And because high treason is said to be *contra ligeantiae debitum*, it will not be amiss to premise something touching alligeance and its kinds, referring myself to 7 *Co. Rep.* *Calvin's* case, in relation to what is here omitted touching it.

Alligeance therefore due to the king is of two kinds: 1. Original, virtual, and implied. 2. Exprest, and declared by oaths or promises.[3]

The virtual or implied alligeance is that, which the subject owes to his sovereign antecedently to any express promise, oath, or engagement: this is that, which the Customer de Normandie mentions cap. 13. *Aliance & la loyaulte de tous ses homes de toute la contree, par quoy ils sont tenus a lui donner conseil & ayde de leurs propres corps contre toutes personnes qui peuvent vivre & mourir & soy garder de lui nuire en toutes choses ne de soustenir in aulcune chose la partie de ceulx qui parlent contre luy.*

And from the breach of this original ligeance ariseth, the crime of treason, though the person committing it never promised or swore faith or alligeance to his prince: for as the king by the very descent of the crown is fully invested with the right of sovereignty before his coronation, (which is only a magnificent solemnity[4] attending that, which is before settled in the prince by the descent of the crown,) so the subject is bound to his king by an intrinsic alligeance before the superinduction of those express bonds of oath, homage, and fealty, which were instituted for the better securing thereof.

And this alligeance is either natural from all that are subjects born within the king's alligeance; or local, which [62]

(d) It was not done in this case, but only it is said by the counsel, that it may be done.

[2] In the United States, an alien enemy is not permitted to make the declaration required by law, preparatory to the naturalization of aliens. *Ex parte Newman.* 2 *Gallis. C. C. R.* 11.

[3] 1 *Bl. Com.* 366. 1 *East, P. C.* 49. 2 *Kent's com.* 39.

[4] *See Post.* 189.

obligeth all that are resident within the king's dominions, and partake of the benefit of the king's protection, although strangers born.

The breach of this primitive or virtual alligance is that, which is called high treason; what shall be said of breach of this alligance, so as to make a person guilty of treason, shall be shown hereafter.

The express or explicit alligance consists in certain promises, oaths, or professions attesting and witnessing that alligance, and instituted for the farther security thereof: and they are of two kinds; first, those, which were anciently instituted by the Common law, namely the oath of fidelity and alligance, and the profession of lige homage: and such, as are instituted by act of parliament, namely the oath of supremacy instituted by the statute of 1 *Eliz.*,^(e) and the oath of obedience instituted by the statutes of 3 *Jacobi.*^(f) Something I shall say of all these.

The oath of fidelity or fealty is of two kinds: 1 That which is due by tenure, whether of the king, or of mesne lords, which is *ratione feodi vel vassalagii*, and hath a special relation to the lands so held, and is set down by *Littleton*, § 19. "Hear ye, my lord, I shall be faithful and loyal, and faith to you shall bear for the tenements, which I claim to hold of you, and I shall lawfully do to you the customs and services, which I ought to do at the terms assigned. *So help me God.*"

Touching this feudal fealty, or fealty by reason of tenure, I have not much to do in this place. The other kind of fealty is that oath, which is called *fidelitas ligea*, or *alligance*, and performed only to a sovereign prince, and therefore regularly ought to be performed by all men above the age of twelve years, whether they hold any lands or not. The tenor of this oath according to *Fleta*, *Lib. III.*

[63] *cap. 16*,^(g) runs thus: "Hoc auditis, circumstantes, quod fidem regi portabo de vita, & membris, & terreno honore, & arma contra ipsum non portabo: sic me Deus, &c."

According to *Briton*, who wrote about 5 *E. 1 cap. 29.* (which is also mentioned in *Calvin's case*, 7 *Co. Rep. 6.*) the common form of the oath of alligance taken in leets runs thus: "Ceo oyes vous N. baillife, que jeo A. de ceo jour en avaunt serray feal, & leal a nostre seignieur E. roy d'Angleterre, & a ses heires, & foy & lealte lui porteray de vie, & de membre, & de terrien honour, & que jeo lour mal, ne lour damage, ne saveray, ne orray, que jeo ne le defeudray a mou

(e) *Cap. 1.*

(f) *Cap. 4.* [Vide 7 *Jac. I. cap. 2. & 6. 13 Car. II. St. 2. cap. 1. 13. & 14 Car. II. cap. 3 & 4. 25 Car. II. cap. 2. 30. Car. II. St. 2. cap. 1.*] But these oaths are abrogated by 1 *W. & M. Sess. 1. cap. 1 & 9.* and new ones appointed in their room; see 1 *W. & M. Sess. 2. cap. 2. § 3.* and 3 *W. & M. cap. 2. 13 W. 3. cap. 6. 1 Annæ, cap. 22. 4. Annæ, cap. 8. 6 Annæ, cap. 7. 14. 23. 1 Geo. I. cap. 13, &c.*[5]

(g) *Sect. 22.*

[5] See also the oath of abjuration, 6 *Geo. 3. c. 53.* The Declaration against Transubstantiation, 10 *Geo. 4. c. 7.* Affirmations of Quakers and Moravians, 9 *Geo. 4. c. 32. 3. & 4 W. 4. c. 49. 1 & 2 Vict. cc. 5. 15. 77.* Affirmations of Separatists, 3 & 4 *W. 4. c. 82.*

pozer: si moy eyde Dieu & les Seyntz.” This is the form of the ancient oath of alligance, or fidelity to the king, and as it is used at this day; and he that is minded to see the antiquity of it, may read thereof 7 *Co. Rep.* 7. *Calvin’s case*, *Spelman’s Gloss. Titulo Fidelitas*, which carry it up as high as king *Arthur*; more particularly it was established by the laws of the Confessor, ^(h) and by the laws of king *William I. quod vide in Spicilegiis Seldeni ad Edmerum lege* 52, ⁽ⁱ⁾ “Statuimus, ut omnes liberi homines fœdere & sacramento affirment, quod intra & extra universum regnum Angliæ *Willielmo* regi domino suo fideles esse volunt, terras & honores illius omni fidelitate ubique servare cum eo & contra inimicos & alienigenas defendere.” ^(k)

And herein the prudence of the Common law is observable; the ancient oath of alligance, 1, was short, and plain, not entangled with long and intricate clauses or declarations, but the sense of it is obvious to the most common understanding; and yet, 2. it is comprehensive of the whole duty of the subject to his prince, and therefore hath obtained for above six hundred years in this kingdom; and if any difficulties should occur in the sense or extent thereof, length of time and long experience and practice hath suf- [64] ficiently expounded it.

I shall subjoin some observables concerning this oath, which indeed explain that implied and virtual alligance, whereof before.

1. By whom this oath is to be taken: It is to be taken by all persons above the age of twelve years, whether denizens or aliens, 2 *Co. Instit.* p. 121, except women, earls, prelates, barons, and men of religion, according to *Britton*, cap. 12. which exception is not to be absolutely and universally understood; for all persons above the age of twelve years are bound to take this oath of alligance, except women, as shall be shown, but not in the same manner or place, as others; but because regularly this oath was to be taken in the leet, or at least in the sheriff’s turn, which is in nature of a leet, where earls, barons, prelates, and men of religion were not bound to do their suit, therefore by the statute of *Marlbr. cap. 10*, is this exception added: but yet at other times and in other places men of religion and noblemen were to take it: as shall be shown.

It differs from the oath of fealty performed to the king by tenure, for that includes somewhat more, and somewhat less; and according to *Britton cap. 68.* ^(l) runs thus when performed to the king: “Ceo oyes vous bone gents qe jeo *J. S.* foy a nostre seignior le roy *Edward* porterai de ceo jour en auant de vie & de membre, de cors & de chateux, & de terrene honor, & les services qe a lui appendent de

^(h) L. 35. but these laws are evidently spurious, and seem to be the composition of some lawyer after the reign of *William II.* Vide *Hickesii Dissert. Epist.* p. 95. and even in the best MS. copies of these laws the legendary account of king *Arthur* is omitted.

⁽ⁱ⁾ Vide *Leg. Anglo-Sax. Edit. Wilkins.* p. 228. *Edit. Lambard,* p. 170.

^(k) Vide *assisas Henrici regis factas apud Clarendon & renovatus apud Northampton.* *Hoveden,* p. 314. *Edit. Savil.*

^(l) § 479.

fees & de tenements, que jéo teigne de lui, leaument les ferray as termes dues a mon poer: si moy ayde Dieu & les Seyntz, &c.”

Now, besides this oath of fealty or alligeance to the king, there were anciently certain oaths administered to persons of a different age; but these have been long disused, as namely, that, which *Britton* mentions *cap. 12. viz.* that all above the age of fourteen years, (m) should swear to be true and faithful to the king, and that they should not be felons nor assenters to felons, excepting men of religion, wo-

men, clerks, knights, and their eldest sons; (n) and of the like [65] nature was that oath appointed by king *Henry III.* to be taken by all men above fifteen years, consisting of divers particulars in order to the preservation of the peace, and mentioned at large by *Bracton, Lib. III. Tract. 2. cap. 1. de Corona*; both which it seems were temporary provisions for preservation of the peace, and therefore administered to persons above fourteen and fifteen years, and differed from this settled oath of alligeance above mentioned.

2. What kind of oath of fidelity this is: As there is *homagium ligeum*, and *homagium simplex*, so there is *fidelitas ligea* and *fidelitas simplex*; this, that is performed to the king, is *fidelitas ligea*, and differs from the later, 1. In that this is performed to a king, the other to a *mesne* lord. 2. This is performed without relation to any tenure of lands. 3. This is without exception of the fidelity to any person, that is always *salva fide & ligeantia domini regis*.

Yet there seems to be a double kind of lige fealty, [6] as where there is a prince, that is subordinate to another, and yet hath *jura summi imperii* over his subjects: such was the king of *Scots*, whilst in some times of *Edward I.* and *Edward III.* he was in subjection to the crown of *England*; such was the prince of *Wales* before the conquest thereof by *Edward I.* and the full union of it to the crown of *England*; and thus it was in many investitures made formerly by the kings of *England*: for instance *anno 35 H. 3.* when that king gave to his son *Edward* the principality of *Gascoigne* in *France*, so that the great men of that country *fecerunt ei homagium & fidelitatis juramentum*; yet *Matthew Paris* (o) tells us, that *dominus rex lumen sibi retinuit principale dominium, scilicet ligeantiam*.

The like was done by *E. 3.* when *Rot. Vascon. 36 E. 3. m. 13.* the king had given to the *Black Prince* the principality of *Aquitain*

(m) This probably should be twelve years. See 2 *Co. Instit.* 147. *Vide supra in notis, p. 24.*

(n) This exception seems not to relate to the oath, but to the being in a *decenna* or tithing. The whole passage runs thus: “Volons nous, que tres tous ceux de xiiii ans de southe nous facent le serement, que ils nous ferrount fealx & leaux, & que ils ne serrount felons, ne a felons assentaunts, & volons, que toutz soient en dizeyne, & plevys par deseyners, sauve gentz de religion, clers & chivalers & leurs fitz eynes, & femes.”

(o) p. 845.

with a regal jurisdiction, viz. *merum & mixtum imperium*, so that in relation to the subjects of *Aquitain* he was in [66] nature of a sovereign; yet the king not only reserved *homagium ligeum* to be performed to him by the prince, but also reserved his own sovereignty, viz. *Dominio directo & superioritate nobis semper specialiter reservatis*: by reason whereof the king did not only substitute his delegates or judges *de la sovereignty et de resort* to receive appeals from the prince, as appears by Mr. Selden's *Tit. Honoris*, part 2. cap. 3. § 4. but was intitled to a superior alligance of all the subjects of *Aquitain*: so that here were two alligances; one due to the prince, which was qualified and restrained, *salvâ fide regis*; and the other absolute, which was due to the king as supreme.[7]

Again, when in the year 1170, *Hen. 2.* by consent of parliament,(p) as it seems, (for otherwise it could not be done,) made his eldest son king of *England*; so that there was *rex pater*, and *rex filius*, yet he reserved to himself the supreme alligance of all his subjects: "Et in crastino coronationis illius rex pater fecit *Willielmum* regem Scotorum, & *Davidem* fratrem suum, & comites, & barones regni devenire homines novi regis, & jurare ei fidelitatem contra omnes homines, salvâ fidelitate suâ;" Quod vide apud *Hoveden* sub eodem anno,(q) and the instrument itself at large apud *Brompton*, p. 1104:(r) "Hæc est conventio & finis, quæ *Willielmus* rex Scotiæ fecit cum domino suo *Henrico* rege Angliæ filio Matildis imperatricis, viz. quod dictus *Willielmus* rex Scotiæ devenit *homo ligeus* domini regis Angliæ contra omnem hominem de Scotia, & de omnibus terris suis aliis, & fidelitatem ei fecit, ut ligeo domino suo, sicut alii homines suo principi facere solent; similiter fecit *homagium Henrico* filio suo, & fidelitatem, salvâ fidelitate domini regis patris sui; &c. Comites & barones de terrâ regis Scotiæ, de quibus dominus rex Angliæ homagium habere voluerit, facient ei homagium contra omnem hominem, & fidelitatem, ut ligeo domino suo, sicut alii homines sui ei facere solent, & *Hen-* [67] *rico* regi filio suo & hæredibus suis, salvâ fidelitate domini regis patris sui."

Here was *first* the supreme king, namely *rex pater*, who did not oust himself of his regality, as some have mistaken, but had the sovereignty still, for he reserved his ligeance from the new king, and from all his subjects; yea, and in farther testimony thereof, the *rex filius* in the year 1175, did his father lige homage, and swore alligance *contra omnes homines*, as appears by *Hoveden*. *Secondly*, Here is a subordinate king, *rex filius*, who, though in relation to his father

(p) *Hoveden* sub anno 1170, *Brompton*, p. 1061.

(q) *Et* sub anno 1175.

(r) *Et in libro rubro staccarii*, fol. CLXVI. & *Rymer's Fœdera*, vol. I. p. 39, ex magno rotulo penes Camerar'.

[7] The citizens of the *United States* owe a double allegiance; first, to the *United States*, and then to the State of which they are citizens. 2 *Kent's Com.* 43.

he was a subject, yet in relation to his subjects, and particularly to the king of *Scots*, was a sovereign. *Thirdly*, Here is yet another subordinate king, *William*, the king of *Scots*, who was a sovereign in relation to his subjects; and altho there was an alligance or *fidelitas ligea* due by the subjects of *Scotland* to their king *William*, yet it was *salvâ fidelitate* to the kings of *England*, father and son; and tho there was a lige fealty due to *rex filius*, yet it was *salvâ fide regis patris*; but the fidelity or alligance to the *rex pater* was purely *fidelitas ligea*, for it had no exception.

3. The third observable upon this oath of alligance is, that it is not only applicable to the politic capacity of the king, but to the person of the king, as well as to his office, or capacity; and for the misapplication of the alligance to the regal capacity or crown, exclusive of the person of the king, among other things the *Spencers* were banished. *Vide Judicium inde in Veteri Magnâ Chartâ, & 7 Rep. 11. Calvin's case*, for the oath is to be applied to the person of the king, as well as his crown.

4. That in all oaths of fealty, as likewise in the profession of homage to any inferior or subordinate lord or prince, it must be *salvâ fide & ligeantiâ domini regis*; and to omit *this saving*, is punishable in such lord: see for this, the notable Record of 6 *E. 1.* against the bishop of *Exeter*, *Co. Litt. § 85, (s)* and it is no more than is used in other kingdoms. *Vide Spelm. in titulo Fidelitas*. The emperor *Frederic Barbarossa* in the year 1152, made a law that within his empire *in omni sacramento fidelitatis imperator nominatim excipiatur*, which obtained presently the like observation in all other countries, and accordingly is the *Custom de Normandy, cap. 29 & Glossa, 2. da. Ibidem*.

5. That tho there may be due from the same person *subordinate* alligances, which tho they are not without an exception of the fidelity due to the superior prince, yet are in their kind *sacramenta ligea fidelitatis*, or subordinate alligances, yet there cannot, or at least should not be two or more co-ordinate absolute ligeances by one person to several independent or absolute princes; for that lawful prince, that hath the prior obligation of alligance from his subject, cannot lose that interest without his own consent by his subject's resigning himself to the subjection of another; and hence it is, that the natural-born subject of one prince cannot by swearing alligance to another prince put off or discharge him from that natural alligance; for this natural alligance was intrinsic and primitive, and antecedent to the other, and cannot be divested without the concurrent act of that prince to whom it was first due: [8] indeed, the subject of

(s) p. 65, a. b.

[8] In his lectures on the *Laws and Constitution of England*, p. 94, Mr. Anstey thus speaks: "Upon no better foundation than the speculation of a Publicist, it has been assumed, that the rights of the subject are so thoroughly reciprocal, that, where the one ceases or is suspended, the other ceases and is suspended too: and that the one cannot be lessened and impaired, without the other being weakened in proportion. Such positions are unknown to the laws of *England*. It is not from compact or reciprocity but from

a prince, to whom he owes alligeance, may entangle himself by his absolute subjecting himself to another prince, which may bring him into great straits; but he cannot by such a subjection divest the right of subjection and alligeance, that he first owed to his lawful prince.(t) [9]

It appears by *Bracton, Lib. V. cap. 24, (u)* that there were very many, that had been anciently *ad Fidem regis Anglæ & Franciæ*, especially before the loss of *Normandy*; such were the *comes marescallus* that usually lived in *England*, and *M. de Feynes manens in Franciâ*, who were *ad fidem utriusque regis*, but they ever ordered their homages and fealties so, that they swore or professed ligeance or lige homage only to one; and the homage they performed to the other, was not purely *lige homage*, but rather *feudal*, as shall be shewn more hereafter: and therefore when war happened between the two crowns, *remaneat personaliter quilibet eorum, cum eo, cui fecerat ligeantiam, & faciat servitium debitum ei; [69] cum quo non steterat in personâ*, namely, the service due from the feud or fee he holds: but this did not always satisfy the prince, *cum quo non steterat in personâ*, but their possessions were

(t) The case here put by our author is evidently meant of a private subject's swearing alligeance to a foreign prince, and has no relation to a national withdrawing alligeance from a prince, who has abdicated the throne.

(u) *Tractat 5. De Exceptionibus.*

birth, that the Queen's claim to subjection and her subject's claim to liberties arise. Both claims spring together and from the same source. The subject's life is the natural term of both. Yet it is always possible that one of them may be determined incidentally and before its time. The subject may forfeit his liberties, or the Queen may by her own act, withdraw him from her subjection. In the first case, the Queen is not deprived of her subject, notwithstanding his forfeiture of right. In the second case, albeit, no longer *de facto* true and lawful, he still retains the rights which were vested in him by his birth. There is, indeed, a close connexion between this fallacy and the proposition of *American* jurists—false as we have seen it to be—that it is in the power of the citizen to renounce his alligeance, and without the consent of his sovereign, to take upon himself, in all respects, the character and rights of a citizen of a foreign state. To this pretension it is once for all to be replied, that the character of a *British* subject—once vested by birth—cannot be extinguished or suspended by the mere adoption of any foreign allegiance. The party may withdraw himself from the local obedience and protection of his sovereign, and yet not cease to be within her actual obedience and protection. (*Calvin's Case, 7 Rep. 8. a.*) He may place himself beyond the jurisdiction of the public justice of his country, and thus forego its benefits; but he cannot place himself beyond the jurisdiction of the executive power. The Queen's remedial writs cannot by any means extend into his foreign domicile; but those that are mandatory and not remedial, do reach him even there. They are not tied to any place, but do follow subjection and ligeance in what country or nation soever the subject is. (*7 Rep. 20. a.*) *Amittit regnum sed non Regem. Amittit patriam, sed non patrem patriæ.*" (*7 Id. 2. b.*) See 2 *Kent's Com.* 43. 49.

[9] The doctrine of perpetual allegiance is not applied by the *British* courts to the *American ante nati*. Their doctrine is, that the *American ante nati*, by remaining in *America* after the peace, lost their character of *British* subjects; and our rule is, that by withdrawing from this country and adhering to the *British* government, they lost, or rather never acquired the character of *American* citizens. The right of election in all revolutions like that of *America* is well established. *Inglis v. The Sailor's Snug Harbour, 3 Peters, 99.* The Revolution severed the ties of allegiance; and made the inhabitants of each country aliens to the other. 3 *Story on Cons.* 571.

usually seized, and rarely or not without difficulty restored without a capitulation to that purpose between the two crowns. *Vide Clause. 15 H. 3. m. 21. pro Henrico de la Vagor, Claus. 20 H. 3. m. 1. pro Simone Montford and Placita Parl. 18 E. 1.*(x) the petition of the earl of *Ewe* in *France* for the castles of *Hasting* and *Tikehull* is answered, "Quandocunque placuerit domino regi *Franciæ* terras & tenementa hominibus istius regni restituere, quæ sua fuerunt, in potestate ipsius domini regio, quod ipse dominus rex *Angliæ* de castris & terris prædictis prædicto comiti reddendis faciet, quod de consilio suo viderit esse faciendum."

But sometimes it fell out, that the inconsiderateness of persons carried them upon presumptions of some advantages to make alligance to both princes; and then the successes of either side rendered them within the penalty of the breach of alligance to the adverse party.

Peter Brian had the earldom of *Richmond* here in *England*, and held it of the crown of *England*, and the duchy of *Britany* in *France*, which was held of the crown of *France*, (though *Brompton* tells us, that by an agreement between *Richard I.* and the king of *France* sub anno 1191.(y) the seigniory thereof was bestowed upon the king of *England*) he was an homager of the crown of *France*, and upon some agreement between him and the king of *England* touching a war with *France*, he came into *England*, and, as it seems, swore fealty to the crown of *England*; but afterwards he fell in again with the king of *France*, and betrayed the army of the king of *England*, and per internuncios reddidit Anglæ regi homagium; but he lost himself with both crowns: the king of *France* disposed of the duchy of *Britany* to his son, and the king of *England* gave the earldom of *Richmond* to *Peter de Sabaudia*; tho upon an exchange he afterwards took it back, and restored it to a [70] son of the former earl. *M. Paris sub anno 1234. p. 406.* and *Claus. 19 H. 3 m. 17. dors.* where in a letter by the king to the pope the whole story is related.

After this, *John de Breme* otherwise *Montford* descended from the above-mentioned *Peter*, falling in with king *Edward III.* after his assumption of the title of *France*, was restored to the duchy of *Britany* and earldom of *Richmond*; and *Claus. 19 E. III. p. 1. m. 14. dors.* did his lige homage to king *Edward III.* as king of *France* in these words: "Monseigneur, jeo vous reconnoisse droiturell roy de *France*, et a vous, come à mon seignior liege et droiturell roy de *France*, face mon homage pur le dit duchy de *Bretagne*, quel jeo claime tener de vous, mon seignior, et deveigne vostre home lige de vie, et de membre, et de terrene honor, a vivre et morir coudre tous gents." His son *John de Montford* falling back to the king of *France* lost the earldom of *Richmond* by judgment in parliament, 7 R. 2. but entered de recordo. *Rot. Parl. 14 R. 2. n. 14.*

These difficulties befel those, that were *ad fidem utriusque regis*;

(x) *Ryley's, Plac. Parl. p. 20.*

(y) *Vide Brompton, p. 1196.*

they were sure to be losers on one side, and sometimes on both sides.

And thus far touching the oath of alligance or fealty.[10.]

II. The second express obligation of the subject to his prince is that of homage.

This, though it be no oath, but a very solemn profession of duty, yet it hath always fealty performed with it, and after it; for homage draws with it fealty, which in case of simple homage done to a subject is with the same exceptions as the homage is; but in case of *homagium ligeum* it hath attending upon the performance thereof *fidelitas ligea*, or alligance.

The kinds of homage are three: 1. *Simple*, as that which is performed to a mere subject by virtue of his tenure. 2. *Homagium ligeum*. 3. *Homagium mixtum*.

1. The simple homage, which is performed barely by reason of tenure, is that which *Littleton* describes both in the words and ceremonies, *Lib. II. cap. 1.(x)* wherein always there is an exception of the faith due to the king.

2. *Homagium ligeum*, which is thus: "Jeo deveigne vostre home de ceo jour en avant de vy et membre, et de [71] terrene honor, et a vous serra foyal et loyal, et foy a vous portera contre tous gents, qe viure point, ou morier;" this is the form, that *Fleta* gives *Lib. III. ca. 16.(a)*

The ceremony is the same, when done to the king, as when it is performed to a mesne lord, only *Rot. Parl. 18 H. 6. n. 58.* the cere-

(x) *Sect. 85.*

(a) *Sect. 21.*

[10] It has been a question, says Chancellor *Kent*, frequently and gravely argued, both by theoretical writers, and in forensic discussions, whether the *English* doctrine of perpetual allegiance applies in its full extent to this country. The writers on public law have spoken loosely, but generally in favour of the right of a subject to emigrate, and abandon his native country, unless there be some positive restraint by law, or he is at the time in the possession of a public trust, or unless his country be in distress, or in war, and stands in need of his assistance. *Cicero* regarded it as one of the firmest foundations of *Roman* liberty, that the *Roman* citizen had the privilege to stay or renounce his residence in the state, at pleasure, (*Orat. pro Balbo, ch. 13.*) The principle which has been declared in some of our state constitutions, that the citizens have a natural and inherent right to emigrate, goes far towards a renunciation of the doctrine of the *English* Common Law, as being repugnant to the natural liberty of mankind, provided we are to consider emigration and expatriation, as words intended in these cases, to be of synonymous import. But the allegiance of our citizens is due, not only to the local government under which they reside, but primarily to the government of the *United States*; and the doctrine of final and absolute expatriation requires to be defined with precision, and to be subjected to certain established limitations, before it can be admitted into our jurisprudence, as a safe and practicable principle, or laid down broadly as a wise and salutary rule of national policy. The question has been frequently discussed in the courts of the *United States*, but it remains to be definitively settled by judicial decision." 2 *Com.* 43. He then enters into an analysis of the *American* cases on the subject, and concludes thus: "From this historical review of the principal discussions in the Federal Courts on this interesting subject in *American* jurisprudence, the better opinion would seem to be, that a citizen cannot renounce his allegiance to the *United States* without the permission of government to be declared by law; and that as there is no existing legislative regulation on the case, the rule of the *English* Common Law remains unaltered." p. 49. See *Serg. on Const.* 304. *Rawle on Const.* 96.

mony of kissing the king was dispensed with by reason of the danger of contagion in time of plague.

And touching this homage these things are observable :

1. It differs from the oath of alligeance, in that this is only by a profession ; but alligeance is by an oath, though the oath of alligeance also accompany it.

2. It differs in this, that, whereas all men above the age of twelve years are to take the oath of alligeance, whether they hold land, or not ; yet lige homage is not to be performed but by three sorts of persons: 1. Such as hold of the king by homage, which though it be performed in respect of tenure, yet it is *homagium ligeum*, because performed to the sovereign, and without any exception of the homage due to inferior lords. 2. Such as are dukes, earls, or viscounts, or barons, though they hold nothing of the king, yet at the coronation they perform a lige homage; the tenor whereof runs thus: "I become your liege man of life and limb, and of earthly worship, and faith and truth I shall bear unto you to live and die against all manner of folk: *so God me help!*" and then he toucheth the crown, and then toucheth the ground ; *nota*, it refers not to any lands. 3. By prelates or bishops ; and this is not only at the coronation of the king, but after their election, and before the restitution of their temporalities. *Vide Statute 25 H. 8 cap. 20.*

Anciently the clergyman quarrelled at the performance of homage to the prince ; but by the constitutions of *Clarendon* set down by *Matthew Paris*, p. 101. they were bound to perform it, and it hath been hitherto practiced ; only to gratify them in something antiently it was indulged in this manner, viz: "Faciet electus homagium &

[72] fidelitatem regi, sicut ligeo domino suo, de vita, & membris, & de honore terreno, salvo ordine suo, priusquam consecratur;" and though I do not find this *salvo ordine* inserted in after-times, yet there hath been a temperament added to that homage performed by clergymen, which it seems satisfied their scruple, their homage running thus: "I do you homage and faith, and truth bear unto you, our sovereign lord, and to your heirs kings of *England*, and I shall do, and truly acknowledge the service of the lands, which I claim to hold of you in the right of the church, as God me help."

And this is fealty, as well as homage, for it is accompanied with an oath, though it hath the solemnity of genuflexion, and kissing the king's cheek.

3. The agreements and differences between that homage, that is simply feudal, or by reason of tenure only, and this homage, that is *homagium ligeum*, are these: 1. Because though homage is not to be done by any, but those that hold by that service, or by the nobility, or clergy, as before: yet when done to the king, it becomes *homagium ligeum* in respect of the person to whom it is performed. 2. If it be homage done to the king, it is *homagium ligeum*, and hath no exception of homage due to others. 3. But principally the difference is in the effect of it, which is excellently described by

Terrien in his Comment upon the *Customs of Normandy*, Lib. III. cap. 1. Feudal homage, that is simply such, binds only *ratione feodi*; therefore if the homager alien, or deliver to his lord his fief, or fee, he is discharged of the obligation; but lige homage, tho' it may be performed by reason of the fee in its kind or species, yet it principally binds the person; and though the fief itself be aliened, or transferred to another, yet the obligation of lige homage continues.

3. There are certain homages, that are mixt, and partly lige, and partly not; and they are of two kinds: 1. When the homage is performed to a prince, that is sovereign in relation to his subjects, yet owes a subjection to some other prince; this was the case of the prince of *Wales*, and the king of *Scots* before mentioned, the homage, that they performed to the king of *England*, was simply lige homage, as we may read before, and particularly in *Walsingham's Ypodigma Newstriæ sub anno 1291*, (b) where the tenor of the homage of *John de Baliol* king of *Scots* is entered in hæc verba: "Domine *Eduarde* rex *Angliæ*, superior domine regni *Scotiæ*, ego *Johannes Baliol* rex *Scotiæ* recognosco me hominem vestrum ligeum de toto regno *Scotiæ*, & omnibus pertinentiis, & hiis, quæ ad hoc spectant; quod regnum meum teneo & de jure debeo & clamito tenere hæreditarie, de vobis & hæredibus vestris regibus *Angliæ*, de vita & de membris, & de terreno honore contra omnes homines, qui possunt vivere & mori."

I mention this homage of the king of *Scots* not to revive the ancient controversy touching the subordination of that kingdom to this, for that difference hath been long settled and at peace; but only to apply my instances of the various sorts of homages performed by sovereign princes.

But the homage, that was performed by their subjects to them, was partly lige homage, and partly not; it was lige homage as to between the king of *Scots* and them, and as to all persons in the world, except the king of *England*; for the king of *Scots* and prince of *Wales* had the rights of sovereignty *jura imperii* as in relation to their subjects and all others, but the king of *England*.

But in relation to the king of *England*, the homage performed to the prince of *Wales* or king of *Scots* was not lige homage; for there was an exception either expressed or implied at least *salvâ fide domini regis Angliæ*, as appears plainly above.

2. Another instance of a mixt homage is, when a sovereign prince hath a vassalage, or possession in another absolute prince's dominion; this was the case of the king of *England*, in relation to the lordships and seignory he had in *France*, as *Aquitaine*, *Anjou*, and *Picardy*, &c. which were all held of the crown of *France*; these descended to king *Edward III.* the king of *France* required lige homage from the king of *England* for these territories; the king of *England*, as king of *England*, had no dependence on *France*, and therefore for the more caution performed to the king of *France* for

the dutchy of *Aquitaine* and other his possessions in *France* a general homage by these words, "Nous entromys in l'hom-
 [74] age de roy de *France* per ainsi, come nous et nous predecessors ducs de *Guyen* estoient jades enterent en l'homage des royes de *France* pur temps esteant;" and although afterwards a settled form of homage was prescribed in this case,^(c) yet most evident it is, that it was not *homagium ligeum*, but only a *feudal homage* relative to those territories of the crown of *France*, but not at all with any relation to the person or crown of the king of *England*.

For the king of *England* had a double capacity, one as an absolute prince, that owed no subjection to the crown of *France*; nor to any other king, or state in the world; in this capacity he neither did nor could do homage to the king of *France*; he had another capacity, as duke of *Aquitaine*, and in that capacity he owed a *feudal*, but not *personal* subjection to the crown of *France*; and in this latter capacity only, and as a different person from himself, as king of *England*, he did the homage, which was in truth no *lige homage*, but a bare *feudal homage*, which I rather mention to rectify the mistakes of those that call it a *lige homage*.

But by the way I must observe, this feudal homage, as duke of *Aquitaine*, lasted not long; for in 14 *E.* 3 the king of *England* assumed the title of king of *France* together with the arms of *France* by hereditary descent, which style his successors have ever since used.

And indeed the name of *lige homage* from him that was king of *England*, to the king of *France*, though purely in the capacity of duke of *Aquitaine*, sounded so ill, that when a peace was in treaty between the king of *France* and *Richard II.* viz. *rot. parl.* 17 *R.* 2 *n.* 16. the entry is made, "Fait a remember qe le roy, seigneurs, chivalers, et justices assenterent en cest parlement a la pees, purensi qe nostre dit seigneur le roy ne face homage lige, et sauant tous dits le liberty de la person nostre seigneur le roy, et de son royaume de Angleterre et de ses liges du dit royaume," and with power to resort to the title of the crown of *France*, in case of breach of league by the king of *France*; this is farther amplified by the speech made openly by the speaker of the house of commons. *Ibid.* *n.*

[75] 17. The homage here meant was with relation to the duchy of *Aquitaine*, which upon this treaty was to be delivered to the king of *England*.

And thus much touching these two securities of the subject's allegiance to the king of *England*, wherein I have seen the larger, because many things occur in this business, that give some light to antiquity, and do not so commonly occur, and because the great brand of high treason is, that it is a violation or breach of that sacred bond from the subject to his king commonly called allegiance, for the security whereof this oath of allegiance and *lige homage* were

(c) *Vide Pat.* 5 *E.* 3. *part* 1. *m.* 17.

instituted, and effectually expounds the obligation, and duty of that alligiance, that is due from the subject to the king.

I shall now only mention those two eminent oaths of supremacy, and obedience, though there were besides them other temporary oaths relating to the crown, as that of 25 *H. 8. cap. 22.* 26 *H. 8. cap. 2.* 28 *H. 8. cap. 7.* 35 *H. 8. cap. 1.*

The supremacy of the crown of *England* in matters ecclesiastical is a most unquestionable right of the crown of *England*, as might be shewn by records of unquestionable truth and authority, but this is not the business of this place; yet nevertheless the pope made great usurpations and encroachments upon the right of the crown herein.

King *Henry VIII.* in the twenty-fifth year of his reign having pared off those incroachments in a good measure by the statute of 25 *H. 8. capp. 19, 20, 21.* in the twenty-sixth year of his reign the supremacy in matters ecclesiastical is rejoined and restored to the crown by the statute of 26 *H. 8. cap. 1.*

The papal encroachments upon the king's sovereignty in causes and over persons ecclesiastical, yea even in matters civil under that loose pretense of *in ordine ad spiritualia*, had obtained a great strength, and long continuance, notwithstanding the security the crown had by the oaths of fealty and alligiance; so that there was a necessity to unrivet those usurpations by substituting by authority of parliament a recognition by oath of the king's supremacy as well in causes ecclesiastical as civil.

And therefore after those revolutions, that happened in the life, and on the death of *Henry VIII. Edward VI.* and [76] queen *Mary*, queen *Elizabeth* coming to the crown, the oath of supremacy was enacted by the statute of 1 *Eliz. cap. 1.* for the better securing of the supreme authority of the crown of *England* as well in matters ecclesiastical as temporal; which I shall not here repeat, but reserve the same, and what is proper to be said touching it, to a particular chapter hereafter. (d)

Afterwards the dangerous practices of popish recusants gave the occasions of enacting of the oath of obedience by the statute of 3 *Jac. cap. 4.* which I shall likewise refer to its proper place.

And thus far touching alligiance, and the securities of the same by the oath of alligiance, and the profession of lige homage. [11]

(d) *Vide postea cap. 25.*

[11] The Acts of Congress relating to naturalization are, An Act to establish an uniform rule of naturalization, 26 *March*, 1790. An Act to establish an uniform rule of naturalization and to repeal the acts heretofore passed on that subject, *January* 29, 1795. An Act to establish an uniform rule, &c., and to repeal, &c., *April* 14, 1802. *Ch. 28.* An Act in addition to an Act entitled, "An Act to establish, &c., and to repeal," &c., *March* 26, 1804. *Ch. 47.* An Act relating to evidence in cases of naturalization, *March* 22, 1816. *Ch. 32.* An Act in further addition to an "Act to establish, &c., and to repeal," &c., *May* 26, 1824. *Ch. 186.* An Act to amend the Acts concerning naturalization, *May*, 24, 1828. *Ch. 116.*

CHAPTER XI.

CONCERNING TREASONS AT THE COMMON LAW, AND THEIR UNCERTAINTY.

HAVING shewn in the former chapter the kinds and bonds of fidelity and alligeance from the subject to the king, I come to consider of those crimes, that in a special manner and signally violate that alligeance, namely high treason.

At Common law the crime of high treason had some kinds of limits and bounds to it.

In the time of *Henry II. Glanvil*, who then wrote *Lib. [77] IV. cap. 1 & 7*, tells us of four kinds of *crimina læsæ majestatis*, viz. *de morte regis*, *de seditione regni*, *de seditione exercitus regis*, and the counterfeiting of the great seal; for as to the counterfeiting of money, that came under the title of *Crimen falsi*, and the punishment thereof antiently was various; but of that particular hereafter.

Bracton, that wrote in the time of *Henry III. Lib. III. cap. 3*. "Siquis ausu temerario machinatus sit in mortem domini regis; vel aliquid egerit; vel agi procuraverit ad seditionem(a) domini regis, vel exercitus sui; vel procurantibus auxilium & consilium præbuerit, vel consensum, licet id, quod in voluntate habuerit, non perduxerit ad effectum;" to which he adds counterfeiting of the seal and money; which, though they come under *crimen falsi*, yet are reckoned by him among the *crimina læsæ majestatis*; tho in these old authors treason is sometimes expressed by the name of *sedition*, yet that word is too general and comprehensive of other offenses not capital, as well as of treason; and therefore a charge of sedition against the king, or of exciting sedition, or of speaking, writing, or doing any thing *seditionously*, doth not amount to a charge of treason; and therefore it was, that in the case of *Selden* and others, *Trin. 5 Car. B. R. (b)* when upon an *habeas corpus* the parties were returned *committed*

(a) In the case of *Mr. Selden* this is supposed to be the true reading, but in most of the MSS. of *Bracton* the word in this place is *seductionem*, altho in other places of the same chapter the word *seditio* is used: *Fleta* makes frequent use of the word *Seductio*, *Lib. I. cap. 20. § 1 cap. 21. § § 1, 2, 3.* (the last of which places seems to be a direct transcript from *Bracton*) though the word *seditio* is once used by him *dicto capite, § 8.* and *Bracton* afterwards in this same chapter styles a traitor *seductor*.

Hengham, cap. 2. and *Glanvil, Lib. I. cap. 2.* both of them place *seditionem* in the rank of treasons, and so it was esteemed by the Civil law. *Dig. Lib. XLVIII. tit. 4. ad leg. Jul. Majestatis, l. 1. tit. 19. De pœnis, l. 38. § 2.* *Seditio* continued to be the technical word in legal proceedings (as will appear from several records hereafter quoted) until the terms *proditio* & *proditorie* prevailed in its room, which last word must now be necessarily used in every indictment of treason. *3 Co. Inst. 4. 12, 15.*

(b) *Mich. 5. Car. I. Vide Rushworth's Historical Collections, Vol. I. p. 679. Appendix, p. 18, &c. Seldeni Opera, Vol. VI. p. 1938.* The court was content, that they should be bailed, but said, that they ought to find sureties also for their good behaviour: they had their sureties ready for the bail, but they were remanded to the Tower, because they would not find sureties for the good behaviour. *Selden* was not bailed till May 1631, and not discharged from his bail till January 1634. *Vindiciæ Maris Clausi. Seldeni Opera, Vol. IV. p. 1427, &c.*

by the privy council by the king's command for stirring up sedition against the king; the prisoners were bailed in the king's court, because it amounted not to a charge of treason, for sedition in a true legal signification doth not import treason.[1]

Fleta, who wrote in the time of *Edward I.* agrees almost *verbatim* with *Bracton*, viz. *Lib. I. cap. 20, 21.(c)*

Britton, who made his book in the time also of king *Edward I.* reckons up treasons much in the same manner, yet makes some additions, *cap. 8. de treson*; "Grand treson est a compasser nostre mort, ou disheriter nous de nostre royaume, ou de fauser nostre seal, ou de countrefaire nostre monoye, ou de la retoundre."

And *cap. 22. de appeles*: "Sont ascunes felonies, que touchent nostre suyt, et poient estre suys pur nous, sicome de vers nos mortels enemies, de nostre seal, de nostre corone, et de nostre monoye fause."

Again; "En primes, c'est a dire, de appels de felonies, que poient estre faitz par nous, et nemye pour nous, sicome de treson, et de compassement purveu vers nostre persone pour nous mettre a mort, ou nostre compayne, ou nostre pere, ou nostre mere, ou nous enfauntz, ou nous disheriter de nostre royaume, ou de trahir nostre hoste, tout ne soit tiel compassement mys en effect."

And in the latter end of the same chapter, "Et de fausyn de nostre seal, & de nostre monoye, purra. lenseur appels pour nous en mesme la manere, et ausi del purgiser de nostre compayne, ou de nous filles, ou des norices de nos enfauntz:(d) En queux cases soit le jugement, de estre treyne, et pendu, &c." By these various expressions of *Britton*, it appears that the crime of high treason [79] was very uncertain; sometimes styled under the name of felony, sometimes had the punishment of petit treason applied to the crime of high treason, and some crimes mentioned, as treasons, which were not so taken by *Bracton*, or *Fleta*; and indeed in the farther pursuit of this argument we shall find, that at common law there was a great latitude used in raising of offences into the crime

(c) He does not rank the counterfeiting of the seal or of the coin among the *crimina lese majestatis* (as *Bracton* does,) but among the *crimina falsi*, *Lib. I. cap. 22.*

(d) According to the *Mirror of Justice*, p. 21, 22. high treason is committed, 1. Per ceux, que occident le roy, ou compassent de faire. 2. Per ceux, que luy disheritent del royaume, per [ceux que] trahissent un host, ou compassent de le faire. 3. Per ceux avowterors que spargissent le fomme le roy, le file le roy eignesse legitime, avant ceo que elle soit mary, en la garde le roy, ou la nurice le ant. le heire le roy. These are the only offenses, which that treatise calls *Crimes de Majesty*. Counterfeiting of the king's seal or money is ranked under *Fausonnery*, p. 29. And every species of petit treason is styled *Treason*, p. 30. as it is also by *Britton*, *cap. 8.*

It is one of the articles against *Roger Mortimer*, *Rot. Parl. 4 E. 3 n. 1. 28. E. 3 n. 8.* that he compassed to destroy *les nurriz le roy*. If a private lord was injured in this manner, it was antiently petit treason: "Traditores autem, qui dominum dominamve interfecerint, vel qui cum uxoribus dominorum suorum, vel filiabus, vel nutricibus dominorum concubuerint," &c. *Fleta Lib. I. cap. 37. § 4.* "Ou disparage ma file, en ma chambre, ou ma femme, ou la norrice, de mon heire, ou le aunt, &c." *Miroir de Justice*, p. 31. *Vide Britton, cap. 22. (70)*

[1] For the distinction between sedition and high treason, see 1 *East*, P. C. 48. *Archb. C. P.* 493.

and punishment of treason, by way of interpretation and arbitrary construction, which brought in great inconvenience and uncertainty.[2]

In the parliament of 33 *E. 1.* now printed, (e) which is likewise entered *P. 33 E. 1. Rot. 22 North't. coram rege*: Nicholas de Segrave was impeached (f) de eo, quod cum dominus rex nunc in ultimâ guerrâ suâ *Scotiæ* inter hostes & inimicos suos extitisset, & idem *Nicholaus de Segrave* homo ligeus tenens de ipso domino rege per homagium & fidelitatem in eadem guerrâ in exercitu & auxilio ipsius commorans esset; idem *Nicholaus de Segrave* motu proprio, malitiosè, & absque causâ contentionem & discordiam versus *Johannem de Crumbwell* in eodem exercitu similiter in auxilium regis existentem movebat," laying great iniquities to his charge; that *Crumbwell* offered to defend himself against these imputations, as the king's court should award: Et ad hoc fidem suam ei dedit; et post ejusdem fidei dationem prædictus *Nicholaus* elongando se & suos, & extra-hendo prædictum *Johannem* & suos ab exercitu & auxilio ipsius domini regis, quantum in ipso *Nicholao* fuit, eundem dominum regem inter inimicos suos periculo hostium suorum relinquendo sprexit, & prædictum *Johannem* ad se defendendum in curia regis *Franciæ* adjornavit, & certum diem ei dedit; et sic, quantum in eo fuit, submittens & subjiciens dominium regis & regni *Angliæ* subjectioni domini regis *Franciæ*; and that in pursuance thereof con-

[80] trary to the king's prohibition he took his journey towards *France*; and that he did this "nequiter & malitiosè in personæ domini regis periculum, curiæ suæ contemptum, coronæ & dignitatis suæ regiæ læsionem & exhæredationem manifestam, & contra ligeantiam, homagium, jurementum, & fidelitatem, quibus ipse domino regi tenebatur." *Segrave* confessed the offence. The lords in parliament are charged by the king upon their alligeance to give advice, what punishment was to be inflicted: "Qui omnes habito super hoc diligenti tractatu & advisamento, consideratis & intellectis omnibus in dicto facto contentis & per prædictum *Nicholaum* plene & expressè cognitis, dicunt, quod crimen hujusmodi meretur pœnam amissionis vitæ, &c." but he was after pardoned.

Which judgment seems to import no less, than the crime of high treason, though the whole judgment be not declared at large but with an &c.

Accroaching of royal power was a usual charge of high treason antiently, though a very uncertain charge, that no man could well tell what it was, nor what defence to make to it.[3]

The great charge against the *Spencers* about the 1 *E. 2.* was, that they did accroach royal power, whereof several instances are given.(g)

(e) In *Ryley's Placita Parliamentaria*, p. 266.

(f) Per *Nicholaum de Warewick*, qui sequitur pro domino rege.

(g) Vide *Knighton*, p. 2545, 2547. Edit. *Twysden*.

[2] See *Hallam's Constitutional History of England*, vol. 3. p. 203.

[3] *Luders' Tract on Constructive Treason*, 57 et seq.

The great charge against *Roger Mortimer* in the parliament of 4 *E. 3.* next to that of the procurement of king *Edward II.*'s death, was accroaching of royal power, whereof several instances are given; but he had judgment by the lords in parliament to be drawn and hanged, upon that article only, that concerned the death of king *Edward II.* *Vide infra cap. 14.*

Trin. 21 E. 3. Rot. 23. rex corum rege. John Gerberge, Knt. indicted "Quod ipse simul cum aliis in campo villæ de *Royston* in altâ regiâ stratâ," rode armed with his sword drawn in his hand, *modo guerrino*, and assaulted and took *William de Botelisford*, and detained him till he paid 90*l* &c. and took away his horse, "usurpando sibi infra regnum regis regiam potestatem ipso domino rege in partibus exteris existente, contra sui ligeantiam, & regis & coronæ suæ præjudicium & seditionem manifestam:" he prayed his clergy, but was ousted of it, Quia privilegium clericale in hujusmodi [81] casu seditionis secundum legem & consuetudinem regni hactenus obtentas & usitatas non est allocandum: (h) but yet he refusing to plead was not convicted, as in case of treason, but was put to penance, *ad pœnitentiam suam*; two of his companions being convicted by verdict, had judgment, *quod distrahantur & suspendantur.*

This judgment it seems troubled the commons in parliament, who thought that the accroaching of royal power was somewhat too general a charge of treason before the ordinary courts of justice, though it had been used in charges of treason in parliament; and therefore in the parliament following held *Crastino Hilarii 21 E. 3. n. 15*] there is a petition in parliament in these words: Item prie le comen, qe come ascuns des justices en place devant eux ore de novel ont adjudges pur treason accrochment de royal poer, pry le dit comen, que le point soit desclare en ceo parlement, en quele case ils accrochent royal poer, per quei les seigneurs perdent lour profit de le forfeiture de lour tenents, et les arreynes beneficie de seint esglise.

Ro'. En les case, ou tiel judgments sont rendus, sont les points des tieux treasons et accrochments declares per mesmes les judgments.

In 22 *Ass. 49.*, (i) it appears that *John at Hill* was indicted, and attaint of high treason for the death of *Adam de Walton nuntii domini regis missi in mandatum ejus exequendum.*

And in the year before, viz. 21 *E. 3. 23.* it seems admitted, that an appeal of treason lies for the killing one of malice prepeñse, that was sent in aid of the king in his wars with certain men of arms.

King *Edward II.* being deposed, and committed prisoner to *Barclay* castle under the custody of *John Matravers* and *Thomas Gurney*, was there by the procurement of *Roger Mortimer* barbar-

(h) For the same reason clergy was refused in *Thorpe's* case, T. 21 *E. 3. Rot. 23. Rex. de quo vide postea.*

(i) B. Treason 14.

ously murdered; for which *Mortimer* and *Gurney* were attainted of treason by judgment of the lords in parliament. 4 *E. 3. n. 1, 5.*(*k*)

[82] *Matravers* was suspected to be guilty, but yet he played another game, for though he knew of the death of *Edward II.* yet he informed *Edmund* earl of *Kent*, half brother to *Edward II.* that he was living; the earl therefore with many others raised a force for his deliverance, but prevailed not, but was for that fact attainted of treason, *anno 3 E. 3.* which attainder was afterwards in the parliament 28 *E. 3.* reversed, and the grandchild of the earl of *Kent* restored: (*l*) *John Matravers*, who it seems had animated the insurrection of the earl of *Kent*, though he fled into *Germany*, yet by judgment of the lords in parliament 4 *E. 3. n. 3.* was attainted of treason for the death of the earl of *Kent*: the words of the record are, “Tres-touts les peres, counts, et barons assemblez a cest parlement a *Westminster* si ont examine estraitment, et sur ce sont assentus et accordes, qe *John Matravers* si est culpable de la mort *Esmon* count de *Kent* le uncle nostre seigneur le roy qe ore est, come celui qe principalement, trayterousment et fausment la mort le dit counte compassa issint, qe la ou le dit *John* savoit la mort le roy *Edward*; ne per quant le dit *John* par enginous manner et par ses fausses et mauveyse subtilties fist le dit counte intendre la vye le roy, le quel fausse compassement fust cause de la mort le dit counte et de tout le mal qe s’ ensuist, par quor les sus-dits peres de la tre et jugges du parlement ajuggent et agardent, que le dit *John* soit treine, pendus, et decolle, come treitre, queu part, qil soit estre troue.”

Upon this judgment *Matravers* brought a petition of reversal. *Rot. Parl. 21 E. 3. n. 65. dors.* but nothing was done upon it; but *Rot. Parl. 25 E. 3. p. 2. n. 54, 55.* he was restored by act of parliament.

By these and the like instances, that might be given, it appears, how uncertain and arbitrary the crime of treason was before the statute of 25 *E. 3.* whereby it came to pass, that almost every offense, that was, or seemed to be a breach of the faith and alligance due to the king, was by construction and consequence and interpretation raised into the offense of high treason.

[83] And we need no greater instance of this multiplication of constructive treasons, than the troublesome reign of king *Richard II.* which, though it were after the limitation of treasons by the statute of 25 *E. 3.* yet things were so carried by factions and parties in this king’s reign, that this statute was little observed; but as this, or the other party prevailed, so the crimes of high treason were in a manner arbitrarily imposed and adjudged to the disadvantage of that party, that was intended to be suppressed; so that *de facto* that king’s reign gives us as various instances of these arbitrary determinations of treasons, and the great inconve-

(*k*) Vide *Rot. Parl. 28 E. 3. n. 8.* when the judgment against *Mortimer* was reversed.

(*l*) That attainder was reversed long before, viz. 4. *E. 3.* Vide *Rot. Parl. 4 E. 3. n. 11, 12.* upon the petition of *Edmund* his eldest son, and *Margaret* countess dowager of *Kent*; and *Edmund* the son was restored.

niences that arose thereby, as if indeed the statute of 25 *E. 3.* had not been made or in force. And though most of those judgments and declarations were made in parliament;(*) sometimes by the king, lords, and commons; sometimes by the lords, and afterwards affirmed and enacted, as laws; sometimes by plenipotentiary power committed by acts of parliament to particular lords and others, yet the inconvenience, that grew thereby, and the great uncertainty, that happened from the same, was exceedingly pernicious to the king and his kingdom.

I shall give but some instances. *Rot. Parl. 3. R. 2. n. 18.* *John Imperial*, a public minister, came into the kingdom by the safe-conduct of the king, and he was here murdered;(m) and an indictment taken by the coroner upon the view of his body, “*Quel case examine et dispute entre les seigneurs et commons, et puis monstre au roy en plein parlement, estoit illoques devant nostre dit seigneur le roy, declare, determine, et assensus, qe tiel fait et coupe est treason, et crime de royal majesty blemmy, en quel case y ne doet allouer a nullr de enjoyer privilege de clergy.*”(n)

This declaration, it is true, was made and grafted upon the clause in the latter end of the statute of 25 *E. 3.* touching declaring of treasons by parliament.

In the parliament of 10 *R. 2.* there was a large commission (o) granted by the king upon the importunity of certain great lords, and of the commons in parliament, to the archbishop [84] of *Canterbury* and others for the reformation of many things supposed to be amiss in the government; which commission was thought to be prejudicial to the king's prerogative. *Vide Rot. Parl. 10 R. 2. n. 34. Rot. Parl. 21 R. 2. n. 11.*

After this, *viz. 25 Aug. 11 R. 2.* the king called together the two chief justices, and divers others of the judges, and propounded divers questions touching the proceeding in that parliament, and the obtaining of that commission; and they gave many liberal answers, and among the rest, “*Qualem pœnam merentur, qui compulerunt sive arctârunt regem ad consentiendum confectioni dictorum statuti, ordinationis, & commissionis? Ad quam quæstionem unanimiter responderunt, quod sunt, ut proditores, merito puniendi: Item qualiter sunt illi puniendi, qui impediverunt regem, quo minus poterat exercere, quæ ad regalia & prærogativam suam pertinuerunt? Unanimiter etiam responderunt, quod sunt ut proditores, etiam puniendi,*” with divers other questions, and answers to the like purpose.(p)

This extravagant, as well as extrajudicial declaration of treason by these judges, gave presently an universal offence to the kingdom; for presently it bred a great insecurity to all persons, and the next parliament *crastino purificationis 11 R. 2.* there were divers appeals

(*) This was the reason why the statute of 25 *E. 3.* was not followed, because that statute was not thought to limit declarations in parliament.

(m) *Holin. Chron. p. 422. 60. b.*

(n) See 3 *Co. Instit. 8.*

(o) See this commission 10 *R. 2. cap. 1.* and *State Trials, Vol. 1. p. 3.*

(p) See the questions and answers, *State Trials, Vol. 1. p. 8.*

of treason by certain lords appellors, wherein many were convict of high treason under general words of *accroaching royal power, subverting the realm, &c.* and among the rest those very judges, that had thus liberally and arbitrarily expounded treason in answer to the king's questions, were for that very cause adjudged guilty of high treason, and had judgment to be hanged, drawn, and quartered, though the execution was spared; (q) and they having led the way by an arbitrary construction of treason not within the statute, they fell under the same fate by the like arbitrary construction of the crime of treason.

Neither did it rest here, for the tide turned, and in *Rot. [85] Parl. 21 R. 2. n. 12, 13.* the commission before-mentioned, and the whole parliament of 11 *R. 2.* is repealed, and a new appeal of treason against the duke of *Gloucester*, earl of *Arundel*, and the commissioners in the former commission, and the procurers thereof under that common style of *accroaching royal power*, whereupon divers of them were condemned as traitors: and *n. 18.* there were four points of treason farther declared, *viz.* "Chescun-que compasse, et purpose la morte le roy, ou de lui deposer, ou de susrendre son homage liege, ou celui, que levy le people, et chivache encounter le roy a faire guerre deins son realme, et de ceo soit dument atteint, et adjugge en parlement, soit adjuggez come traytor de haut treason encounter la corone, et forfait de lui, et de ses heyres, quecunques tous ses terres, tenements, et possessions, et libertys, et tous autres inheritements, queux il ad, ou ascun autre a son oeps, ou avoit le joir de treason perpetres, si bien en fee tayl, come de fee simple, au roy."

These four points of treason seem to be included within the statute of 25 *E. 3.* as to the matter of them, as shall be hereafter shewed; but with these differences, *viz.* 1. The forfeiture is extended farther than it was formerly, namely to the forfeiture of estates-tail and uses. 2. Whereas the ancient way of proceeding against commoners was by indictment, and trial thereupon by the country, the trial and judgment is here appointed to be in parliament. [4] 3. But that, wherein the principal inconvenience of this act lay, was this, that whereas the statute of 25 *E. 3.* required an overt-act to be laid in the indictment, and proved in evidence, this act hath no such provision, which left a great latitude, and uncertainty in point of treason, and without any open evidence, that could fall under human cognizance, subjected men to the great punishment of treason for their very thoughts,

(q) They were all banished to *Ireland* except *Tresilian*, who was executed according to the judgment. See *State Trials*, Vol. I. p. 13, 14.

[4] In 1681, the House of Commons passed a resolution to impeach one *Fitzharris* of high treason, at the bar of the House of Peers. The Lords refused to entertain the cause; and voted that he should be proceeded against by indictment in the lower courts. It seems to be the better opinion, that the House of Lords have no jurisdiction in such a case. 4 *Bl. Com.* 259, though Mr. *Hallam* thinks differently. 2 vol. *Cons. His.*, p. 603.

which without an overt-act to manifest them are not triable but by God alone.

These were the unhappy effects of the breaking of this great boundary of treason, and letting in of constructive treasons, which by various vicissitudes and revolutions mischieved all parties first or last, and left a great unquietness, and unsettledness [86] in the minds of people, and was one of the occasions of the unhappiness of that king.

Henry IV. usurping the crown, and the people being sufficiently sensible of the great mischiefs they were brought in by these constructive treasons, and the great insecurity thereby, *Rot. Parl.* 1 *H.* 4. n. 70. the parliament of 21 *R.* 2. is entirely repealed, that of 11 *R.* 2. entirely revived; and it was enacted, *(r)* that a parliamentary authority be not for the future lodged in a committee of particular persons, as it was done 21 *R.* 2. “*Et auxint mesme nostre seigneur le roy de son propre motif reherceant, qe come in le dit parlement tenuz l’an 21. y fueront ordeynes per estatute pluseurs pains de treason, si qe y ne avoit ascun home, qe sauoit, come il se deust savoir, de faire, parler, ou dire pur doubt des tielx paines, dist, qe sa volunte est tout outrement, qe en nul temps avener ascun trayson soit adjudges autrement qil ne feust ordeignez par statute en temps de son noble aiel le roy E. le 3. qe dieu assoyl; dont les dits seigneurs et comens fuerent tres grandment rejoyces, et mult humblement ent remercierent nostre dit seigneur le roy.*” *(s)*

Now although the crime of high treason is the greatest crime against faith, duty, and human society, and brings with it the greatest and most fatal dangers to the government, peace, and happiness of a kingdom, or state, and therefore is deservedly branded with the highest ignominy, and subjected to the greatest penalties, that the law can inflict; yet by these instances, and more of this kind, that might be given, it appears, 1. How necessary it was, that there should be some fixed and settled boundary for this great crime of treason, and of what great importance the statute of 25 *E.* 3. was, in order to that end. 2. How dangerous it is to depart from the letter of that statute, and to multiply and enhance crimes into treason by ambiguous and general words, as *usurpation of royal power, subverting of fundamental laws*, and the like; and 3. How dangerous it is by construction and analogy to make treasons, where the letter of the law has not done it: for such a method [87] admits of no limits or bounds, but runs as far as the wit and invention of accusers, and the odiousness and detestation of persons accused will carry men. *(t)*

(r) See 1 *H.* 4. cap. 3, 4, & 5.

(s) See 1 *H.* 4. cap. 10.

(t) This reasoning of our author is equally strong against constructive interpretations of *compassing the death of the king*.

CHAPTER XII.

TOUCHING THE STATUTE OF 25 E. III. AND THE HIGH TREASONS
THEREIN DECLARED.

A Parliament was held on *Wednesday* on the feast of St. *Hill*. 25 E. 3. at which parliament the statute declaring the points of treason was made. The petition of the commons, upon which it was made, is *Rot. Parl.* 25 E. 3. p. 2. n. 17. in these words: "Item come les justices nostre seigneur le roy assignes en diverses countees ajuggent les gents, qe sont empesches devant eux, come treitours par divers causes disconus a la comen estre treison, qe plesse a nostre seigneur le roy par son counsel, & par les graunts & sages de la terre declarer les points de treson en cest present parlement.

"*Ro'*. Quant a la petition touchant treison nostre seigneur le roy ad fait declarer les articles de ycele en manner qe ensuit: cest assavoir, en case quant home face compaser ou ymaginer la mort nostre seigneur le roy, ou madame sa compaignie, ou de lour fitz primer & heir; ou si home violast la compaignie le roi, & la eisne fille le roy niente marié, & la compaignie a leisne fitz & heire du roi; & si home leve de guerre contre nostre seigneur le roy en son royaume; ou soit adhereant as enemies nostre seigneur le roy en le royaume, donant a eux aide, & confort en son royaume ou par aillours, & de ceo probablement soit atteint de overt fait par gents de lour condition: Et si home contreface le grant seale le roy, ou sa monoie, & si home apporte fausse monoie en cest royaume contrefait a la monoie dengleterre, si come la monoie appelle *Lussemburgh*, ou autre semblable a la dite monoie dengleterre, sachant la monoie estre fausse, pur marchander ou paiement faire, en deceit nostre seigneur le roy & de son people: Et si home tuast chancellor, treasurer, ou justice nostre seigneur le roi del un baunk, ou del autre, justice en eir, des assisez & de touz auters justices assignez a oyer & terminer, esteantz en lour places enfesant lour office. Et fait a entendre qe en les cases susnomees doit estre ajuggee treisonce, qe estent a nostre seigneur le roi & a sa royale majeste, & de tiels maneres de treison la forfeiture des escheets appertient a nostre seigneur le roy, sibien des terres, & tenementz tenuz des auters, come de lui mesme: ouesque ceo il y ad autre manere de treison, cest assavoir, quant un servant tue son mestre, une feme, qu tue son baron, quant home secular ou de religion tue son prelate, a qi il doit foi & obedience, & tiel manere de treison doun forfeiture des escheets a chescun seigneur de son fee propre; & pur ceo qe plusours autres cas de semblable treison purront eschaier en temps avenir, queux home ne purra penser ne declarer en present, assentu est qe qui autre cas suppose treison, qe nest especifiétz peramont, aviegne de novel devant ascuns justices, demoerge la justice sanz aler a jugement de treison, tantque per devant nostre seigneur le roy & son parlement soit le case monstre, &

declare, le quel ceo doit estre ajugge treson, ou aut' felonie; & si par cas ascun home de cest royalme chivache armee descoverte, ou secretment ad gentz armez contre ascun autre pur lui tuer ou desrobber, ou pur lui prendre & retenir tanque il face fyn ou raunceon pur sa deliverance avoir, nest pas lentent du roy & du son conseil, qe en tiel cas soit ajugge treison, einz soit ajugee felonie, ou trespass solonc la ley de la terre auncienement usee, & solonc ceo que le cas demand: Et si en tiel cas, ou autre semblable devant ces heures ascun justice eit ajugge treison, & par ycelle cause les terres & tene- [89.] mentz devenuz en la maine nostre seigneur le roi come forfaitz eient les cheifes seignours de fee lour escheets des tenementz de eux tenuz, le quel qe les tenementz soient en la maine le roi ou en main dauters par doun, ou en autre manere: savant toutes foits a nostre seigneur le roi lan, & le wast, & auters forfeitures des chatelx, qe a lui attient en les cas susnomez, & qe briefs de *scire facias* vers les terre-tenants soient grantez en tiel cas sanz autre original & sanz alouer la protection nostre seigneur le roi en la dite suyte; & de les terres, qe sont in la maine le roi, soient grantez briefs as viscontz des countees la, ou les terres serront, de ouster la maine sanz autre delaie."

The statute itself is drawn up upon this petition and answer, and differs nothing in substance from the answer to the petition upon the parliament-roll: the statute itself runs in these words: "*Item*, whereas divers opinions have been before this time in what case treason shall be said, and in what not, the king at the request of the lords and of the commons hath made a declaration in the manner, as hereafter followeth: that is to say, when a man doth compass or imagine[1] the death of our lord the king, or our lady his queen, or of their eldest son and heir; or if a man do violate the king's companion, or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir; or if a man do levy war against our lord the king in his realm, or be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm or elsewhere, and thereof be provably(a) attainted of open deed by the people of their condition; and if a man counterfeit the king's great or privy seal, or his money; and if a man bring false money into this realm counterfeit to the money of *England*, as the money called *Lushburgh*, or other like to the said money of *England*, knowing the money to be false, to merchandize or make payment in deceit of our lord the king and of his people: and if a man slay the chancellor, treasurer, or the king's justices of the one bench or the other, justices in eyre, or justices of assize, and all other justices assigned to hear and determine, being in their places doing their offices. And it [90] is to be understood, that in the cases above rehearsed that ought to be judged treason, which extends to our lord the king and his royal majesty, and of such treason the forfeiture of the escheats pertaineth to our lord the king, as well of the lands and tenements

(a) See 3 Co. Inst. p. 12.

[1] See *Luders' Tracts*, 137.

holden of others, as of himself: and moreover there is another manner of treason, that is to say, when a servant slayeth his master, or a wife her husband, or when a man secular, or religious, slayeth his prelate, to whom he oweth faith and obedience; and of such treason the escheats ought to pertain to every lord of his own fee: and because that many other like cases of treason may happen in time to come, which a man cannot think nor declare at this present time, it is accorded, that if any other case supposed treason, which is not above specified, doth happen before any justices, the justices shall tarry without any going to judgment of the treason, till the cause be shewed and declared before the king and his parliament, whether it ought to be judged treason, or other(b) felony: and if *par case* any man of this realm ride armed[2] covertly, or secretly with men of arms against any other to slay him, or rob him, or take him, or retain him, till he hath made fine or ransom for to have his deliverance, it is not the mind of the king, nor his council, that in such case it shall be judged treason, but shall be judged felony, or trespass according to the laws of the land of old time used, and according as the case requireth. And if in such case, or other like, before this time any justices have judged treason, and for this cause the lands and tenements have come into the king's hands as forfeit, the chief lords of the fee shall have the escheats of the tenements holden of them, whether that the same tenements be in the king's hands, or in others by gift, or in other manner; saving always to our lord the king the year and the wast, and the forfeitures of chattels,

[91] which pertain to him in the cases above-named; and that writs of *scire facias* be granted in such case against the land-tenants without other original, and without allowing any protection in the said suit; and that of the lands, which be in the king's hands, writs be granted to the sheriffs of the counties, where the lands be, to deliver them out of the king's hands without delay." [3]

The several high treasons hereby declared are these:

1. The compassing of the death of the king, queen, or prince, and declaring the same by an overt-act.
2. The violation or carnal knowledge of the king's consort, the king's eldest daughter unmarried, or the prince's wife.
3. The levying of war against the king.
4. The adhering to the king's enemies within the land or without, and declaring the same by some overt-act.
5. The counterfeiting of the great seal or privy seal.
6. The counterfeiting of the king's coin, or bringing counterfeit coin into this realm.

(b) The old translation seems here to be preferable, *viz. else*; for *aut*' being abbreviated may be either *autre* or *autrement*.

[2] *Luders*, 141.

[3] Mr. *Luders*' translation of this statute is somewhat different from the one here given. *Tract* 1. p. 4.

7. The killing of the chancellor, treasurer, justices of the one bench or the other, justices in eyre, justices of assise, justices of *oyer* and *terminer* in their places doing their offices.[4]

[4] By Art. 3. Sect. 3. of the Constitution of the *United States*, treason against the *United States* shall consist only in levying war against them; or adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witness to the same overt act, or confession in open court.

Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

In furtherance of this constitutional provision, an *Act of Congress* was passed April 30th, 1790, for the punishment of certain crimes against the *United States*, by which it is enacted, "That if any person or persons, owing allegiance to the *United States of America* shall levy war against them, or shall adhere to their enemies, giving them aid and comfort within the *United States*, or elsewhere, and shall be thereof convicted, on confession in open Court, or on the testimony of two witnesses to the same overt act of the treason whereof he or they shall stand indicted, such person or persons shall be adjudged guilty of treason against the *United States*, and shall suffer death."

The other parts of the Act of Congress with the decisions of the federal Courts, declaring what acts amount to the two species of treason defined by the Constitution and laws of the *United States*, and the cases that have come within the cognizance of the courts of the different States, will be given in their proper places. It may, however, be here observed, that under the old confederation there was no judicial power organized or clothed with authority for the trial and punishment of treason against the *United States*. It became necessary therefore to provide for it under the judicial powers of the several States. But since the framing of the Constitution, the jurisdiction is exclusively in the *United States Courts*, 11 *Johns*. 553. Many of the States have provisions in their Constitutions respecting this crime; thus: "Treason against the State shall consist only in levying war against it; or in adhering to its enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses, or on confession in open court," is to be found in the Constitutions of *Maine, Connecticut, New Jersey, Kentucky, Indiana, Louisiana, Mississippi, Alabama, Missouri, Michigan, and Arkansas*. And most of them have enacted laws, some of which contain treasons unknown to the Constitution of the *United States*.

It has been doubted by several learned gentlemen whether, since the making of the Constitution of the *United States*, treason can in any case be committed against a State. Mr. *Livingston*, in his *System of Penal Laws*, p. 148, says that, "from the nature of the federal union, a levy of war against one member of the Union is a levy of war against the whole; therefore it is concluded that treason against the State, being treason against the *United States*, it is to be punished under their laws and in their courts." See also p. 380. A writer in the *American Law Magazine*, vol. 4, p. 318, argues in the same manner; and Mr. Justice *Story* says, that a State cannot take cognizance, or punish the offence, (treason against the *United States*,) whatever it may do in relation to the offence of treason committed exclusively against itself, if, indeed, any case can, under the Constitution, exist, which is not at the same time treason against the *United States*. *Const.* 3 vol. p. 173; but in his charge to the Grand Jury, (June 15, 1842,) he speaks thus, "Treason may be, and often is, aimed altogether against the sovereignty of a particular State. Thus, for example, if the object of an assembly of persons, met with force to overturn the government or constitution of a State; or to prevent the due exercise of its sovereign powers, or to resist the execution of any one or more of its general laws; but without any intention whatsoever to intermeddle with the relations of that State with the national government, or to displace the national laws or sovereignty therein, every overt act done with force towards the execution of such a treasonable purpose, is treason against the State, and against the State only." 1 *Story's Rep.* 616. That this offence may be committed against a State, seems to be recognized by the second section of article four of the Constitution of the *United States*, which provides that, "a person charged in any State with treason, &c., who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime;" it was assumed in the case of *The People v. Lynch*, 11 *Johns*. 549, where the court said, "that it might be by an open and armed opposition to the laws of the State, or a combination and forcible attempt to

overtura or usurp the government. And, indeed, the State in its political capacity, may, under certain special circumstances pointed out by the Constitution of the *United States*, be engaged in war with a foreign enemy;" and it was directly decided, after argument, in *Dorr's case*. *Pamph. p. 123.* See also 4 *Tucker's Bl. Com. Apdx. 21.* *Serg. on Const. 382.* *Rawle on Const. 305.*

CHAPTER XIII.

TOUCHING HIGH TREASON IN COMPASSING THE DEATH OF THE KING, QUEEN, OR PRINCE.

THE first article of high treason declared by the statute of 25 *E. 3.* is this, and in these words:

"*When a man doth compass or imagine the death of our lord the king, or of our lady the queen, or of their eldest son*
[92] *and heir.*"

Upon this division there will be these considerations.

- I. What shall be said a *man that compasseth.*
- II. What shall be said the *king, queen, or their eldest son.*
- III. What shall be said a *compassing or imagining of any of their deaths.*
- IV. What shall be evidence, or an *overt-act* to prove such imagining.
- V. The form of an indictment of compassing the death of the king, queen, or prince.

I. What shall be said a *man compassing, &c.*

The general learning of this point in relation to natural, accidental, or civil incapacities hath been at large handled in the former chapters; but there is something peculiar to the case of high treason, which is considerable in this division.

If an *alien amy* comes into *England*, and here compass the death of the king, queen, or prince, this is a man compassing within this law; for, tho he be the natural subject of another prince, yet during his residence here he owes a local alligance to the king of *England*, and tho the indictment shall not style him *naturalis subditus*, nor style the king *naturalem dominum*, yet it shall run *proditorie & contra ligeantiæ suæ debitum.* *Co. P. C. p. 5. 7 Rep. Calvin's case. (a) Dyer. 144.*

If an *alien amy* subject of another prince comes into this kingdom and here settles his abode, and afterwards war is proclaimed between the two kings, and yet the alien continues here and takes the benefit of the king's laws and protection, and yet compasses the death of the king, this is a man compassing within this law; for, tho he be the natural subject of another prince, he shall be dealt with as an *English* subject in this case, unless he first openly remove himself from the king's protection by passing to the other prince, or by a pub-

lie renunciation of the king of *England's* protection, which hath some analogy with that, which they call *diffidatio*, or defiance.

And the same law I take to be, if the subject of a foreign prince in war with ours come into *England* and here trade [93] and inhabit either as a merchant, dweller, or sojourner, if such a person compass the death of the king, he may be dealt with as a traitor, because he comes not hither as an enemy, or by way of hostility, but partakes of the king's protection: with this agrees the case of *Stephano Farrara de Gama*, and *Emanuel Lewes Tinoco*, *Portugueze* born, and then subjects to the king of *Spain*, between whom and the queen of *England* there was then open war, who were indicted and attaint of high treason for conspiring with Dr. *Lopez* to poison the queen. (b) 37 *Eliz.* *Calvin's case.* 7 *Co. Rep.* p. 6.

And, though they came hither with the queen's protection, it alters not the case, for every foreigner living publicly and trading here is under the king's protection: and this appears by the statute of *Magna Charta*, cap. 30. "Et si sint de terrâ contra nos guerrinâ, & tales inveniantur in terrâ nostra in principio guerræ, attachientur sine damno corporum suorum vel rerum, donec sciatur a nobis vel a capitali iusticiario nostro, quomodo mercatores terræ nostræ tractentur, qui tunc inveniantur in terrâ illâ contra nos guerriâ; & si nostri salvî sint ibi, alii salvî sint in terrâ nostrâ."

The statute speaks indeed of *mercatores*, but under that name all foreigners living or trading here are comprised.

And therefore in ancient times before the subjects of foreign princes in hostility residing here were dealt with as enemies, a proclamation issued for their avoidance out of the kingdom; and in default of their avoidance within the time limited by such proclamation they lost the benefit of the king's protection.

And after such proclamation, yet upon caution given sometimes by mainprise *de se bene gerendo*, sometimes by oaths of fidelity to the king, they had sometimes special, and oftentimes general protections, notwithstanding such hostility. *Rot. Vascon.* 18 *E.* 2. 21, 24. *Pat.* 14 *H.* 6. part. 2. m. 34, 35.

The statute of the *Staple*, (c) cap. 17. hath made provision for merchants strangers, in case war shall happen between their prince and the king of *England*, viz. that they shall have convenient warning by forty days by proclamation to avoid the realm; [94] and if they cannot do it by that time by reason of some accident, they shall have forty days more, and in the mean time liberty to sell their merchandizes: during these eighty days they have the king's protection, and if they do any treasonable act above-mentioned, they shall be indicted of treason, notwithstanding the hostility between their sovereign and the king of *England*; but it seems, that if he remain here in a way of trade after proclamation so made, and the time of his demurrage allowed by this act, he may be dealt with as an alien enemy; but yet if he after that time continues in his way

(b) *Vide Camdeni Elis. sub anno 1594.*

(c) 27 *E.* 3.

of trade or living as before, and shall then conspire the king's death, &c. the king may deal with him as an alien enemy by the law of nations, or as a traitor by the law of the land; because *de facto* he continues as a subject, and under the benefit *de facto* of the king's protection.

Therefore the general words in *Co. P. C. p. 5.* wherein he supposeth an alien enemy cannot be guilty of treason, but must be dealt with by martial law, are to be taken with that allay, that is given in *Calvin's case, fol. 6. b.* in these words: "But if an alien enemy come to invade this realm, and be taken in war, he cannot be indicted of treason, for the indictment cannot conclude *contra ligeantiae suæ debitum*:" the like may be said of such as are sent over merely as spies by a foreign prince in hostility; but an alien enemy living here in the condition of an inhabitant or trader may be guilty of treason as well as an alien *amy*, for he doth it *praditorie* and treacherously, and against the obligation that lies upon him, as well as any others, to be true to the prince, the benefit of whose laws and protection he holds, so long as he is under the same. [1]

But yet this is observable upon the statute of *Magna Charta, cap. 30.* and what hath been before said, 1. That if an alien enemy comes into *England* after the war begun, and lives here under the king's protection as a subject, yet if he practise treason against the king during such his abode here, he may be indicted of high treason *contra ligeantiae suæ debitum*. 2. Yet such an alien, coming in after the war begun without the king's licence or safe-conduct, cannot

[95] claim the privilege allowed by the statute of *Magna Charta, cap. 30.* to those that were here before the beginning of the war. 2 *Co. Inst. 58.* 3. That by the law of *England* debts and goods found in this realm belonging to alien enemies belong to the king, and may be seized by him. 19 *E. 4. 6.* 7 *E. 4. 13.* and therefore in debt brought by an alien enemy it is a good plea in bar *prima facie*, that the person is an alien born in *G. in partibus transmarinis sub obedientia Phillippi regis Hispaniæ hostis & inimici domini regis*; so that, though to some purposes he is under the king's protection, so as to be guilty of treason, if he conspire against the king's life, yet his goods are not by law privileged from confiscation; and the reason is, because he might secure his goods by purchase of letters patents of denization, and he shall not take away the king's rights by his neglect therein.

But then, what if in truth our merchants have liberty of reclaiming their goods and recovering their debts in the hostile country? May the merchant plaintiff reply with this clause of the statute of *Magna Charta*, that "*Nostri mercatores salvi sunt ibi, &c.*?"

I answer, he cannot, for it is reserved to another kind of trial; for the words are "*donec sciatur a nobis vel a capitali justiciario nostro, quomodo mercatores nostri ibi tractentur.*" The king must be ascertained of the truth of the fact, in whose cognizance it best lies;

[1] See *De la Motte's case, 21 St. Tr. (by Howell), 687.*

and if he be satisfied, that our merchants are permitted to recover their debts in the hostile kingdom without impediment or confiscation; this is to be notified and declared by some proclamation, or instrument under the great seal declaring the fact, and allowing them to prosecute for their debts here; and then, by virtue of this statute or public declaration, the merchant alien plaintiff, may reply with this special matter in maintenance of his action.[2]

Here somewhat may be of use to be said touching treasons by ambassadors of foreign princes, wherein altho sometimes reason of state and the common interest of princes do *de facto* govern in these cases, yet it will not be amiss to consider the opinions and practices of former times in relation to this matter. [96]

First, If an *Englishman* born, though he never took the oath of alligiance, becomes a sworn subject to a foreign prince, and is employed by him into *England* as his minister, agent, or ambassador, and here conspires against the king's life, he shall be indicted and tried for treason, as another subject should be; and the reason is, because no man can shake off his country wherein he was born, nor abjure his native soil or prince at his pleasure. This was the case of Dr. *Story*, who had sworn alligiance to the crown of *Spain*, and was here condemned and executed for treason. *Vide Camden's Eliz. 14. Eliz. p. 168.(d)*[3]

Secondly, But if a foreigner being the agent, minister, or ambassador of a foreign prince either in amity or enmity with the king of *England* come over with or without the king's safe-conduct, and here conspire against the life of the king, or to raise rebellion or war against him, some have been of opinion, that he may be indicted of treason; but by the civilians he cannot, because he came in as a foreign ambassador representing the person of his prince, and therefore is not to be so dealt with in such case, but by the law of nations may be dealt with as an enemy, not as a traitor; and though he have the protection and safe-conduct of the king of *England*, yet it is under a special capacity, and for a special end, namely, as a foreign agent; but if he be criminally proceeded against, it must be as an enemy by the law of war or nations, and not as a traitor; but how far and in what cases he may be dealt with as an enemy, remains to be further considered. *Camden's Eliz. sub anno 1571. p. 164.*

Thirdly, therefore those, that are most strict after the rights and privileges of ambassadors, yet seem to agree, that if he do not only

(d) *English folio.*

[2] See ante, p. 60. in notis.

[3] It has always been the law of *England*, that a natural born subject owes an alligiance to the crown, which is intrinsic and perpetual, and which cannot be divested by any act of his own. *Storke's case, Dyer, 228, b. 1 Bl. Com. 370*; and that no foreign letters of naturalization can in any manner take from him his alligiance, or alter his duty to his lawful sovereign, *Macdonald's case, Fost. 60*. And yet the British parliament not unfrequently passes acts of naturalization, thereby aiding a foreigner to shake off that natural alligiance to his own country, which they deny every other nation the power to do in regard to British subjects.

conspire the death of the king or the raising a rebellion against him, but, actually attempt such an act, as actually or interpretatively is a consummation thereof, though possibly the full effect thereof [97] do not ensue, yet he may be dealt withal as an enemy, and by the law of nations he may be put to death, as if he should stab or poison the prince, and yet doth not kill him, or raise an actual rebellious army, or should levy an actual war against the prince, to whom he was sent, and in that prince's country, as *Fabius(e)* the *Roman* ambassador to the *Gauls*, by challenging and fighting with the champion of the *Gauls*; *Plutarch in vita Numæ*, the prince, to whom he is sent, may, without consulting the prince that sends him, inflict death upon such an ambassador by the law of nations, as an enemy: "Consummata autem sunt, quæ eousque producta sunt, quo produci ab hominibus solent, & quæ delinquendi finem statuere solemus. Vide Albericus Gentilis, *Lib. II. cap. 2. de legationibus*."

Fourthly, But in case of a bare conspiracy against the life of the king, or a conspiracy of a rebellion or change of government, *novarum rerum molimina*, there is great diversity of opinions among learned men, how far the privilege of an ambassador exempts him from penal prosecution as an enemy for such conspiracies or inconsummate attempts, that do not proceed farther than the machination, solicitation, or conspiracy.

Upon an attempt of this nature by the bishop of *Rosse*, agent and ambassador of the queen of *Scots*, 14 *Eliz.* the question was propounded to *Lewes, Dale, Drury, Aubry, and Jones*, doctors of law, viz.

"Whether an ambassador, who stirreth up rebellion against the prince to whom he is sent, should enjoy the privileges of an ambassador, and not be liable to the punishments of an enemy?"

They answered, that such an ambassador hath by the law of nations, and by the civil law of the *Romans*, forfeited all the privileges of an ambassador, and is liable to punishment. See the rest of the resolutions touching this matter *Camden's Eliz. sub anno 1571. p. 164, 165. & ibidem p. 370.*

Hereupon he was committed to the Tower, but yet no criminal process against him as an enemy.[4]

(e) *Fabius Ambustus.*

[4] See *Ward's Hist.* 2 vol. 486; *Somers' Tracts*, 1 vol. 186; 4 *Inst.* 153; *Hawk. c.* 17. s. 5; *Hob.* 271; *Salk.* 630. It was held in *Rex v. Owen*, 1 *Rolle*, 185, that if an ambassador compass the king's death, it is treason in him, although he would not be punished for other treasons. *Mr. Justice Foster* says, that for murder and other offences of great enormity, which are against the light of nature and the fundamental laws of all society, ambassadors are certainly liable to answer in the ordinary course of justice, as other persons offending in the like manner are. For though they may not be thought to owe allegiance to the sovereign, and so incapable of committing high treason, yet they are to be considered as members of society, and consequently bound by that eternal, universal law by which all civil societies are united and kept together. *Disc. l. s. 7.* After stating the above doctrine, *Blackstone* says, "But however these principles might

And *Mendoza*, the *Spanish* ambassador, who here in *England* fostered and encouraged treason, was not dealt [98] with according to the utmost severity, that possibly in such cases might be used, but was only sent away, *sub anno 27 Eliz. Camden's Eliz. p. 298.* The lord *L'Aubespine* also, the *French* ambassador, that conspired the queen's death, was not proceeded against criminally, but only reprov'd by *Burghley*, and advised to be more careful for the future. *Camden's Eliz. sub anno 1587. p. 378, 379.*

And upon these and some antient instances among the *Romans* and *Carthaginians* learned men have been of opinion, that an ambassador is not to be punished as an enemy for traitorous conspiracy against the prince, to whom he is sent, but is only to be remitted to the prince that sent him. *Albericus Gentilis de Legationibus, Lib. II. cap. 18. Grotius de Jure Belli, Lib. II. cap. 18.(f)* who gives these two instances in confirmation thereof.

The truth is, the business of ambassadors is rather managed according to rules of prudence, and mutual concerns and temperaments among princes, where possibly a severe construction of an ambassador's actions, and prosecutions of them by one prince may at another time return to the like disadvantage of his own agents and ambassadors; and therefore they are rather temperaments measured by politic prudence and indulgence, than according to the strict rules of reason and justice; for surely conspiracies of this kind by ambassadors are contrary to the trust of their employments, and may be destructive to the state whereunto they are sent, and according to true measures of justice deserve to be punished, as acts of enmity, hostility, and treachery by private persons.

And altho of all hands it is admitted, that the prince, to whom the ambassador is sent, is the judge of the miscarriage of such foreign ambassador without any application to the master from whom he is sent, and without any actual dedition or giving him up to the judgment of the law; yet they assign this reason of the difference between a bare conspiracy or machination against the prince, and an

(f) in notis ad § 4. n. 5.

formerly obtain, the general practice of this country, as well as of the rest of *Europe*, seems now to pursue the sentiments of the learned *Grotius*, that the security of ambassadors is of more importance than the punishment of a particular crime." 1 *Com.* 254. See *Vattel, B. 4. c. 7. The Schooner Exchange v. McFaddon, 7 Cranch, 138, and 1 Kent's Com. 37. 38,* where the learned author comes to the conclusion that an ambassador cannot, in any case, be made amenable to the civil or criminal jurisdiction of the country to which he is sent. The *Act of Congress* of the 30th April, 1790, declares (sects. 25. & 26.) void any writ or process, whereby the person of any ambassador, or other public minister, their domestic or domestic servants, may be arrested or imprisoned, or his or their goods or chattels may be distrained, seized or attached; and subjects the parties concerned to fine and imprisonment. This *Act* seems to take away all process of execution, civil as well as criminal, against the person or goods. *Serg. on Cons. 90.*

But if a foreign minister commits the first assault he forfeits his immunity, so far as to excuse the defendant for returning it. *U. S. v. Ortega, 11 Wheat. 467.*

actual attempt of treason, whether against his person or [99] government, which hath attained as great a consummation as such ambassador is able to effect, as procuring the wounding of the prince, or an actual attempt to poison him, tho death ensue not, or an actual raising of a rebellious army against him; because in these latter the mischief is consummate, as far as the ambassador could effect it, and so prohibited not only by the civil and municipal laws, but by the laws of nations; but inconsummate machinations, according to their opinions, are raised to the *crimen læsæ majestatis* by civil or municipal laws or constitutions; and they think it too hard, that an ambassador or foreign agent, who doth *sustinere personam principis*, should be obnoxious to a capital punishment for bare machination or conspiracy, which is a secret thing and of great latitude; but this, as I have said, is rather a prudential and politic consideration, and not according to the strict measure of justice.

But now, altho it should be admitted that a foreign ambassador committing a consummate treason is not to be proceeded against as a traitor, but as an enemy; yet if he or his associates commit any other capital offence, as rape, murder, theft, they may be indicted and proceeded against by indictment in an ordinary course of justice, as other aliens committing like offences; for though those indictments run *contra pacem regis*, yet they run not *contra ligeantiae suæ debitum*; and therefore, when in the late troubles the brother and servants of the *Portugal* ambassador committed a murder in the *Exchange*,(g) they were tried and convicted by a special commission of *oyer and terminer* directed to two judges of the common law, some civilians, and some gentlemen, to proceed according to the ordinary course, *secundum legem & consuetudinem regni Angliæ*, whereupon some of them were convict by jury, and had judgment; and, as I remember, some of them were executed.(h) And yet many [100] civilians(i) allow the same privilege to the *comites legati*, as to the ambassador himself.

And the difference between proceeding against an alien (whether ambassador or other) in cases of felony and treason, is well illustrated by the book of 40 *Ass.* 25, where a *Norman* captain of a ship with the help of *English* mariners committed robbery and piracy upon the narrow seas; the *English* pirates were convict and attain of treason,(k) but the *Norman* captain was attain of felony, but not of treason, because it could not be said *contra ligeantiae suæ debitum*.

(g) The *New Exchange* in the Strand.

(h) Don *Pantaleon Sa*, the ambassador's brother, was condemned to die for it: he had like to have prevented his execution by making his escape out of *Newgate*; but he was retaken, and beheaded on *Towerhill*, July 10, 1654, the same day the ambassador signed the peace between *England* and *Portugal*.

(i) *Dig. Lib. XLVIII. tit. 6. ad leg. Jul. de vi publica. l. 7. Grot. de jur. Belli, Lib. II. cap. 18. § 8.*

(k) For before the 25 *E. 3.* piracy was petit treason. *Co. P. C.* 113. and tho' this case be quoted in the 40 *E. 3.* yet it must be intended to have happened before the statute of 25 *Ed. 3.* because piracy, not being enumerated therein among the species of treason, has never been counted treason since that statute. *Co. P. C.* 8.

The queen consort the wife of the king, or the husband of the queen regent, compassing the death of the king her husband or the queen regent his wife, are persons compassing within this act. *Co. P. C. p. 8.*

II. As to the second inquiry, what shall be said *a king, queen, or their eldest son*, within this law.

1. The words *our lord the king, &c.*, extend to his successor, as well as to him.^(l)

1. Because it is a declarative law.

2. Because usually acts of parliament speaking thus generally, and not confining it to the person of that king, when the law passed, *include his successor*; therefore the statute of 8 *H. 6. cap. 11.* 23 *Hen. 8. for Brewers.* 27 *H. 8. cap. 24*; that were limited to continue during the pleasure of our lord the king,^(m) continued after that king's death: *Mich. 38 & 39 Eliz. Cro. Eliz. 513.* Lord *Darcie's* case. The statute of 11 *H. 7. c. 1*, of aiding our lord the king in his wars, extends to the successor.⁽ⁿ⁾ *Hill. 10 Jac. 12 Co. Rep. 109.*

M. 24 Eliz. Moore 176. Coke Litt. 9. b.(o) But the statute [101] of 34 & 35 *H. 8. cap. 26*, giving power to our said lord the king to alter the laws of *Wales*, died with him;^(p) yet *in majorem cautelam* it was specially repealed by the statute of 21 *Jac. cap. 10.*

2. The heir of the king is a king within this act the next moment after the death of his ancestor, and commenceth his reign the same day the ancestor dies; and therefore the compassing his death before coronation, yea before proclamation of him, is a compassing of the king's death, for he is a king presently upon the ancestor's death; and the proclamation or coronation are but honorable ceremonies^(q)

(l) *Vide Co. P. C. p. 6.*

(m) Of these statutes the first only is so limited; but the 23 *H. 8. cap. 4. sect. 5, 14.* and 27 *Hen. 8. cap. 24. sect. 10.* only name the king without the addition of *his heirs and successors.* 10 *H. 7. 7. b.* it is said by *Keble* with relation to 9. *H. 6. cap. 2.* and not denied by the court, that where a statute limits *to continue so long as it shall please our lord the king*, it continues in force, if no proclamation be made to the contrary in the times of that king or of any of his successors.

(n) This statute comes not up to the point, because the words of it are not, *our lord the king*, but *the king and sovereign lord of this land for the time being.* Our author seems to have intended the *Irish* statute of 10 *H. 7.* called *Poyning's* act, upon which act a doubt was conceived, whether it extended to the successors of *H. 7.* for that the act speaks only of the king generally, and not of his successors; the chief justices, chief baron, attorney and solicitor general were of opinion, that the word *king* imported his politic capacity, which never dies; and therefore being spoke indefinitely, extended in law to all his successors, and was so expounded by an *Irish* act in the 3 & 4 *Phil. & Mar. 12. Co. Rep. 109.*

(o) The case in *Moore* relates to statutes *during the pleasure of the king*: the words are, "*Walmesley* moved a question, whether the demise of the king determines a statute limited to continue during the king's pleasure, and the whole court agreed that the demise of the king determines his will."

(p) The words of that statute, § 119. are, "That the king's most royal majesty shall and may, &c. as to his most excellent wisdom and discretion shall be thought convenient; and also to make laws, &c. at his majesty's pleasure." It was resolved by the justices, *Hil. 5 Jac. 12 Co. Rep. 48.* that this was a temporary power, and confined to the person of king *Henry VIII.* *Vide Plowden, 176. b. &c. 458. a.*

(q) The coronation is something more than only an honourable ceremony, for it is a solemn engagement to govern according to law, which was always required by the

for the farther notification thereof: resolved 1 *Jac.* in the case of *Watson and Clerk. Co. P. C. p. 7.*

3. The queen regent, as were queen *Mary* and queen *Elizabeth*, is a king within this act.(r)[5].

4. A king *de facto* but not *de jure*,(s) such as were *H. 4. H. 5.*

ancient constitution of the kingdom. *Brompton* speaking of the coronation of *W. I.* says, the archbishop of *York* performed the office. *Ipsūque Gulielmum regem ad jura ecclesiæ Anglicanæ tuenda & conservanda, populumque suum recte regendum, & leges rectas statuendum sacramento solemniter adstrinxit*; and *Bruct. Lib. III. cap. 9.* says, that the king of *England* *debet in coronatione sua in nomine Jesu Christi præstito sacramento hæc tria promittere populo sibi subdito, &c.* See also 1. *W. & M. cap. 6.*

(r) *Vide Co. P. C. p. 7.* This appears by the declarative law in favour of queen *Mary*, 1 *Mar. cap. 1 sess. 3.*

(s) This distinction, which with respect to the kingly office was never known in our law before the statute of 1. *E. 4.* seems to have been purposely invented to serve the turn of the house of *York*; nor do I find any such distinction ever mentioned or supposed in any of our ancient law-books, save only in *Bagot's* case, 9 *E. 4. 1. b.* cited by our author, p. 61. for the doubt conceived by *Markham*, 4 *E. 4. 43. a.* concerning the authority of coroners chosen in the time of *H. 6.* was not founded (as some have supposed) on *H. 6.* being only king *de facto*, but on another point, viz. whether the demise of the crown did not determine the power of coroners, as it does the commissions of judges and other commissioner; and as to *Bagot's* case, if carefully considered, it will but little serve the purpose of such a distinction, for the principal point in that case was concerning the validity of letters patent of denization granted to *Bagot* by *H. 6.* whether they were void by the act of 1 *E. 4.* set forth in the pleadings; this point was not argued by the judges, but by the serjeants and apprentices, 9 *E. 4. 2. a.* it will therefore be necessary to distinguish the discourse of the counsel from the resolution of the court.

Bagot's counsel asserted, "That all judicial acts relating to royal jurisdiction, which were not in diminution of the crown, though done by an usurper, would nevertheless bind the king *de jure* upon his regress, that *H. 6.* was not merely an usurper, the crown having been entailed on him by parliament, that *Bagot's* denization was an advantage to the prince on the throne, for the more subjects he had, the better it was for him; and they likened it to the case of recoveries suffered in a court-baron, while the disseisor was in possession, which would continue in force notwithstanding the re-entry of the disseisee."

This was all that could be expected for them to say, considering that *E. 4.* was then on the throne, and they were obliged to admit, that grants of the regal revenue made by *H. 6.* were void against *E. 4.* because the act of parliament of *E. 4.* which declared *H. 4. H. 5.* and *H. 6.* usurpers, vested in *E. 4.* all such manors, castles, honours, liberties, franchises, reversions, remainders, &c. and all hereditaments with their appurtenances, whatsoever they were, in *England, Wales, and Ireland, and in Calais, as king Richard II. had on the feast of St. Matthew the twenty-third year of his reign in right of the crown of England and lordship of Ireland*; all mesne grants therefore of such manors, &c. were by this act indisputably defeated.

The counsel on the other side objected, "That the letters patent of denization were void, for that the king ought not to be in a worse condition than a common person; and that if a common person were disseised and re-entered, his re-entry would defeat all mesne acts; and that therefore *E. 4.* being in by descent from king *Richard*, and this act being but an affirmance of the common law, his regress would avoid all acts done by the usurper, for which reason provision was made in that act for grants of wards, licenses of mortmains, charters of pardon, and judicial acts, but no provision was made for grants of denization; that the patent in controversy was to the disadvantage of the king, since it was not reasonable, that such an alien should be made his subject against his will, for by the same reason *H. 6.* might have made twenty thousand *Frenchmen* denizens; that if a league was made between *H. 6.* and another king, it would not bind *E. 4.* and yet such league is intended for the advantage of the realm; that an exemption granted by *H. 6.* from being put upon juries in assises, &c. would now be void."

Here *Billing* the chief justice interposed and said, *I do not agree to this*; he added, "It pertains to every king by reason of his office to do justice and grace, justice in execu-

H. 6. R. 3. H. 7. being in the actual possession of the crown is a king within this act, so that compassing his death is treason within this law; and therefore the 4 *E. 4. 20. a.*, (†) a person [103] that compassed the death of *H. 6.* was attainted for that treason in the time of the rightful king; but had it been an act of hostility in assistance of the rightful heir of the crown, (*) which afterwards obtained, this had not been treason, but *é converso* those that assisted the usurper, though in actual possession of the crown, have suffered as traitors, as appears by the statute of 1 *E. 4.*, (†) and as was done upon the assistants of *H. 6.* after his temporary re-adeption of the crown in 10 *E. 4.* and 49 *H. 6.*

5. A king admitting by act of parliament his son *in consortium imperii*, as was done by *H. 2.* whereby there was *rex pater* and *rex filius*, only the father reserved to himself the lige homage or alligiance of his subjects, yet the son actually administered the kingdom;

ting the laws, &c. and grace in granting pardon to felons, and such legitimation as this is." Yelverton seemed at first to think that the denization was void, not because the regress of *E. 4.* avoided all meane acts done by *H. 6.* but because the act of 1 *E. 4.* resumed all liberties and franchises, and denization being a liberty was therefore resumed.

The cause was adjourned, during which time it was abated by the death of *Swirenden* one of the plaintiffs; a new assise was brought by *Bagot*, and the same matter was pleaded as before; the assise was taken, and the verdict was in favour of *Bagot* 9 *E. 4. 5.* the defendant's counsel moved in arrest of judgment, and *Brian* (who was of counsel against *Bagot*, and not one of the judges) repeated the former objection, that since *E. 4.* was in possession by remitter, as cousin and heir of king *Richard*, the patent of denization by *H. 6.* who was but an usurper and intruder was void, 9 *E. 4. 11.* but the justices said, that they had conferred upon all points of this case with the justices of the common pleas, and they were all of opinion, that those matters were not sufficient to arrest judgment; and accordingly judgment was given for *Bagot* 9 *E. 4. 12. a.* abridged in *Br. Patents* 21. *Denizen* 3. *Chartre de Pardon* 22. *Exemption* 4. *Judgment* 42. *F. Assise* 29. *Denizen* 1.

From this state of the case it appears, that the question was entirely upon the construction of an act of parliament, and not upon any maxims of common law; and tho it was said, that that act was an affirmance of the common law, yet that was only the saying of counsel, and unsupported by any book-case or record: so that the distinction here taken by our author between a *rex de facto* and a *rex de jure* being no way warranted by the constitution or common law of this kingdom, all that is here said by him on that supposition must fall to the ground.

(†) This case is cited before by our author, p. 61. but is somewhat differently related in *Slow's Annals*, p. 418. *Seld. Titles of Honour*, cap. 5. p. 654.

(*) But who shall take upon them to determine who that is? Our author therefore prudently adds, *which afterwards obtained*, for this is the most effectual way of deciding questions of this nature; but then by the same rule, *if he should not obtain*, such act of hostility had been treason, for it cannot be imagined, that any prince in the actual possession of the government will suffer his own title to be disputed, nor indeed is it fitting, that private subjects should set themselves up for judges in such an affair, whose duty it is to pay a legal obedience to the powers that are in fact set over them; *for the powers that be, are ordained of God. Rom. xiii. 1.*

This serves to show how idle the distinction is between a *rex de jure* and a *rex de facto*, which is not only founded on a precarious bottom, but also must in fact prove a distinction without a difference, being equally serviceable to all sides and parties; and thus it was in regard of *H. 6.* and *E. 4.* who were both of them by turns declared by parliament to be rightful kings and usurpers.

(†) This must have been for acts before *E. 4.* first obtained the crown, and therefore was wrong according to our author's own doctrine, because, as he says below, even the rightful heir before he has got possession of the crown is not a king within the statute of 25 *E. 3.*

the father continued a king, and a treason committed against
 [104] him by his son or any of his subjects was treason within this act; and so was the son a king within this act, as in reference to all but the father, a subordinate king, that had the *jura imperii*, as the king of Scots was after his homage done to king Edward I. and therefore compassing his death by any of his subjects had been high treason within this act, if it had been then made; for it is mistaken in lord Coke's *P. C. p. 7.* that *H. 2.* resigned his crown, for he continued still *rex de facto & de jure*, as *Hoveden* tells us. *Vide supra cap. 10.*

Having thus shewn who is a king within this act, we shall the more easily see who is not a king within this act.

1. The right heir of the crown, during such time as the usurper is in plenary possession of it, and no possession thereof in the heir, is not a king within this act; [6] such was the case of the house of *York* during the plenary possession of the crown in *H. 4. H. 5. H. 6.* but if the right heir had once the possession of the crown as king, though an usurper hath gotten the possession thereof, yet the other continues his style, title and claim thereunto, and afterwards re-obtains the full possession thereof, a compassing the death of the rightful heir during that interval, is a compassing of the king's death within this act, for he continued a king still, *quasi* in possession of his kingdom; [7] this was the case of *E. 4.* in that small interval, wherein *H. 6.* re-obtained the crown, and the case of *E. 5.* notwithstanding the usurpation of his uncle *R. 3.*

2. If a king voluntarily resign, as some in other countries have done, and this resignation admitted and ratified in parliament, he is not afterwards a king within this act; (u) but we never had such an example in *England*, for that of *R. 2.* was a constrained act, touching which and the deposition of *E. 2.* I shall not say farther, for they were acts of great violence and oppression.

Only thus much is certain, that although *E. 2.* had a kind
 [105] of pretended deposing, and his son *E. 3.* took upon him the kingly name, and office, yet in the opinion of those times *E. 2.* continued, as to some purposes, his regal character, for in the parliament of 4 *E. 3. Mortimer, Berisford, Guernei*, and others had judgment of high treason given against them for the death of *E. 2.* after his deposition.

Neither was this judgment grounded simply upon that old opinion

(u) The same reason holds in the case of a king, who is deemed by parliament to have abdicated, or by actions subversive of the constitution virtually to have renounced the government; this was the case of king *James II.* who, tho not in words, yet by acts and deeds equally expressive had renounced holding the crown upon the terms of the constitution.

[6] A king may be kept out of the exercise of the kingly office, (as *Charles II.* was for twelve years, by *Cromwell*;) and still be a king, both *de facto* and *de jure*; and all acts done to keep him out are high treason. *Sir Henry Vane's case, Kel. 15. Fost. 402.*

[7] This is denied by *Foster, pp. 188. 398.*

in *Britton*,^(x) that killing of the king's father was treason; for, though in some parts of that record, as in the judgment of the lords against *Mortimer*, the words are, Touchant le mort seigneur *Edward* pere nostre seigneur le roy, qe ore est,—countes, barons, & peres, come jugges de parlement, agarderent & adjudgerent le dit *Roger*, come tretor & enemy de roy & de realme, feust treine & pendu; yet in other parts of that roll of parliament he is styled at the time of his murder *seignior lige*, and sometimes *rex*, as n. 6. The lords make their protestation, that they are not to judge any but their peers; yet they declare that they gave judgment upon some that were not their peers, in respect of the greatness of their crimes; *et ce per encheson de murder de seigneur lige*, &c. and in the arraignment of *Thomas* lord *Berkele* for that offense, the words of the record are, *Qualiter se velit acquietare de morte ipsius domine regis*, who pleaded, *Quod ipse de morte ipsius domini regis in nullo est inde culpabilis*; and the verdict, as it was given in parliament, 4 *E. 3.* n. 16. and the record is, *Quod prædictus Thomas in nullo est culpabilis de morte prædicti domini regis patris domini regis nunc*; so that the record styles him *rex* at the time of his death, and yet every one acquainted with history knows, that his son was declared king, and took upon him the kingly office, and title upon the twenty-fifth, or, according to *Walsingham*, the twentieth of *January*; and *E. 3.* was not murdered till the twenty-first of *September* following.

I have been the longer in this instance, though it were before the making of the statute of 25 *E. 3.* when treason was determined according to the common law, that it may appear, that this judgment was not singly upon this account, that he was [106] father to king *E. 3.* but that notwithstanding the formal deposing of him, and that pretended or extorted resignation of the crown mentioned by the histories of that age, yet they still thought the character *regius* remained upon him, and the murder of him was no less than high treason, namely, the killing of him who was still a king, though deprived of the actual administration of his kingdom.

3. The husband of a queen regent is not a king within this law, for the queen still holds her sovereignty entirely, as if she were sole: *vide* 1 *Mar. cap. 2. sess. 3.* and for the remedy hereof there was a special temporary act made enacting and extending treason as well to the compassing of the death of king *Philip* of *Spain* husband to queen *Mary*, as of the queen, and for the making of other acts against the king, as against the queen, within the compass of high treason, during the continuance of the marriage between them. 1 & 2 *Phil. & Mar. cap. 10.* so that it seems, tho the husband of a queen regent be as near to him, as the wife of a king regnant, the statute of 25 *E. 3.* declaring the compassing of the death of the king's wife to be treason, did not extend to the husband of a queen regent.^(y)

(x) *Brit. cap. 22. Co. P. C. p. 7.*

(y) *Co. P. C. p. 6, 7.*

4. A *prorex*, *viceroy*, *custos regni*, or *justiciarius Angliæ*, which import in substance the same office, *viz.* the king's lieutenant in his absence out of the kingdom, is not a king within this act, (z) though his power be very great, and all commissions, writs and patents pass under his *teste*; and the same law is touching the lord lieutenant or *justitiarius Hiberniæ* or his deputy. *Vide statut. Hiberniæ.*

Rot. Parl. 31 H. 6. n. 38. & 39. Richard duke of *York* by the king's letters patent, and by consent of parliament, was constituted *protector & defensor regni, & ecclesiæ Anglicanæ & consiliarius regis principalis*, till the full age of the prince, or till discharged of that employment by the king in parliament by the consent of the lords spiritual and temporal; though this were a high office, and exceeded much the power of a protector of the king during [107] his minority, such as were the earl of *Pembroke* to *H. 3.* and the duke of *Somerset* to *E. 6.* yet this protector was not a king within this statute.

III. I come to the third division, what shall be said *a compassing or imagining of the death* of the king, queen, or prince.

The words *compass or imagine* are of a great latitude.

1. They refer to the purpose or design of the mind or will, tho the purpose or design take not effect.

2. Compassing or imagining singly of itself is an internal act, and without something to manifest it, could not possibly fall under any judicial cognizance, but of God alone; and therefore this statute requires such an overt-act, as may render the compassing or imagining capable of a trial and sentence by human judicatories.

And yet we find that other laws, as well as ours, make compassing or conspiring the death of the prince to be *crimen læsæ majestatis*, though the effect be not attained.

Ad legem *Juliam* majestatis in Codice (a) in the law of *Honorius* and *Arcadius*, *Quisquis cum militibus, vel privatis, vel barbaris scelestam inierit factionem, vel factionis ipsius suscepit sacramentum vel dederit, de nece etiam virorum illustrium, qui consiliis & consistorio nostro intersunt, senatorum etiam (nam & ipsi pars corporis nostri sunt,) vel cujustibet postremò, qui nobis militat, cogitaverit, (eadem enim severitate voluntatem sceleris, quâ effectum, puniri jura voluerunt) ipse quidem, utpote majestatis reus, gladio feriat, bonis ejus omnibus fisco nostro additis.*

A bare accidental hurt to the king's person, in doing a lawful act, without any design or compassing of bodily harm to the king, seems not a compassing of the king's death within this act.

Walter Tirrel by command of *William Rufus* shot at a deer; the arrow glanced from an oak, and killed the king; *Tirrel* fled, but this being purely accidental, without intention of doing the king any harm, hath been held not to be a compassing of the king's death. *Co. P. C. p. 6. Paris & Hoveden anno ult. Willielmi secundi.*

Calculating of the king's nativity, or thereby or by witchcraft, &c.

(z) *Co. P. C. p. 8.*

(a) *Lib. IX. tit. 8. l. 5. pr.*

seeking to know, and by express words, writing, &c. publishing and declaring how long the king shall live, or who shall succeed him, or advisedly or maliciously to that intent uttering any prophecies, seems not a compassing of the king's death within the statute of 25 *E. 3.*(b) but was made felony during the life of queen *Elizabeth* by 23 *Eliz. cap. 2.* and before that, was only punishable by fine and ransom. *Co. P. C. p. 6.*

Compassing the death of the king is high treason,(c) though it be not effected; but because the compassing is only an act of the mind, and cannot of itself be tried without some overt-act to evidence it, such an overt-act is requisite to make such compassing or imagination high treason.[8] *De quo infra.*

IV. Therefore as to the *overt-act* in case of compassing the death of the king, queen, or prince.

1. Though the words in the statute of 25 *E. 3. and be provably thereof attaint by open deed, &c.* come after the clause of levying of war, yet it refers to all the treasons before-mentioned, *viz.* compassing the death of the king, queen, or prince. *Co. P. C. 6. 12.* and therefore what is said here concerning the compassing of the death of the king is applicable to queen and prince.

And therefore in an indictment of treason for compassing the death of the king, queen, or prince, there ought to be set down both the treason itself, *viz.* Quod preditorie compassavit & imaginatus fuit mortem & destructionem domini regis, & ipsum dominum regem interficere, and also the overt-act, & ad illam nefandam & preditoriam compassationem & propositum perimplend', and then set down the particular overt-act certainly and sufficiently, without which the indictment is not good. *Co. P. C. p. 12.*

2. If men conspire the death of the king and the manner, and thereupon provide weapons, powder, harness, poison, or [109] send letters for the execution thereof, this is an overt-act within this statute. *Co. P. C. p. 12.*

3. Though the conspiracy be not immediately and directly and expressly the death of the king, but the conspiracy is of something that in all probability must induce it, and the overt-act is of such a thing as must induce it; this is an overt act to prove the compassing of the king's death, which will be better explained by the instances themselves, and therefore,

4. If men conspire to imprison the king by force and a strong hand, till he hath yielded to certain demands, and for that purpose gather company or write letters, this is an overt-act to prove the compassing

(b) Even before that statute, *viz. Hil. 18. E. 2. Rpt. 24. rex coram rege*, there was an instance of several persons charged with endeavouring to compass the king's death by necromancy by making his image in wax, &c. yet they were appealed only *de felonio & malificio*, and were all acquitted by the jury.

(c) Inasmuch that where the king is actually murdered, it is the compassing his death which is the treason, and not the killing, which is only an overt-act. *Kel. 8.*

[8] Overt acts must not only show the intentions of the heart; but they are the means made use of to effectuate the purposes of the heart. *Fost. 203.*

of the king's death, for it is in effect to despoil him of his kingly government; and so adjudged by all the judges in the lord *Cobham's* case, 1 *Jac.*(*d*) and in the case of the Earl of *Essex*, 43 *Eliz.*,(*e*) *Co. P. C.* p. 12. But then there must be an overt-act to prove that conspiracy to restrain the king, and then that overt-act to prove such a design is an overt-act to prove the compassing the death of the king.

But then this must be intended of a conspiracy *forcibly* to detain or imprison the king; and therefore, when in the time of *R. 2.* in parliament a commission was somewhat hardly gotten from the king, which seemed to curb his prerogative too much, the answer of the judges to the general question, "*Qualem pœnam merentur illi, qui compulerunt sive arctârunt regem ad consentiendum dict' statut' ordination' & commission'?*" ad quam quæstionem unanimiter responderunt, quod sunt, ut proditores, meritò puniendi, *Rot. Parl.* 11. *R. 2.*"(*f*) was too rash and inconsiderate, and for which the judges themselves were condemned as traitors, as before is shown;(*g*) for *compulerunt* and *arctaverunt* may have a double construction; either it may be intended of an actual force used upon the person of the king, as

[110] by restraint, imprisonment, or injury to his person, to enforce his consent to that commission; and then it had not differed from the execrable treason of the *Spencers*, who declared, that since the king could not be reformed by suit of law, it ought to be done *per asperies*, for which they were banished by two acts of parliament.(*h*) *Vide* 7 *Co. Rep.* fol. 11. in *Calvin's* case. 2. Or it might be intended, not of a personal compulsion upon the king, but by not granting supplies, or great persuasion or importunity, and then it could not be treason; the latter whereof was the only compulsion or arctation, which was used for the obtaining that commission.

And therefore the judges that delivered that opinion, were inexcusable in their decision of treason under such ambiguous and large expressions of *compulerunt* & *arctaverunt*; and tho the parliament of 11 *R. 2.* was repealed by 21 *R. 2.* yet that again was repealed 1 *H. 4. cap. 3.*

5. A conspiring to depose the king, and manifesting the same by some overt-act, is an overt-act to prove the compassing of the death of the king within this act of 25 *E. 3. Vide* 1 *Mar. B. Treason* 24.(*i*) *Co. P. C.* p. 12.

(*d*) *State Trials*, Vol. I. p. 206.

(*e*) *State Trials*, Vol. I. p. 199.

(*f*) *State Trials*, Vol. I. p. 9.

(*g*) *cap.* 11. p. 94.

(*h*) One in the reign of *Edward II.* called *Exilium Hugonis le Spencer*; and the other in anno 1 *Edward III. cap. 1.*

(*i*) *Broke* makes this *quære*: "*Quære vel depriv', car home poet depriver, & uncore intende null morte, & pur cest cause un statute fuit ent fait tempore H. 8. & E. 6. Nota.*" The statutes here referred to are 26 *H. 8. cap. 13* by which it was made high treason "to wish or desire by words or writing, or to imagine, or invent, or attempt to deprive the king, the queen, or their heirs apparent of the dignity, title, or name of their royal estates." And 1 *E. 6. cap. 12.* by which it was made highly penal (for the third offense high treason) "to compass or imagine by open preaching, express words or sayings, to depose or deprive the king, his heirs, or successors, kings of this realm, from his or their royal estate or titles to or of the realm aforesaid."

It is true, that by the statute of 21 *R. 2. Ca. 3.* it was enacted, That every man that compasseth or purposeth the death of the king, or to depose him, or to render up his homage liege, or he that raiseth people, and rideth against the king to make war within his realm, and of that be duly attainted and adjudged in parliament, shall be adjudged as a traitor of high treason against the crown; and this act is particularly repealed by the statute of 1 *H. 4. cap. 10.* as a great snare upon the subject; for it is recited, that by reason thereof no man knew *how he ought to behave himself, to do, speak, or say, for doubt of such pains of treason.*

But the true reason was not in regard of the four points themselves, for many of them were treasons within the [111] statute of 25 *E. 3.* but that wherein the act of 21 *R. 2.* varied from the act of 25 *E. 3.* were these: 1. That the compassing to levy war is made treason by the statute of 21 *R. 2.* whereas the levying of war only was treason by 25 *E. 3.* Again 2dly, Tho compassing the death of the king was treason within the letter of 25 *E. 3.* and compassing to depose him was an evidence or overt-act of a compassing of the king's death within the meaning of the act of 25 *E. 3.* yet both required an overt-act. The statute of 21 *R. 2.* makes the bare purposing, or compassing, treason, without any overt-act; and though it restrains the judgment thereof to the parliament, yet it was too dangerous a law to put men's bare intentions upon the judgment even of parliament under so great a penalty, without some overt-act to evidence it: this was one reason of the repeal of the treasons declared by the statute of 21 *R. 2.* But this was not all, for in that parliament of 21 *R. 2.* the resolutions of the judges to the questions propounded by the king are entered at large, and received an approbation not only by the suffrage of some other judges and serjeants, but by the statute made in the same parliament, as appears at large by the statute of 21 *R. 2. cap. 12.*

And therefore, wholly to remove the prejudice that might come to the king's subjects by those rash and unwarrantable resolutions, the statute of 1 *H. 4. Ca. 10.* was made, reducing treasons to the standard of 25 *E. 3.* and the entire parliament of 21 *R. 2.* also repealed as appears 1 *H. 4. Ca. 3.*

6. Regularly words, unless they are committed to writing, are not an overt-act within this statute. *Co. P. C. p. 14;(k)* and the reason given is, because they are easily subject to be mistaken, or misapplied, or misrepeated, or misunderstood by [112] the hearers.(l.)

(k) *Vide Co. P. C. p. 38, 140.* The passages quoted *S. P. C. 2. b.* from *Bracton* and *Britten*, only describe the form of accusation, but are far from proving that words alone were, in the opinion of those writers, a sufficient evidence of treason; but if they were so at common law, yet it does not follow, that they would be so by the statute of 25 *E. 3.* which expressly requires the proof of an overt-act, and consequently disallows the evidence of bare words, for words and acts are contra-distinguished from each other. See *Co. P. C. 14* in margin. The preamble of 1 *Maria, cap. 1. sess. 1.* makes it matter of complaint, *that many had for words only suffered shameful death.*

(l) This is one but not the only reason, for another reason was, because men in a pas-

And this appears by those several acts of parliament, which were temporary only, or made some words of a high nature to be but felony. *Co. P. C. cap. 4. p. 37.* The statute of 3 *H. 7. cap. 14.* makes conspiring the king's death to be felony; which it would not have done, if the bare conspiring without an overt-act had been treason.

26 *H. 8 cap. 13.* malicious publishing by express writing or words, that the king were an heretic, schismatic, tyrant, infidel, or usurper, enacted to be high treason. (m)

1 *E. 6. cap. 12.* If any person or persons do affirm or set forth by open preaching, express words or sayings, that the king, his heirs or successors, is not or ought not to be supreme head of the church of *England* and *Ireland*; or is not or ought not to be king of *England*, *France*, and *Ireland*; or do compass or imagine by open preaching, express words or sayings to depose or deprive the king, his heirs or successors from his or their royal estate or titles aforesaid, or do openly publish or say by express words or sayings, that any other person or persons, other than the king, his heirs or successors, of right ought to be kings of this realm; every such offender being convicted, for his first offense shall forfeit his goods, and be imprisoned during the king's pleasure; for the second offense shall lose his goods and the profits of his lands during life, and shall suffer imprisonment during life; and the third offense is made high treason.

But if this be done by writing, (n) printing, overt-deed, or act, then every such offense is high treason by the act of 25 *E. 3.*[9]

sion or heat might say many things, which they never designed to do; the law therefore required, that in a case of so nice a nature, where the very intention was so highly penal, the reality of that intention should be made evident by the doing of some act in prosecution thereof.

(m) This same statute makes it high treason to wish or desire by words or writing to deprive the king of his dignity.

(n) This is said by Lord Coke, *P. C. 14.* and in *Sidney's case*, *State Tr. Vol. III. p. 733.* it is said, *scribe est egere; quære tamen*, for if our author argues rightly, that words were not treason by 25 *E. 3.* because there needed new acts to make them so in particular cases afterwards, the same argument holds good with respect to writing, especially if not published; for there were also new acts to make that treason.

[9] Although writings cannot be laid as an overt act, unless published, yet if they tend to prove any overt act laid, they shall be admitted in evidence for that purpose, although never published. *R. v. Lord Preston*, 4 *St. Tr.* 410. 440. *R. v. Laver*, 6 *St. Tr.* 272. *R. v. Watson*, 137. And the papers found in *Sidney's* closet, had they been plainly relative to the other treasonable practices charged in the indictment, might have been read in evidence against him. *Fost.* 198. 4 *Bl. Com.* 80. The papers found in Lord *Preston's* custody, those found where Mr. *Laver* had deposited them, and the intercepted letters of Dr. *Hensley*, were all read in evidence as overt acts of the treasons respectively charged on them; for they were all written in prosecution of certain determinate purposes which were treasonable, and then in contemplation of the offenders; and such papers being found in the custody of the prisoners are admissible in evidence, without any proof of the hand-writing being theirs. *Gragg's Case*, 10 *St. Tr. Appdx.* 77. Dr. *Hensley's Case*, *Burr.* 644. Evidence of the same nature was received in the case of *Horne Tooke* and others, at the *Old Bailey*, in 1794, as also in *Stone's Case*, *Hil.* 36 *Geo.* 3. And not only was evidence received of such papers as were found in their own possession, but also of such as were found in the possession of their accomplices; the connexion between them being first proved. 1 *East, P. C.* 119.

So much of this act, as concerns any thing in derogation of the papal supremacy, is repealed by the statute of 1 & 2 [113] *Ph. & M. cap. 8.* And so much as concerns treason, farther than it stands settled by 25 *E. 3.* is repealed by the statute of 1 *Mar. cap. 1. sess. 1.* But the rest of this act, that concerns only misdemeanors, stands perpetual, as it seems.

By 1 & 2 *P. & M. cap. 9.* Prayers by express words, that God would shorten the queen's days, or take her out of the way, or such like malicious prayer, amounting to the same effect, made treason; but if person penitent upon his arraignment, no judgment to ensue; (o) the like provision is made during the queen's life by 23 *Eliz. cap. 2.*

1 & 2 *P. & M. cap. 10.* Compassing to levy war against the queen, or to depose her or the heirs of her body, and maliciously, advisedly, and directly uttering such compassing by open preaching, express words or sayings; and also affirming by preaching, express words or sayings, maliciously, advisedly and directly, that the queen ought not to be queen of this realm, is punishable by loss of goods and chattels, whole profits of the offender's lands during life, and perpetual imprisonment; and the second offense is made high treason; but if this be done by writing, printing, or overt-act, then it is made high treason.

1 *Eliz. cap. 5.* the same act almost *verbatim* for the safety of queen *Elizabeth* and the heirs of her body.

By 13 *Eliz. cap. 1.* Compassing the death or bodily harm of the queen, or to deprive her of the imperial crown, or to levy war against her; and such compassing, maliciously, expressly or advisedly uttered or declared by printing, writing, cyphering, speech, words or sayings; and also malicious, advised and direct publishing and declaring by express words or sayings, that she ought not to be queen, that she is an heretic, schismatic, tyrant, infidel, or usurper, is made high treason in the principal, procurers and abettors. (p)

14 *Eliz. cap. 1.* Compassing to take, or detain, or burn the queen's castles, and such compassing declared by any [114] express words, speech, act, deed, or writing, is made felony; but the actual taking, or with-holding, or burning them, is made treason.

13 *Car. 2. cap. 1.* Compassing the death of the king or any bodily harm tending to his wounding, imprisonment, or restraint, or to depose him, or to levy war against him, or to stir foreigners with force to invade the kingdom, and such compassing declared by printing, writing, preaching or malicious and advised speaking, is made high treason: publishing or affirming the king to be an heretic or a papist, or that he endeavours to bring in popery; or inciting the people by

(o) This last clause extended to such only, who had been guilty during that session of parliament, for the act had a retrospect to the beginning of the session.

(p) "The indictments and attainders of treason by force of this statute are not more to be followed; because the statute, which made them good, is expired." *Co. P. C. p. 10.* in the margin.

writing, printing, preaching, or other speaking to hatred of his majesty or the government, disables to hold office. (q)

By all which it seems, that regularly, 1. words of themselves cannot make high treason; 2. words of themselves are not a sufficient overt-act within the statute of 25 E. 3. to serve an indictment of compassing the king's death. [10]

And with this agrees that notable case of Mr. *Pyne* in *Croke's* reports, T. 4 Car. (r) the words of which are these: "Upon consideration of the precedents of the statutes of treason it was resolved by the seven judges there named, and so certified to his majesty, that the speaking of the words there mentioned, tho they were as wicked as might be, were not treason; for they resolved, that, unless it were by some particular statute, no words will be treason; for there is no treason at this day, (*viz.* 4 Car. 1.) but by the statute of 25 E. 3. for

imagining the death of the king, &c. and the indictment must [115] be framed upon one of the points in that statute; and the words spoken there can be but evidence to discover the corrupt heart of him that spake them; but of themselves they are not treason, neither can any indictment be framed upon them."

Baker in his *Chronicle*, p. 229, tells us of two very hard judg-

(q) No penalties are to be incurred by this act, unless the prosecution be within six months next after the offense committed. See also the 4 Ann. cap. 8. and 6 Ann. cap. 7. whereby it is made high treason to declare by writing or printing, that the queen is not lawful or rightful queen, or that any other person hath right to the crown otherwise than according to the acts of settlement, or that the kings or queens of this realm by authority of parliament are not able to make laws of sufficient force and validity to bind the descent of the crown: persons who declare the same by preaching or advised speaking incur a *præmunire*; but no prosecution to be for words spoken, unless information be given upon oath before a justice of peace within three days after, and the prosecution be within three months after such information.

(r) *Cro. Car.* 125.

[10] This doctrine is maintained with great ability by Sir *Michael Foster*, see his *C. L.* 202 *et seq.*: *Blackstone*, (4 Com. 80.) says, "But now it seems clearly to be agreed that, by the common law and the statute of *Edw.* 3. words spoken amount only to a high misdemeanour, and no treason. For they may be spoken in heat, without any intention, or be mistaken, perverted, or misremembered by the hearers; their meaning depends always on their connexion with other words and things; they may signify differently even according to the tone of voice, with which they are delivered; and sometimes silence itself is more expressive than any discourse. If the words be set down in writing, it argues more deliberate intention; and it has been held that writing is an overt act of treason; for *scribere est agere*. But even in this case, the bare words are not the treason, but the deliberate act of writing them. And such writing, though unpublished, has in some arbitrary reigns convicted its author of treason." But *Hawkins*, (*ch.* 17. sects. 83 to 89.) reasons differently; amongst other things he observes, that to charge a man with speaking treason, is unquestionably actionable, which could not be, if no words could amount to treason; also, that as, in case of felony, he who by command or persuasion induceth another to commit felony, is an accessory in felony, so he who does the same in treason is a principal traitor, (there being no accessories in treason, but all being principals,) and yet such person doth not act but by words. And in another place (*ch.* 17. s. 45.) "neither does it appear to me that my Lord Chief Justice *Hale* was at all of this opinion; for though in the latter edition of his *Treatise of the Pleas of the Crown*, it is said, that compassing by bare words is not an overt act, &c. yet in the first edition, published in the year 1678, it is twice said, that it hath been adjudged that words are an overt act." See *R. v. Lord George Gordon*, *Dough.* 590. 1 *East*, P. C. 117.

ments of treason given in the time of *E. 4. viz.* that of *Walter Walker*, dwelling at the sign of the *crown* in *Cheapside*, who told his little child if he would be quiet, he would make him heir of the crown: the other of *Thomas Burdett*,^(s) who having a white buck in his park, which in his absence was killed by *E. 4.* hunting there, wished it, horns and all, in his belly that counselled the king to it; whereas in truth none counselled him to it, but he did it of himself: for these words both these were attaind of high treason, and executed: though *Markham chief justice* rather chose to leave his place, than assent to this latter judgment. *Vide* indictment of treason for treasonable words, *P. 3 H. 4. Rot. 4. & 12. Walton's case* and *Seuthe's case*.^(t)

Therefore tho this be regularly true, that words alone make not treason or an overt-act, yet it hath these allays and exceptions.

(1.) That words may expound an overt-act to make good an indictment of treason of compassing the king's death, which overt-act possibly of itself may be indifferent and unapplicable to such an intent; and therefore in the indictment of treason they may be joined with such an overt-act, to make the same applicable and expositive of such a compassing, as may plainly appear by many of the precedents there cited.^(u)

(2) That some words, that are expressly menacing the death or destruction of the king, are a sufficient overt-act to prove that compassing of his death *M. 9 Car. B. R. Crohagan's case* [116] in *Croke*,^(x) who being an *Irish* priest, 7 *Car. 1* at *Lisbon* in *Portugal* used these words, "*I will kill the king (innuendo dominum Carolum regem Angliæ) if I may come unto him,*" and in *Aug. 9. Caroli* he came into *England* for the same purpose.^(y) This was proved upon his trial by two witnesses, and for that his traitorous intent and the imagination of his heart was declared by these words, it was held high treason by the course of the common law, and within the express words of the statute of 25 *E. 3.* and accordingly he was convicted, and had judgment of high treason; yet it is observable, that there was somewhat of an overt-act joined with it, namely, his coming into *England*, whereby it seems to be within the former consideration, namely, tho the coming into *England* was an act indifferent in itself, as to the point of treason;

^(s) See *Rapin's history sub anno 1478.* who mentions it in the same manner; but it appears from the indictment in *Cro. Car. 120.* that he was indicted for calculating the king's and prince's nativity, and declaring that they would not live long; and also for publishing seditious rhymes and ballads, although this was not treason, and was therefore made felony during queen *Elizabeth's* life, by 23 *Eliz. cap. 2. Co. P. C. p. 6.*

^(t) *Louth's* (not *South's*) and *Walton's case* are *Trin. 3 H. 4. coram. rege rot. 4.* and *P. 3 H. 4. coram rege rot. 12.* in *Sperhauck's case*, who was also convicted of treason for scandalous words.

^(u) In *Pyne's case.*

^(x) *Cro. Car. 332.*

^(y) This case does by no means prove, that words alone are a sufficient overt-act, for here were not only threatening words, but also an act done in order to put that threatening in execution; so that, as our author admits, it comes more properly under the former head; the resolution therefore in *Kelyng 13.* that words are an overt-act, which is founded on this case, must fall to the ground.

yet it being laid in the indictment, that he came to that purpose, and that in a great measure expounded to be so by his minatory words, the words coupled with the act of coming over make his coming over to be probably for that purpose, and accordingly applicable to that end.

To say that the king is a bastard, or that he hath no title to the crown, is held high treason. *M. 5 Jac. Yelvert. 197. Blanchflower's case, & ibidem Hill. 8 Jac. Berisford's case.*(z).

P. 13 Jac. B. R.(a) *John Owen* alias *Collins* was indicted [117] of treason, for that he, intending the king's death, *falso & malitiose* spake these words of the king: The king being excommunicate by the pope may be lawfully deposed and killed by any whatsoever, which killing is not murder; and being demanded by *Henry White*, how he durst utter such a bloody and fearful conclusion, *Owen* answered, "The matter is not so heinous, as you suppose, for the king being the less is concluded by the pope being the greater; and it is all one as a malefactor being convicted by a temporal judge is delivered to execution, so the king being convicted by the pope may be lawfully slaughtered by any whatsoever, for this is the execution of the supreme sentence of the pope, as the other is the execution of the law:" to this indictment he pleaded not guilty; and it was ruled to be high treason by *Coke chief justice* and all the Court; and being found guilty he had judgment to be hanged, drawn and quartered.(b) And here it was said by the king's attorney(c) upon the evidence, and not denied by the court, 1. that the statute of 25. *E. 3.* as to compassing the king's death was but an affirmation of the common law. 2. That it is treason by the laws of all nations; and therefore an ambassador for compassing the king's death shall be executed here for treason; but for other treasons shall be remitted into his own country to be tried. 3. That words of this nature spoken *de futuro* have been adjudged high treason presently; and therefore it was there said to be adjudged in the time of *H. 8.* in the case of the duke of *Bucks*, that these words were high treason, *If the king*

(z) This case is likewise reported *Cro. Jac. 275.* and 1 *Buls. 147.* but both the cases quoted here by our author, were actions for scandalous words, and the single point in judgment before the court was, whether the words were actionable, and even as to that *Yelverton* and *Croke* in *Berisford's* case differed from the other judges; so that none of these cases prove, that bare words are an overt-act of treason within 25 *Ed. 3.* indeed where any one not only utters words declaring his own thoughts, but endeavours by promises of reward or other arguments to persuade another to kill the king, or the like, this has been construed an overt-act of treason, because here is something besides the words, here is an attempt to draw another into the design, and is as much an overt-act as an agreement or a consultation how to effect it. *Lord Stafford's case, State Tr. Vol. III. p. 208. Charneck's case, State Tr. Vol. IV. p. 581. 2. Salk. 631.*

(a) 1 *Roll. Rep. 185.*

(b) These words, tho very wicked and of a mischievous tendency, and therefore an high misdemeanor, yet unless accompanied with some circumstances to show that they were made use of in order to persuade somebody to kill the king, cannot according to the resolution in *Pyne's* case amount to an overt-act of high treason, for they are not any act at all, and besides might be said by a bigotted papist, in the height of his ignorant zeal, without intending or imagining the death of the king.

(c) *Bacon.*

should arrest him of high treason, he would stab him; (vide case *de duke Bucks*, 13 H. 8. 11. b. 12. a. where there are other words also;)(d) and in the case of another, *If H. 8. will not take again queen Catherine as his wife, he shall not be king*;(e) and in the case of *Stanley*, Temp. H. 7. *That if Pierce Warbeck [118.] were the son of E. 4. he would take part with him against H. 7.*(f)

And note, that king *James* had been long excommunicated by the pope, and that every *Maunday Thursday* the pope excommunicates all *Calvinists*, &c. and all that have withdrawn their obedience from the pope: *Owen* was executed accordingly. *Vide la(g)* the whole judgment and particulars and consequence thereof.

7. Those words, which being spoken will not make an overt-act to make good an indictment of compassing the king's death; yet, if they are reduced into writing by the delinquent either letters or books, and published,(h) will make an overt-act in the writer to make good such an indictment, if the matters contained in them import such a compassing,(i)[12] *Co. P. C. p. 14.*

Instances of this kind are many in 4 *Cur. Croke*, *ubi supra*: but I shall instance particularly only in *Williams's* case, *P. 17 Jac. B. R.*(k)

(d) There was also somewhat of an overt-act joined with the words; for being told by a monk, that he should be king, and commanded to obtain the good will of the commonalty, he was accused of giving certain robes for that intent: this duke's case was counted hard, and his fate is lamented by the reporter.

(e) This was the case of *Elizabeth Barton*, the holy maid of *Kent*: the words as related by lord *Bacon* in his history of *Henry VII. p. 134.* were these; "That if king *Henry* the eighth did not take *Catharine* his wife again, he should be deprived of his crown, and die the death of a dog." She and her accomplices were attainted of treason by a particular act of parliament, viz. 25. H. 8. cap. 12. upon which lord *Coke* observes, *Co. P. C. 14.* that they could not have been attainted of treason within 25 E. 3.

(f) Lord *Bacon* in his history of *Henry VII. p. 134.* reports, that the criminal words, for which *Stanley* was accused, were these; "That if he was sure, that the young man (*Perkin Warbeck*) were king *Edward's* son, he would never bear arms against him." Upon which the historian makes this observation; "This case seems somewhat an hard case, both in respect of the conditional, and in respect of the other words, &c."—But (says he) "Some writers do put this out of doubt; for they say, that *Stanley* did expressly promise to aid *Perkin*, and sent him some help of treasure." And it appears by the record of *Stanley's* indictment quoted in *Cro. Car. p. 123.* that he was accused not only of words, but of an express agreement and conspiracy to bring in *Peter Warbeck* and make him king. Note, That the lord *Bacon*, whose history is here quoted, is the attorney general mentioned in *Owen's* case.

(g) 1 *Rol. Rep.* 185.

(h) In *Peacham's* case quoted in *Cro. Car.* 125. an unpublished writing was admitted in evidence as an overt-act of treason; the like in the case of *Col. Sidney*; *State Tr. Vol. III. p. 710.* but both those cases were unwarrantable; as to the first it does not appear there was any judgment, for the book says it was against the opinion of many of the judges, and the latter was resolved at a time of day, when the resolution of the judges, in such an affair ought to be but little regarded; that judgment was accordingly reversed by act of parliament, 1 W. & M.[11]

(i) As was *Town's* case, *Kelyng* 22. for report says, that the people were exhorted by that book to put the king to death, *State Tr. Vol. 2. p. 524.*

(k) This case (which seems a very hard one) is reported, 2 *Rol. Rep.* 88. and is quoted, *Cro. Car.* 125.

[11] *Hallam's Const. His.* 1 vol. p. 409. *Fost.* 198.

[12] "But this is indefinitely expressed; and the case of *Williams*, under *James I.* which *Hale* cites in corroboration of this, will hardly be approved by any constitutional lawyer." 3 *Hallam*, 213. note.

Williams wrote a book, intitl'd *Balaam's Ass*, (l) in [119] which there were many things reproachful and dangerous to the king, and among others, *that the king should die anno domini 1621, and that the realm should be destroyed, because it was anti-christian and the abomination of desolation*: this book he inclosed and sealed up in a box and sent it to the king; (m) and for this he was indicted and attainted and executed for high treason, *vide Co. P. C. 14. concerning words*, where it is said thus: "*But if the same be set down in writing by the delinquent himself, this is a sufficient overt-act within this statute.*" And the same law it is, if it be set down in writing by any other by his command or direction.

8. If there be an assembling together to consider how they may kill the king, this assembling is an overt-act to make good an indictment of compassing the king's death. This was *Arden's case*, (n) 26 *Eliz.* and accordingly it was ruled *Decem. 14. Caroli* at *Newgate*, in the case of *Tonge* and other confederates. (o)

By my lord *Coke's* opinion, *Co. P. C. 14.* "A conspiracy to levy war is no treason by the statute of 25 *E. 3.* till war be levied;" and there have been several particular and temporary acts, that make the conspiracy to levy war treason, as well as compassing the king's death. And therefore he saith, "That it hath been resolved, 35 *Eliz.* that conspiracy to levy war against the king shall not be said an overt-act, to serve an indictment for the compassing the king's death, because the clauses concerning compassing of the king's death, and that of levying war, are distinct clauses, and declare distinct treasons; and therefore the latter shall not be an overt-act to serve the former, because this were to confound several classes or *membra dividenda* of high treason." [13]

And yet in the same book, p. 12. the case of the earls of [120] *Essex* and *Southampton*, 43 *Eliz.* are cited, which seem to contradict that opinion; the words are, "That the said earls intended to go to the court where the queen was, and to have taken her into their power, and to have removed divers of her council, and for that end did assemble a multitude of people; this being raised to the end aforesaid was a sufficient overt-act for compassing the death of the queen," which seems to contradict what is elsewhere by him said. (p)

(l) He wrote two books, one called *Balaam's Ass*, and the other *Speculum Regale*.

(m) In this case was first broached that famous doctrine, *scribere est agere*. The court went so far as to declare it to be their opinion, that if this book had been found in his study, it would have been a sufficient evidence of the treason, for which he was indicted; but this case destroys its own authority by going too far, for they agreed it to be a clear point, that bare words might amount to treason; strange contradiction of the statute of 25 *Ed. 3.*

(n) *Anderson, pars. I. p. 104.*

(o) *Kelyng 17. State Tr. Vol. II. p. 474.*

(p) I do not see how this contradicts what is said by lord *Coke*, p. 14. for here was an express design to put the person of the queen under a force; nay it had proceeded farther than a design, for there was a multitude actually assembled for that end. *State Tr. Vol. I. p. 190.*

[13] Lord *Hale* was once himself of this opinion. In his *Summary of the Pleas of the Crown*, p. 13. he says, "Conspiring to levy war no overt-act, unless levied, because it relates to a distinct treason."

And he that shall read the proceeding against the duke of *Norfolk* set forth at large by *Camden Eliz. sub. anno 1572. p. 170. & sequentibus*, will find, that not only the conspiring with a foreign-prince to invade this kingdom, and signifying it to him by letters, is an overt-act to maintain an indictment for compassing the queen's death: but that the duke's purpose to marry the queen of *Scotland*, who had formerly laid claim to the crown of *England*, and signifying it by letters, and all this done without the consent of the queen of *England*, was held an overt-act to depose the queen of *England*, and to compass her death; for if the queen of *Scots* claimed the crown of *England*, he that married her, must be presumed to claim it also in her right, which was not consistent with the safety of the queen of *England*, and her title to the crown; and altho this extending of treason (as to this point of marriage) by illation and consequence was hard; (q) yet the duke was convict and attaint of treason generally upon this indictment, tho there are likewise some other crimes charged in the indictment.

I will therefore set down the resolutions of the judges 1663. touching those that were assembled in *Yorkshire* at *Farley Wood*, (r) divers of whom were after indicted, and attainted of high treason for compassing the death of the king: the resolution was in these words, as I have transcribed it *verbatim* out of a MS. [121] of my lord keeper *Bridgman* then chief justice of the C. B. who was present at the conference, Fuit agree par les justices sur conference touchant ceux, queux assemble eux in *Farley Wood* in *Yorkshire* 1663, que sur indictment pur compassing mort le roy overt fait poet estre layd in consulting a levyer guerre contre lui (que est overt-act de soy mesme) & actual assembling, & levying guerre: Et ou Co. P. C. 14. dit, "Que conspiracy a levyer guerre nest treason, tanque soit levyed, & pur ceo nest overt-act, ou manifest prooffe de compassing mort le roy, car le parols sont, (de ceo) i. e. compassing mort le roy, & ceo soit a confounder le several classes, ou *membra dividentiæ*:" Uncor le ley est contra; & issint fuit resolve per tous les justices & councel de roy in le case des regicides, *Venner, Tonge & Vane*, (s) que sur indictment de compassing de mort le roy, consulting a levyer guerre, ou actual assembling de guerre fueront evidence, & overt faits provant compassing mort le roy; & ceo appeirt in Co. P. C. 14. "Si subject conspire ove forein prince de invader le realm, & prepare pur ceo per overt fait, ceo est sufficient overt-act pur mort le roy: Et *ibidem* p. 12. Le count de *Essex & South*' intended daler al court, & daver prise la reigne en lour power, & remover ascun de councel, & a ceo fine assembled multitude de people; *this being raised for the end aforesaid* fuet sufficient overt-act pur compassing de mort le roy," queux 2 cases sont expresse contrary al primer.

(q) According to lord Coke's understanding of the statute of 25 Ed. 3. it was not only hard but illegal, for by that statute no one ought to be convicted by inferences or illations. Coke, P. C. p. 12.

(r) *Kelyng*, 19.

(s) *Kelyng*, 20, 21.

Fuit auxi agreee, que si un overt-act soit lay en le enditement, & le proof est dun outre overt-act de mesme le kindē, ou species de treason; ceo est assets bone evidence.

I must confess, that I could never assent to this last part of the resolution: tho I know it was so practised in criminal cases in the star-chamber, for I have always thought, 1. That the overt-act is an essential part of the indictment. 2. As it must be laid, so it must be proved; (t) for otherwise, if another act than what is laid should be sufficient, the prisoner would never be provided to make his [122] defense.[14] 3. That more overt-acts than one may be laid in an indictment, and then the proof of any of them so laid, being in law sufficient overt-acts, maintains the indictment. 4. That if any overt-act be sufficiently laid in the indictment, and proved, any other overt-acts may be given in evidence to aggravate the crime and render it more probable.

This resolution, as to the point of compassing the king's death, being the latter and of great weight, and more than twice practised, (u) ought to out-weigh the opinion before cited, and with this agrees the resolution of 13 *Eliz. Dyer* 298. b. in *Dr. Storie's* case, who conspired with a foreign prince to invade this realm; it was adjudged an overt-act to make good an indictment of compassing the queen's death. (x) *Vide Anderson's Reports Placito* 154. which was the case of *Arden and Somerville* and others, who conspired the death of queen *Elizabeth*, resolved by all the justices, that a meeting together of these accomplices to consult touching the manner of effecting it was an overt-act to prove it, as well as *Somerville's* buying of a dagger actually to have executed it. *Anderson's Rep. Pars. I. p. 104.*

And yet this difference seems to me agreeable to law, and reconciles in some measure both resolutions.

(t) *Kelyng* 8. is *contra*, however this point is put out of all doubt by 7 *W. 3. cap. 3.* § 8. whereby it is provided that no evidence shall be given of any overt-act, which is not expressly laid in the indictment.

(u) But yet it does by no means follow from thence, that this resolution is right as to this point any more than as to the other resolved at the same time, which yet our author thinks to be wrong; were it a point of common law the repeated resolutions of the judges is the only way to know what the law is; but where the question arises upon an act of parliament, that is to be the rule for courts of justice to go by, of which they are to judge according to their own reason and understanding, and are not in such cases tied down by former determinations any farther than the reasons or arguments thereof appear conclusive, for *judicandum est legibus non exemplis. Co. P. C. 6 in margine.* A bare conspiracy to levy war is certainly not treason, and was so adjudged in the case of *Sir John Friend*; but if it appears upon evidence, that the design was to kill the king, or depose him or imprison him, or put any force on him, and the levying war was only the way or method made use of to effect that design, then it will be an overt-act of compassing the death of the king: and this is the distinction taken by lord chief justice *Holt* in *Sir John Friend's* case, *State Tr. Vol. IV. p. 613, 614.*

(x) See 2 *Vent.* 315.

[14] The clause in the Constitution of the *United States* which says, that in all criminal prosecutions, the accused shall enjoy the right "to be informed of the nature and cause of the accusation," secures to him such information as will enable him to prepare for his defence. 2 *Burr's Trial*, 424.

An assembly to levy war against the king, either to depose or restrain, or enforce him to any act, or to come to his presence to remove his counsellors or ministers, or to fight against the king's lieutenant or military commissionate officers, is an overt-act proving the compassing of the death of the king; for such [123] a war is directed against the very person of the king, and he, that designs to fight against the king, cannot but know, at least, it must hazard his life; such was the case of the earl of *Essex* and some others.[15]

But if it be a levying of war against the king merely by interpretation and construction of law, as that of *Burton*,(y) and others, to pull down all enclosures, and that of the apprentices in *London* lately, to pull down all bawdy-houses,(z) *de quibus infra*, this seems not to be an evidence of an overt-act to prove compassing the king's death, when it is so disclosed upon the proof, or if it be so particularly laid in the indictment; though *prima facie* if it be barely laid as a levying war against the king in the indictment, it is a good overt-act to serve an indictment of compassing the king's death, till upon evidence it shall be disclosed to be only to the purpose aforesaid, and so only an interpretative or constructive levying of war. And *Burton's* case 39 *Eliz.* seems to intimate as much, because

(y) *Ch. P. C.* 10.

(z) *Kel.* 70.

[15] It gradually became an established doctrine with lawyers, that a conspiracy to levy war against the king's person, though not in itself a distinct treason, may be given in evidence as an overt act in compassing his death. Great as the authorities may be, on which this depends, and reasonable as it surely is, that such offences should be brought within the pale of high treason, yet I must confess, that this doctrine has ever appeared to me utterly irreconcilable with any fair construction of the statute. It has indeed by some, been chiefly confined to cases where the attempt meditated is directly against the king's person for the purpose of deposing him, or of compelling him, while under actual duress, to a change of measures; and this was construed into a compassing of his death, since any such violence must endanger his life, and because, as has been said, the prison and graves of princes are not very distant. But it seems not very reasonable to found a capital conviction on such a sententious remark, nor is it by any means true that a design against a king's life is necessarily to be inferred from the attempt to get possession of his person. So far indeed, is this from being a general rule, that in a multitude of instances, especially during the minority or imbecility of a king, the purposes of the conspirators would be totally defeated by the death of the sovereign whose name they designed to employ. But there is still less pretext for applying the same construction to schemes of insurrection, when the royal person is not directly the object of attack, and when the circumstances indicate any hostile intentions towards his safety. This ample extension of so penal a statute, was first given, if I am not mistaken, by the judges in 1663, on occasion of a meeting by some persons at *Farley Wood* in *Yorkshire*, in order to concert measures for a rising. But it was afterwards confirmed in *Harding's* case, (2 *Ventr.* 317.) immediately after the revolution, and has been repeatedly laid down from the bench in subsequent proceedings for treason, as well as in treatises of very great authority. It has, therefore, all the weight of established precedent; yet I question whether another instance can be found in our jurisprudence, of giving so large a construction, not only to a penal, but to any other statute. Nor does it speak in favour of this construction, that temporary laws have been enacted on various occasions, to render a conspiracy to levy war treasonable; for which purpose, according to the current doctrine the statute of *Edward III.* needed no supplemental provision. Such acts were passed under *Elizabeth*, *Charles II.*, & *George III.*, each of them limited to the existing reign. 3 *Hallam's Cons. His.* 207.

they took him to be indictable only upon the statute of 13 *Eliz. cap. 1.* for conspiring to levy war against the queen, whereas if this had been an overt-act to prove the compassing of the death of the king, the fact had been treason within 25 *E. 3.* as surely it would have been; if he had conspired to have raised a war directly against the king or his forces, and assembled people for that purpose, tho an actual war had been caused by him.

But such a levying of war may in process of time rise into a direct war against the king; as if the king send his forces to suppress them and they fight the king's forces; and then it may be an overt-act to prove the compassing of the king's death. [16]

And thus far of compassing the *king's* death.

Something I shall add touching the compassing of the death of the *queen*, or *prince*, wherein I shall first consider, what shall be said *the queen*, or *their eldest son* within this act. 2. What a compassing of their death.

1. A queen dowager, namely the queen after the death [124] of her husband, is not a queen within this act, for tho she bear the title of queen, and hath many prerogatives answering the dignity of her person, yet she is not (*his queen*) or, as the other parts of the act express it, (*his companion*) it must be the queen consort, the king's wife, and during the marriage between them.

2. The queen divorced from the king *a vinculo matrimonii*, as for cause of consanguinity, is not a queen within this act, tho the king be living: this was the case of queen *Katharine*, who was first married to prince *Arthur*, and by him, as was said, carnally known, and after his death married to prince *Henry* (afterwards king *Henry VIII.*), by whom she had issue *Mary* (afterward queen of *England*), and afterwards after twenty years marriage was divorced *causa affinitatis*, which divorce was confirmed in the parliament 25 *H. 8. cap. 22.*

This was also the case of his second wife queen *Anne*, who was also divorced *a vinculo*, and that divorce confirmed by the statute of 28 *H. 8. cap. 7.* which nevertheless was again repealed in part by the statute of 35 *H. 8. cap. 1.* and in effect wholly by the statute of 1 *Eliz. cap. 3.* and yet there is one clause observable in the act of 28 *H. 8.* that treasons committed against queen *Anne*, or the lady *Elizabeth* her daughter, mesne between the marriage and that divorce were punishable, altho the divorce made a nullity of the marriage; and therefore there is a special clause to pardon all such

[16] Mr. *East* (1 *P. C.* 63.) says that he does not know that the point, that a mere constructive levying of war is evidence of compassing the king's death, has ever come directly in judgment. It was not so considered in *Cotton's case*, *Kel.* 73. and the point could not arise on the trials of *Damaree & Purchase*, who were severally convicted upon a constructive charge of levying war only; there being no count for compassing the queen's death. It must, however, be admitted, that the object of a great riot or insurrection, comparatively trivial in its origin, may so far vary by its success, continuance, or other circumstances, as to assume a decided tone of resistance to the person of the king and his government, and so become an overt act of compassing his death.

treasons, so that the relation of the divorce, and separation to dissolve the marriage *ab initio*, was not thought sufficient to discharge those treasons, without a special pardon discharging the treasons committed against them.

But we need not put the case of a divorce *a mensa & thoro causâ adulterii*, because adultery by the king's wife is high treason in her, and so the case of a divorce cannot well come in question, for she must be executed for treason. *P. 28 H. 8. Spilman's Rep. (a) 33 H. 8. cap. 21. (b) Co. P. C. p. 9. [17]*

II. *Ou lour fitz eigne & heir.*

At common law compassing the death of any of the king's [125] children, and declaring it by overt-act was taken to be treason, *Briton, ubi supra*; but by this act it is restrained to *the eldest son and heir*.

1. *The eldest son and heir* extends not to a collateral heir, tho declared heir apparent to the crown, unless there be a special provision for that purpose by act of parliament: thus *Roger Mortimer 11 R. 2. Richard duke of York 39 H. 6. John de la Poole tempore R. 3. and Henry marquis of Exeter tempore H. 8.* were declared heirs apparent of the crown; yet compassing any of their deaths in the king's life time was not treason within this act. *Co. P. C. 8, 9.*

And therefore in that great agreement made in the parliament of 39 *H. 6.* when *Richard* duke of *York* made his claim to the crown, and it was enacted, that *H. 6.* should hold the crown during his life, and that *Richard* duke of *York* should succeed him; *Rot. Parl. 39 H. 6. n. 24.* it is specially enacted, that if any person do compass or imagine the death of the duke, and thereof be attaint by open act, it shall be high treason; which had not been so, unless it had been specially enacted.

2. The king takes wife, and by her hath issue two sons, the eldest dies, the wife dies, he takes a second wife; this second son, though he were once not eldest, and tho he be not *lour eigne fitz*, but only the king's son, is eldest son within this statute.

3. King *Edward III.* had issue the *Black Prince*, who had issue *Richard* of *Burdeaux* afterwards king *Richard II.* his eldest grandchild, tho he were not, in the life of his father the *Black Prince*, the king's eldest son within this statute, yet his father being dead in the life of *Edward III.* it may be very considerable whether prince *Richard* be the king's eldest son within this statute, and the compassing of his death be high treason; for he is heir apparent of the crown, and his heirship cannot be devested by any after born child.

The duchy of *Cornwall* was settled upon the *Black Prince* & *ipsius & hæredum suorum regum Angliæ filijs primo-* [126] *genitis*, altho the king's eldest daughter be not duchess

(a) In the case of queen *Anne Bolen*.

(b) In the case of queen *Katharine Howard*.

[17] A wife *de facto* until a divorce, is a queen within this statute. But after a divorce, though it be only *a mensa et thoro*, she is not. *Hob. 13. 36. See 1 East, P. C. 64.*

of *Cornwall*, because not *filius*, yet, (contrary to the opinion delivered in the prince's case 8 *Co. Rep.* 30. a) *H. 8.* after the death of his brother prince *Arthur*, and our late king *Charles*, after the death of his eldest brother prince *Henry*, were dukes of *Cornwall* in the life of their fathers: the latter appears expressly by the statute of 21 *Jac. cap.* 29. wherein it is so declared by judgment of parliament; and *Richard of Burdeaux* was also duke of *Cornwall* after the death of his father the *Black Prince*, and comes in the catalogue of dukes of *Cornwall* in the collection of *Vincent and Mills* of the nobility of *England*; and had the revenues thereunto belonging, as appears undeniably. *Rot. Parl.* 51 *E. 3. n.* 65.

But it seems it was not by virtue of that limitation in the grant to the *Black Prince*, but by a new special creation; for *Rot. Parl.* 50 *E. 3. n.* 50. the common petition, that he might be created duke of *Cornwall*, earl of *Chester*, and prince of *Wales*; the king declined the doing of it at their request, as being a thing proper only for the king to do his pleasure therein: the truth is, the king had done it before the request made, viz. *Rot. Cart.* 47, 48 & 49 *E. 3. n.* 10. the words of the charter are, "*Ex consilio & consensu prælatorum, ducum, comitum & baronum, ipsum Ricardum principem Walliæ ducem Cornubiæ, & comitem Cestriæ fecimus & creavimus,*" and grants him the possessions thereunto belonging, which he accordingly enjoyed: vide *Rot. Parl.* 51 *E. 3. n.* 9. and observe a certain estate is limited by the patent of creation for life; or otherwise, it seems, it was thought fit to leave it to the construction of law, whether he had it purely by a new creation, or by the construction of the charter 11 *E. 2.* to the *Black Prince*.

This case therefore touching conspiring the death of such a prince, as *Richard of Burdeaux* then was, tho it may be probable to be treason within the intent of this act, is fittest to be first decided by parliament according to the caution used in the statute of 25 *E. 3.*

8. If the king of *England* hath two daughters only, and no son, the eldest daughter is not within the words or intent of the [127] king's eldest son within this clause, for a son may be after born; but several statutes have made temporary provisions in this case; vide the statutes of 25 *H. 8. cap.* 22. 28 *H. 8. cap.* 7.

It is true the implication of *Co. P. C. p.* 9. where it is said, "If the heir apparent be collateral heir apparent, he is not within this statute, until it be declared by parliament," implies that the lineal heir, male or female, is within this statute.

But the implication of the statute itself is against it, because this act almost in the same breath takes notice of the king's eldest daughter upon another rank of treason, namely defiling her; and it is not safe to extend this act by construction.

The second daughter, living the first, is certainly not within this law, because not immediately inheritable to the crown.

Yet by the statute of 25 *H. 8. cap.* 22. which was but temporary, provision is made, that if any thing should be written or done to the

peril, slander or disherison of any of the issues and heirs between him and queen *Anne*, the same should be treason.

Thus far touching the persons of the queen or prince.

Now what shall be said a compassing of their death, or an overt-act to prove the same: what shall be said a compassing of the king's death, hath been at large declared, much whereof may be applied to the queen or prince, but not universally; for the king is above the coercion of the law, tho his actions are not exempted from the direction of the law in many cases; but the queen and prince are subjects of the king, and subjects to the laws; whence it comes to pass, that there are certain overt-acts manifesting compassing the king's death, which are specifical and appropriate to the king and his sovereign power and royal dignity, which are not applicable to the queen or prince.

If a man compass to imprison the king, tho it be colorably done by process of law, it is a compassing of the king's death within this act, as hath been shewn.

But if the queen or prince commit a misdemeanor of such a nature, as is a contempt against the king's laws, to which imprisonment is proper, as in case of treason, felony, rescue, [128] they may be imprisoned by process of law without danger of treason: thus was the son of *Henry IV.* committed by *Gascoign* chief justice for rescuing a prisoner from the bar; and several acts of attainder of treason have passed in parliament against some queen-consorts, as appears by 28 *H. 8. cap. 7.* 33 *H. 8. cap. 21.* against queen *Catharine Howard.* *Rot. Parl. 5 H. 5. n. 11.*

Again, to compass to depose the king is treason, but to compass a divorce between the king and queen by the king's commission by due process of law was no treason, as appears in the process before the archbishop of *Canterbury*, whereupon queen *Catherine*, and afterwards queen *Anne* were divorced.

The compassing, therefore of the death of the queen or prince, which is treason within this act, is where a man without due process of law expressly compasseth the wounding or death of them either by force or poison. [18]

[18] The following are some of the instances, under the *English* law, as it is laid down by the writers or decided by the cases, of what are deemed sufficient overt acts of compassing the king's death. Every thing wilfully or deliberately done or attempted, whereby the king's life may be endangered, is an overt act of compassing his death. *Fost. 195.* Killing the king is an overt act of compassing his death, and was so laid in the case of the regicides of *Charles I.* *Kel. 8.* So, going armed for the purpose of killing the king, *R. v. Somerville et al; 1 And. 104;* providing arms, ammunition, poison, or the like, for the purpose of killing the king, 3 *Inst. 12;* conspirators meeting and consulting of the means of killing the king, *Fost. 195, R. v. Vane, Kel. 15, R. v. Tong et al, id. 17;* or of deposing him, or of usurping the powers of government, *R. v. Hardy et al, 1 East, P. C. 60;* or resolving to do it, *R. v. Roekwood, 4 St. Tr. 661, R. v. Charnock, id. 562, Salk. 631;* acting as counsel against the king, in order to take away his life, *R. v. Cobe, Kel. 12, R. v. Harrison, 2 St. Tr. 314.* So, other species of high treason, which are distinct heads of treason in themselves, may be laid as overt acts of compassing the death of the king; thus levying war directly against the king, *Fost. 195. 210. 212, Kel. 21, 3 Inst. 12;* or a conspiracy to levy war directly against the king for the purpose of dethroning him, or obliging him to change his measures, or the like, *Fost.*

And thus much for treason in compassing the death of the king, queen, or prince; and because the next treason declared, namely the violation of the king's wife, the king's eldest son's wife, the king's eldest daughter, hath not much to be said concerning it, I shall close this chapter with it.

1. *The violating the king's companion*, that is the king's wife, the queen consort, her husband being now living; this is high treason, and so it is in her if she consent. *P. 28 H. 8. 93 H. 8. cap. 21. Co. P. C. p. 9.*

2. *The wife of the king's eldest son and heir*, a princess consort, and during the coverture between them; and if she consent, it is treason in her.

3. *The king's eldest daughter not married*: this extends to a second daughter, the eldest being dead; for she is now eldest, and, for want of issue male, inheritable to the crown; but at common law this treason extended to any of the daughters. *Briton, cap. 22. §. 71.* It extends to an eldest daughter, tho there be sons; and *guære*, whether to an eldest daughter, that hath been married, and is now a widow, *nient marry* may be construed either way; or if it [129] doth, yet whether it extends to an eldest daughter, that is a widow, and hath children by her husband; the words of the old books are *avant ceo, qel est marry*: it seems, that if the eldest daughter hath been once married, she is not within this law, because of the words *nient marry*, tho the reason may possibly be the same; and it seems, tho there be sons, yet the violating of the king's eldest daughter, being within the express words of the law, the violation of her is within this law, because within the words; and yet the violation of the wife of the king's second son is not within this statute, yet he and his issue is inheritable to the crown before the eldest daughter; in this case therefore the words of the law are to govern.

Altho it should seem probable, that the eldest son of the prince after the death of his father may be the king's eldest son within this act, as is before observed; yet the daughter of the king's eldest daughter, after her mother's death, seems not an eldest daughter

197. 211, *R. v. Friend*, 4 St. Tr. 599, *R. v. Darrell*, 10 Mod. 321, *R. v. Laver*, 4 St. Tr. 229. 332. *R. v. Campion et al. Saville*, 3, *R. v. Lord Russel*, 3 St. Tr. 705. *R. v. Sydney*, 3 St. Tr. 807. *R. v. Cook*, 4 St. Tr. 737. (But not a conspiracy to effect a general rising for the purpose of throwing down all enclosures, &c. or of any other species of constructive levying of war. *Fost.* 213, *per Holt, C. J., Holt*, 682. 10 Mod. 322.) Adhering to the king's enemies, *Fost.* 196, *R. v. Harding*, 2 Ventr. 315, *R. v. Lord Preston*, 4 St. Tr. 410, *R. v. Stone*, 6 T. R. 527; inciting foreigners to invade the realm. *Fost.* 196. *R. v. Parkyns*, 4 St. Tr. 627. Writings which import a compassing of the king's death, are sufficient overt acts of this species of treason, if published, *Fost.* 198, 1 Hawk. c. 17, s. 31; as for instance, writings inciting persons to kill the king. *R. v. Twyn*, Kel. 22. See *Pyne's case*, Cro. Car. 117. So, words of advice or persuasion are sufficient overt acts of this species of treason, if they advise or persuade to an act which would of itself (if committed) be a sufficient overt act. *Fost.* 195. *R. v. Charnock*, 4 St. Tr. 562. *Salk.* 631. So, words may be laid in the indictment, to explain an act; as for instance, an act seemingly innocent in itself, may be shown to be an act of treason, by its connexion with words spoken by the party at the time. *R. v. Crohagan*, Cro. Car. 332. *R. v. Lee*, 7 St. Tr. 43.

within this act, her grandfather being living, for the grandson, who is heir apparent of the crown, is of more consideration than the daughter of a daughter, who cannot be heir apparent, because a son may be born.

Quære, Whether violating the eldest daughter, after the death of the king her father, be treason within this act, where a son succeeds to the crown: it seems not, for the relation is ceased. (c)

And thus far for the two first branches of high treason.

CHAPTER XIV.

[130]

CONCERNING LEVYING OF WAR AGAINST THE KING.

THE *jus gladii*, both military and civil, is one of the *jura majestatis*, and therefore no man can levy war within this kingdom without the king's commission. *Co. P. C. p. 9.* See the statute, or rather proclamation (a) *de defensione portandi arma*, wherein it is recited by the king, that the prelates, earls, barons, and commonalty *illoeque asembles en evisement sur cest besoigne nous eiont dit, que a nous appent & de nous par nostre royal seignorie defendre, fortment des armes, & de tout autre force contre nostre pees, a tous les foitz, que nous plerra; (b)* and hence it is in all declarations and indictments touching things done against the peace, the conclusion goes *contra pacem domini regis*.

It is true, there have been great disputes in this kingdom touching the disposition of the *militia* of this kingdom, which are now all settled, and declared to be the right of the crown by the statutes of 13 *Car. 2. cap. 6*, and 13 & 14 *Car. 2. cap. 3.* [1]

(c) She is no longer *leigne fille le roy*. It having been before observed that a queen regent is a king within this act, it follows of course that the eldest son and eldest daughter of such a queen is likewise within it. *Co. P. C. p. 8.*

(a) In the seventh year of Edward I.

(b) This statute is only a proof of the king's power to issue his proclamation against coming armed to the parliament. *Vide Rot. Parl. 25 E. 3. pars. 1. n. 58. versa.*

[1] By the Constitution of the *United States*, Art. 1, Sect. 8, Congress shall have power to provide for the calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions: To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the *United States*; reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress. Accordingly the following acts of Congress for the establishment of an uniform system for the government of the militia, have been passed: An Act more effectually to provide for the national defence, by establishing an uniform militia throughout the *United States*; May 8, 1792, ch. 33. An Act providing arms for the militia throughout the *United States*, July 6, 1798, ch. 65. An Act in addition to an Act entitled, "An Act more effectually to provide for the national defence, by establishing an uniform militia throughout the *United States*," March 2, 1803, ch. 15. An Act more effectually to provide for the organizing of the militia of the *District of Columbia*, March 3, 1803, ch. 28. An Act establishing rules and articles for the government of the armies of the *United*

Now as to this clause of high treason, *Ou si home levy guerre contre nostre seigneur le roy en son realme.*

To make a treason within this clause of this statute there must be three things concurring.

- I. It must be a *levying of war*.
- II. It must be a levying of war *against the king*.
- III. It must be a levying of war against the king *in his realm*.

I. For the first of these, the act saith *levy guerre*; what shall be said a levying of war, is in truth a question of fact, and re-
[131] quires many circumstances to give it that denomination, which may be difficult to enumerate or to define; and commonly is expressed by the words *more guerrino arraiati*.

As where people are assembled in great numbers armed with weapons offensive, or weapons of war, if they march thus armed in a body, if they have chosen commanders or officers, if they march *cum vexillis explicatis* or with drums or trumpets, and the like; whether the greatness of their numbers, and their continuance together doing these acts may not amount to *more guerrino arraiati*, may be considerable.

But a bare conspiracy or consultations of persons to levy a war, and to provide weapons for that purpose; this, tho it may in some cases amount to an overt-act of compassing the king's death, yet it is not a levying of war within this clause of this statute; and therefore there have been many temporary acts of parliament to make such a conspiracy to levy war treason during the life of the prince, as 13 *Eliz. cap. 1.* 13 *Car. 2. cap. 1.* and others. *Vide accordant Co. P. C. p. 10.*

Again, the actual assembling of many rioters in great numbers to do unlawful acts if it be not *modo guerrino* or *in specie belli*, as if they have no military arms, nor march or continue together in the posture of war, may make a great riot, yet doth not always amount to a levying of war: *vide statute 3 & 4 E. 6. cap. 5. 1 Mar. cap. 12.(c)[2]*

(c) See also 1 *Geo. 1 cap. 5.*

States, April 10, 1806, ch. 20. An Act in addition to the Act entitled, "An Act to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and to repeal the Act now in force for these purposes," April 18, 1814, ch. 82. An Act concerning field officers of the militia, April 20, 1816, ch. 64. An Act to establish an uniform mode of discipline and field exercise for the militia of the United States, May 12, 1820, ch. 96. An Act to reduce and fix the military peace establishment of the United States, March 2, 1821, ch. 12, sect. 14. See 3 *Story on Cons.* 81.

[2] "It is obvious that Lord Hale supposed an assemblage of men in force, in a military posture, to be necessary to constitute the fact of levying war. The idea he appears to suggest, that the apparatus of war is necessary, has been very justly combated by an able judge, (Mr. Justice Foster; see *Disc.* 208.) who has written a valuable treatise on the subject of treason; but it is not recollected that his position, that the assembly should be in a posture of war for any treasonable attempt, has ever been denied." per *Marshall, C. J. 2 Burr's Tr.* 434. And again, (p. 432.) "If the party be in a condition to execute the proposed treason, without the usual implements of war, I can perceive no reason for requiring those implements in order to constitute the crime."

Alluding to the difference which Lord Hale makes (pp. 131. 141. 150 to 153.) between

II. As to the second; the statute saith, (*against us*) to make it therefore treason, it must be a levying of war against the king: otherwise, tho' it be *more guerrino*; and a levying of war, it is not treason. 1. Therefore if it be upon a private quarrel, as many times it happened between lords marchers, tho' it be *vexillis explicatis*, it seems no levying of war against the king. 2. If it be only upon a private and particular design, as to pull down the inclosures of such a particular common, it is no levying of war against the king. *Co. P. C. p. 9.* 3. But a war levied against the king is of two sorts, 1. Expressly and directly, as raising war against the king or his general and forces, or to surprise or injure the king's person, or to imprison him, or to go to his presence to enforce [132] him to remove any of his ministers or counsellors, and the like. 2. Interpretatively and constructively, as when a war is levied to throw down inclosures generally, or to enhance servants wages, or to alter religion established by law; and many instances of like nature might be given; this hath been resolved to be a war against the king, and treason within this clause; and the conspiring to levy such a war is treason, tho' not within the act of 25 *E. 3.* yet by divers temporary acts of parliament, as 13 *Eliz.* during the queen's life, 13 *Car. 2.* during our king's life. *Co. P. C. p. 10.* [3]

The first resolution, that I find of this interpretative levying of war, is a resolution cited by my lord *Coke, P. C. p. 10.* in the time of *Henry VIII.* for enhancing servants wages; and the next in time was that of *Burton, 39 Eliz. Co. P. C. p. 10. (d)* for raising an armed force to pull down inclosures generally: this is now settled by these instances, and some of the like kind hereafter mentioned; the proceeding against *Burton* and his companions was not upon the statute of 25 *E. 3.* which required, that in new cases the parliament should be first consulted; but upon the statute of 13 *Eliz.* for conspiring to

(d) *Poph. 122.* 2. *Wilson, 363.*

insurrections which carry with them the appearance of an army and these assemblies which have been drawn together without any of the show or apparatus of war, *Foster* says, "I do not think any great stress can be laid on that distinction. It is true that in case of levying war, the indictments generally charge that the defendants were armed and arrayed in a warlike manner; and where the case would admit of it, the other circumstances of swords, guns, drums, colours, &c. have been added. But I think the merits of the case have never turned singly on any of these circumstances. In the case of *Demerée & Purchase, (8 St. Tr. 218. 267.)* there was nothing given in evidence of the usual pageantry of war; no military weapons, no banners, no drums, nor any regular consultation previous to the rising. And yet the want of these circumstances weighed nothing with the Court, though the prisoner's counsel insisted much on that matter. The number of the insurgents supplied the want of military weapons; and they were provided with axes, crowes, and other tools of the like nature proper for the mischief they intended to effect. *Furor arma-ministrat*" It was the opinion of the Court in the case of *Fries, p. 197,* that the legal guilt of levying war might be incurred without the use of military weapons or military array.

Mr. *East* thinks that Sir *Matthew Hale* did not mean to carry his observations further than concerned cases of constructive levying of war. 1 *P. C. 67.* Judge *Tucker* is strongly in favour of the doctrine that warlike array and arms are essential to complete the crime. 4 *Tucker's Bl. Apdx. p. 18.* and Mr. *Luders*, in his *Treatise on Constructive Treason, pp. 52 & 69,* is of the same opinion.

[3] And 36 *Geo. 3. c. 7,* during that king's life.

levy war, which hath not that clause of consulting the parliament in new cases, and therefore seems to leave a latitude to the judges to make construction greater, than that was left by the statute of 25 *E. 3.*

These resolutions being made and settled we must acquiesce in them; but in my opinion, if new cases happened for the future, that have not an express resolution in point, nor are expressly within the words of 25 *E. 3.* tho they may seem to have a parity of reason, it is the safest way, and most agreeable to the wisdom of the great act of 25 *E. 3.* first to consult the parliament and have their declaration, and to be very wary in multiplying constructive and interpretative treasons, for we know not where it will end.

But particular instances will best illustrate this whole learning, which I shall subjoin, tho somewhat promiscuously, as they occur to my memory.

A conspiring or compassing to levy war is not a levying [133] war within this act, unless the war be levied; this appears,

Co. P. C. p. 9. and also by those many acts of parliament above-mentioned, which were but temporary and limited to continue during the life of the king or queen, whereby it is specially enacted, that such compassing to levy war shall be treason; which needed not have been, if it had been treason by the statute of 25 *E. 3.* *Vide 1 & 2 P. & M. cap. 10. 1 Eliz. cap. 5. 13 Eliz. cap. 1. 13 Car. 2. cap. 1.*

And therefore in the case of *Robert Burton* and others, that conspired to assemble themselves and pull down inclosures, and to gain arms at the lord *Norris's* house, and to arm themselves for that purpose, *Co. P. C. 10.* they were indicted and attainted purely upon the statute of 13 *Eliz. cap. 1.* whereby conspiring to levy war is made treason.

But if divers conspire to levy war, and some of them actually levy it, this is high treason in all the conspirators, because in treason all are principals, and here is a war levied.(e)

If divers persons levy a force of multitude of men to pull down a particular inclosure, this is not a levying of war within this statute, but a great riot; but if they levy war to pull down all inclosures, or to expulse strangers, or to remove counsellors, or against any statute, as namely the statute of *Labourers*, or for inhansing salaries and wages, this is a levying war against the king, because it is generally against the king's laws, and the offenders take upon them the reformation, which subjects by gathering power ought not to do.[4] *Co. P. C. p. 9, 10. Vide the act 3 & 4 E. 6. cap. 5.* "If any to the number of twelve shall intend, go about, practise, or put in ure by force to alter the religion established by law, or any other laws, and depart

(e) *Co. P. C. p. 9. Kelyng. p. 19.*

[4] *Fost. 219, Damaree's case, 8 St. Tr. 218. Purchase's case, id. 267. 4 Bl. Com. 82. Mr. Luders urges that none of these acts can be treason by a fair construction of the Stat. 25 Edw. 3. p. 62 et seq.*

not within an hour after proclamation, or after that shall wilfully in a forcible manner attempt to put in ure the things above specified, then it is high treason."

If men levy war to break prisons to deliver one or more particular persons out of prison, wherein they are lawfully imprisoned, unless such as are imprisoned for treason; this upon advice [-134] of the judges upon a special verdict found at the *Old Bailey*, was ruled not to be high treason, but only a great riot 1668, but if it were to break prisons, or deliver persons generally out of prison, this is treason, *Co. B. C. p. 9.*

There was a special verdict found at the *Old Bailey*, anno 20 Car. II., (f) that A. B. and C. with divers persons to the number of an hundred assembled themselves *modo guerrino* to pull down bawdy-houses, and that they marched with a flag upon a staff, and weapons, and pulled down certain houses in prosecution of their conspiracy: this by all the judges assembled, except one, (g) was ruled to be levying of war, and so high treason within this statute; and accordingly they were executed.

But the reason that made the doubt to him that doubted it, was 1. Because it seemed but an unruly company of apprentices, among whom that custom of pulling down bawdy-houses had long obtained, and therefore was usually repressed by officers, and not punished as traitors. 2. Because the finding to pull down bawdy-houses might reasonably be intended two or three particular bawdy-houses, and the indefinite expression should not *in materia odiosa* be construed either universally or generally. And 3. Because the statute of 1 Mar. cap. 12. though now discontinued makes assemblies of above twelve persons and of as high a nature only felony, and that not without a continuance together an hour after proclamation made; as namely an assembly to pull down bawdy-houses, burn mills or bays, or to abate the rents of any manors, lands or tenements, or the price of victuals, corn or grain; or if any person shall ring a bell, beat a drum, or sound a trumpet, and thereby raise above the number of twelve for the purposes aforesaid, which are raised accordingly and do the fact, and dissolve not within an hour after proclamation, or that shall convey money, harness, artillery, it is enacted to be felony; and if any above the number of two, and under twelve, do practise with force of arms unlawfully, and of their own authority to kill any of the queen's subjects, to dig up pales, throw down inclosures of parks, pull down any house, mill, or burn any stack of corn, or [-135] abate rents of manors, lands or tenements, or price of corn or victual, and do not depart within an hour after proclamation, and continue to attempt to do or put in ure any of the things above-mentioned, they are to have a year's imprisonment.

And the statute of 3 & 4 E. 6. cap. 5. is to the same purpose, only if the number of forty, or above, come together to do such acts as

(f) Vide *Kelyng*, p. 70. &c.

(g) This was our author himself. Vide *Kelyng*, 75.

before, or any other felonious, rebellious, or traitorous acts, and continue together two hours, it is made high treason.^(h)

But yet the greater opinion obtained, as it was fit; and these apprentices had judgment, and some of them were executed, as for high treason.

Yet this use may be made of those statutes: 1. That there may be several riots of a great and notorious nature, which yet amount not to high treason.. 2. But again, those acts and attempts possibly might not be general, but might be directed only to some particular instances, as for the purpose not to pull down all houses or mills, but some special ones, which they thought offensive to them; nor to abate the rents of all manors, but of some particular manor, whereof they were tenants; nor to make a general abatement of the prices of victuals or corn, but in some particular market, or within some precinct; and so crosseth not the general learning before given of constructive treason. 3. It seems by that act also, they did not take the bare assembly to that intent to be a sufficient overt-act of levying of war; that was but an attempt and putting in ure, unless they had actually begun the execution of that intention, going about, practising or putting in ure; for this act puts a difference between the same and the doing thereof.

In the parliament of 20 *E. 1.* now printed in *Mr. Ryley, p. 77.* it appears there arose a private quarrel between the earls of *Gloucester* and *Hereford*, two great lords marchers; and hereupon divers of the

earl of *Gloucester's* party with his consent cum multitudine
[136] tam equitum quam peditum exierunt de terra ipsius comitis de *Morgannon* cum vexillo de armis ipsius comitis explicato versus terram comitis *Heref'* de *Brecknock*, & ingressi fuerunt terram illam per spatium duarum leucarum, & illam deprædati fuerunt, & bona illa deprædata usque in terram dicti comitis *Glocestrie* adduxerunt, and killed many, and burnt houses and committed divers outrages; and the like was done by the earl of *Hereford* and his party upon the earl of *Gloucester*: they endeavoured to excuse themselves by certain customs between the lords marchers; by the judgment of the lords in parliament their royal franchise were seised as forfeited during their lives, and they committed to prison, till ransomed at the king's pleasure.

Altho. here was really a war levied between these two earls, yet in as much as it was upon a private quarrel between them, it was only a great riot and contempt, and no levying of war against the king; and so neither at common law, nor within the statute of 25 *E. 3.* if it had been then made, was it high treason.

It appears by *Walsingham sub. anno 1403.* a great rebellion was raised against *Henry IV.* by *Henry Percy* son of the earl of *Northumberland* and others: the earl gathered a great force, and actually took part with neither, but marched with his force, as some thought, towards his son, and, as others thought, towards the king *pro redinte-*

(h) See also 1 *Geo. I. cap. 5.*

grando pacis negotio; he was hindered in his march by the earl of *Westmoreland* and returned to his house at *Werkworth*; the king had the victory; the earl petitioned the king; the whole fact was examined in parliament, *Rot. Parl. 5 H. 4. n. 12.* The king demanded the opinion of the judges and his counsel touching it: the lords protest the judgment belongs in this case to them; the lords by the king's command take the business into examination, and upon view of the statute of 25 *E. 3.* and the statute of Liveries "*Adjuge- rent, qe ceo, qe fuit fait par le counte, nest pas treason, ne felony, mes trespass tantsolement, pur quel trespass le dit counte deust faire fine & ransom a volonte du roy;*" but *Henry* the son was attaint of treason.

It appears not what the reason of that judgment was, whether they thought it only a compassing to levy war, and [137] no war actually levied by him, because not actually joined with his son; or whether they thought his intention was only to come to the king to mediate peace, and not to levy a war, nor to do him any bodily harm; that it was indeed an offense in him to raise an army without the king's commission, but not an offense, of high treason, because it did not appear that he raised arms to oppose the king, but possibly to assist him; but whatever was the reason of it, it was a very mild and gentle judgment, for the earl was doubtful of a more severe judgment: *nota*, he returns thanks to the lords and commons *de lour bone & entyre coers a lui monstre*, and thanks the king for his grace.

The clause in the statute of 25 *E. 3.* If any man ride armed covertly or secretly with men of arms against any other to slay, rob, or take him, or to detain him, till he hath made fine or ransom, or have his deliverance, it is not in the mind of the king or his council, that in such case it shall be judged treason, but shall be judged felony or trespass according to the laws of the land of old times used, and according as the case requireth; and if in such case or other like(s) before this time any judges have judged treason, and for this cause the lands and tenements have come to the king's hands as forfeited, the chief lords of the fee shall have the escheat.

This declares the law, that a riding armed with men of arms upon a private quarrel or design against a common person is not a levying of war against the king; (k) and the especial reason of the express

(i) *Vide simile H. 26. E. 3. coram rege, Rot. 30. Rex. Hale.*

This case was in the county of *Essex*, and was no more than this; Sir John Fitzwouter and William Baltrip, his steward, &c. were presented by juries of divers hundreds for taking men by force, and detaining them till they paid fines for their ransom, for exacting and extorting money from others, and for several great and enormous riots, misdemeanors and trespasses in the county of *Essex*, *attractando sibi regalem potestatem*, upon which Sir John Fitzwouter surrendered himself, and was committed to the Tower of London, and Baltrip was outlawed, who afterwards pleaded the king's pardon *pro felonis, conspiratione, manutentionia & transgressionibus predictis, necnon pro utlagariis occasione promissionum in ipsum promulgatis*, upon which he was discharged *sine die*.

(k) *Co. P. C. p. 10.*

adding of this clause seems to be in respect of that judgment of treason given against Sir John Gerberge, *Trin.* 21. *E. 3. Rot.* 23. *Rex.* and at large before mentioned, *chap.* 11. which judgment is in effect repealed by this act.

It appears by Sir *F. Moore's Rep.* n. 849. (l) the earl of *Essex* was arraigned and condemned for high treason before the lord high steward, whereupon it was resolved by the justices, 1. That when the queen sent the lord keeper of the great seal (m) to him, commanding him to dismiss the armed persons in his house and to come to her, and he refused to come, and continued the arms and armed persons in his house, that was treason. 2. That when he went with a troop of captains and others from his house in the city of *London*, and there prayed aid of the citizens in defense of his life, and to go with him to the queen's court to bring him into the queen's presence with a strong hand, so that he might be powerful enough to remove certain of his enemies, that were attendant on the queen, this was high treason, because it tends to a force to be done upon the queen, and a restraint of her in her house; and the fact in *London* was actual rebellion, tho he intended no hurt to the person of the queen. 3. That the adherence of the earl of *Southampton* to the earl of *Essex* in *London*, tho he did not know of any other purpose than of a private quarrel, which the earl of *Essex* had against certain servants of the queen, was treason in him, because it was a rebellion in the earl of *Essex*. 4. That all they, that went with the earl of *Essex* from *Essex*-house to *London*, whether they knew of his intent or not, were traitors, whether they departed upon the proclamation or not; but those, that suddenly adhered to him in *London*, and departed upon the proclamation made, were within the proclamation to be pardoned: there were other points resolved touching the manner of his trial, whereof hereafter.

The whole history of *Essex* his treason and the proceeding thereupon is set forth at large by *Camden anno* 44 *Eliz.* p. 604. & sequentibus, wherein the charge of his indictment appears to be, [139] that he and his accomplices had conspired to deprive the queen of her crown and life, having consulted to surprize the queen in the court; and that they had broken out into open rebellion by imprisoning the counsellors of the realm, by stirring up the *Londoners* to rebellion by tales and fictions, by assaulting the queen's faithful subjects in the city, and defending the house against the queen's forces; so that the great part of the indictment was compassing the queen's death, and the rest of the charge were the overt-acts, which was treason within the statute of 25 *E. 3.* with which my lord *Coke* agrees, *P. C.* p. 12.

If divers persons levy war against the king, and others bring them relief of victuals *pro timore mortis*, & recesserunt quam citò potuerunt, this was adjudged not to be a levying of war, because *pro timore mortis; quære*, if the same law be in case of marching with

(l) p. 620.

(m) And others of her council.

them in their company for fear of death.[5] *Co. P. C. p. 10. vide sup. cap. 8. Mich. 21 E. 3 Rot. 101. Linc. coram rege. Illi, qui coacti fuerunt ad denarios recipiendos & similiter coacti juraverunt, dimittuntur per curiam per manucaptionem, quia sic in personis ipsorum nihil mali reperitur, in case of a great riot, not unlike a levying of war, for which they were indicted of treason.*

Rot. Par. 17 R. 2. n. 20. upon the complaint of the dukes of *Aquitain* and *Gloucester*, shewing that *Thomas Talbot* and others his adherents by confederacy between them fauxment conspirerent pur tuer les dits ducs uncles le roy & autres persones grants de realme, & pur accomplir le malice susdit le dit *Thomas* & les autres mistrent tout leur poyar, come notoirement est conus, & le dit *Thomas* ad en grand party confesse, en anientissement des estats & de loys de vostre realme, & sur ceo firent divers gents lever armes, & arrayes a feire de guerre en assembles & congregations a tres grant & horrible number en divers parties en les countie de Cestre, and pray that it may be declared in this parliament the nature, pain and judgment of this offense: the conclusion whereof was thus:

“Est avys au roy & a les seigniors de cest parlement en droit de mesme la bille touchant *Thomas Talbot*, que la matter contenu en la dite bill est overt & haut treason, & touche la person du roy & tout son realme, & pur treason le roy & tous les seign- [140] neurs susdits adjuggent & declarant;” and thereupon writs of proclamation for his appearance in the king’s bench are ordered to issue for his appearance in one month, or otherwise to be attaint of treason:(n) *vide Pas. 17 R. 2 B. R. Rot. 16. Rex.* Writs of proclamation issued accordingly to the sheriffs of *Yorkshire* and *Derbyshire*, and the sheriffs returned *non est inventus*; *Talbot* afterwards came and rendered himself, and was committed to the *Tower*, and afterwards a *Supersedeas* came for his enlargement.(o)

But this declaration being only by the king and house of lords is not a conclusive or a sufficient declaration of treason according to the purview of this statute, but yet it was a real levying of war against the king, because done *more guerrino* and by people arrayed *de fet de guerre*, as in *Bensted’s* case hereafter mentioned; but had it been a bare conspiracy, it had not been treason, as appears by the special statute of 3 *H. 7. cap. 14.* whereby a conspiracy to kill the king

(n) And all persons, that shall receive the said Sir *Thomas Talbot* within the realm of *England*, after the said month elapsed from the time of the said proclamation, are declared guilty of high treason upon conviction of such harbouring or receiving.

(o) The *Supersedeas* was not expressly for his enlargement, *Sed quod cuicumq: processus versus ipsum Thomam Talbot ex causis predictis ulterius faciundo supercedant, quousque aliud a rege inde habuerint in mandatis.*

[5] It seems that it would. But the fear of having houses burnt or goods spoiled, is no excuse in the eye of the law for joining and marching with rebels. The only force that doth excuse, is a force upon the person, and present fear of death; and this force and fear must continue all the time the party remains with the rebels. It is incumbent on every man who makes force his defence, to show an actual force, and that he quitted the service as soon as he could. *Per Lee, C. J., McGrowther’s case, East. 14. 216. 1 East, P. C. 70. U. S. v. Vigol, 2 Dell. 347.*

without an overt act, (for then it were treason within the statute of 25 E. 3.) or a conspiracy to kill any of his privy council and certain great officers, tho the event followed not, is made felony.

See for instances of very great riots with multitudes of persons *modo guerrino arraiati*, which yet amounted not to high treason, because upon particular quarrels and differences between private persons. *Claus. 5 E. 2 M. 4. inter Griffinum de Pole & Johannem de Cherleton pro castro de Pole. Pat. 8 E. 4. part 1. n. 7. dors.* between the citizens and bishop of *Norwich*.(p) *Rot. Parl. 5 R. 2. n. 45.* between the town and university of *Cambridge*, *Rot. Parl. 11 H. 4. n. 37. & sequentibus*, between *Hugh de Erdeswick* and others touching the castle of *Bothall*. *Rot. Parl. 13 H. 4. n. 12.* between the lord *Ross* Sir *Robert Tyrrhyt* touching *Turbary* in *Wroughtly*. *Rot. Parl. 4 H. 5. n. 15.* between *Robert* [141] *Whittington* and *Philip Lingdon* and others. *H. 26 E. 3. Rot. 30. Rex Fitzwauter's case.*(q)

All which, tho they were enormous riots, and done *more guerrino*, yet being private and particular quarrels, not much unlike that between the earls of *Gloucester* and *Hereford*, did not amount to high treason, but contempts, riots; or, if death ensued, felony, as the case required.[6]

But going in a warlike manner with drums and arms to surprize the archbishop of *Canterbury*, who was a privy counsellor, it being with drums and a multitude (as the indictment was) to the number of three hundred persons, was ruled treason by all the judges of *England*, and the offenders had judgment accordingly; and at the same time by ten of the judges it was agreed, that the breaking of prison, where traitors were in durance, and causing them to escape was treason, altho the parties did not know that there were any traitors there, upon the case of 1 H. 6. 5. b. and so to break a prison where felons are, whereby they escape, is felony without knowing them to be imprisoned for such offense. *P. 16 Car. Croke, Thomas Bensted's case.*(r)

The case of Sir *John Oldecastle* for levying of war against the king is entered *Rot. Parl. 5 H. 5. n. 11.*

The twenty-fifth of *September anno domini 1413*, *Thomas* archbishop of *Canterbury* the pope's legate by his sentence definitive

(p) This is not to be found among the records.

(q) *Nicholas Brundish* and others to the number of one hundred were sent by Sir *John Fitzwauter* armed *platis, gladiis, bokelariis, arcibus & sagittis ad modum guerras* to seize and take *boves, asinos, &c.* of *Thomas Hubert* in *Herlesw* upon the lands of the said *Thomas*, *quas tenuit de aliis dominis & nihil de ipso Johanne Fitzwauter*; accordingly they did so, and carried them away to maners belonging to the said Sir *John*; but neither this riot, nor any other the facts, which he or his accomplices were indicted for, were conceived to amount to treason, since none of them were arraigned of more than felony; *vide supra in notis*, p. 137.

(r) *Cro. Car. 583. W. Jones 455.*

[6] For an account of these private wars which were so prevalent during the early feudal ages, see *Robertson's Charles V.* vol. I. 45. 286.

declared Sir *John Oldcastle* lord *Cobham* an heretic, especially in the point of the sacrament of the eucharist and penance, excommunicated him, *relinquentes ipsum ex nunc tanquam hæreticum iudicio sæculari.*(s)

Hilk 1 H. 5. Rot. 7. inter placita regis, Middlesex, there is an indictment against him before certain commissioners of *oyer and terminer* of *London* and *Middlesex*, returned into the [142] king's bench to this effect : (t)

“ *Quod Johannes Oldcastell de Coulyng in com' Kane' chivaler, & alii lollardi vulgaritèr nuncupati, qui contra fidem catholicam diversas opiniones hæreticas & alios errores manifestos legi catholicæ repugnantes, a diu est, temerariè tenuerunt opiniones & errores prædictos mantere, aut in facto minime perimplere valentes, quam diu regia potestas & tam status regalis domini nostri regis, quam status & officium prælatiæ dignitatis, infra regnum Angliæ in prosperitate perseverarent; falsò & proditoriè machinando tam statum regium quam statum & officium prælatorum, nec non ordines religionum infra dictum regnum Angliæ penitus adnullare ac dominum nostrum regem, fratres suos, prælatos & alios magnates, ejusdem regni interficere, nec non viros religiosos, relictis cultibus divinis & religionis observantiis, ad occupationes mundanas provocare; & tam ecclesias cathedrales, quam alias ecclesias & domos religiosas de reliquis & aliis bonis ecclesiasticis totaliter spoliare ac funditus ad terram præsternere, & dictum Johannem Oldcastell regentem ejusdem regni constituere, & quamplura regimina secundum eorum voluntatem infra regnum prædictum, quasi gens sine capite, in finalem destructionem tam fidei catholicæ & cleri, quam status & majestatis dignitatis regalis, infra idem regnum ordinare, falsò & proditoriè ordinaverunt & proposuerunt, quòd ipsi insimul cum quampluribus rebellibus domini regis ignotis ad numerum viginti millium hominum de diversis partibus regni Angliæ modo guerrino arraiatis privatim insurgerent, & die Mercurii proximo post festum Epiphaniæ domini anno regni regis nunc primo apud Villam & parochiam sancti Egidii extra barram veteris Templi London in quodam magno campo ibidem unanimiter convenirent & insimul obviarent pro nefando proposito suo in præmissis perimplendo, quo quidem die Mercurii apud Villam & parochiam prædictas prædicti Johannes Oldcastell & [143] alii in hujusmodi proposito proditorio perseverantes prædictum dominum nostrum regem, fratres suos, viz. Thomam ducem Clarenciæ, Johannem de Lancastre, & Humfridum de Lancastre, nec non prælatos & magnates prædictos interficere, nec non ipsum dominum nostrum regem & hæredes suos de regno suo prædicto exhæredare, & præmissa omnia & singula, nec non quamplura alia mala & intolerabilia facere & perimplere, falsò & proditoriè proposuerunt &*

(s) See *State Tr.* Vol. I. p. 42.

(t) See *State Tr.* Vol. VI. Appendix p. 4. Fox in his acts and monuments, Vol. I. p. 655. brings several arguments to prove this indictment to be a forged one; but whatever the indictment was, there is reason sufficient to believe the pretended conspiracy was so. See *Rapin's history* sub anno 1414.

imaginaverunt, & ibidem versus campum prædictum modo guerrino arraiati proditoriè modo insurrectionis contra ligeantias suas equitaverunt ad debellandum dictum dominum nostrum regem, nisi per ipsum manu forti gratiose impediti fuissent, quod quidem indictamentum dominus rex nunc certis de causis coram eo venire fecit terminandum——Per quod præceptum fuit vic' quod non omitteret, &c. quin caperet præfatum *Johannem Oldcastell*, si, &c. & salvo, &c." upon this indictment removed into the king's bench he was outlawed.

All this record and process at the request of the commons was removed into parliament, and in the presence of the *custos regni*, lords, and commons was read, and expounded in *English* to Sir *John Oldcastle*, and it was demanded what he could say why execution should not be done upon him upon that utlary, and he saying nothing in his excuse "pur que agard est en mesme le parlement per les seigneurs avant dits, de l'assent de le dit gardein, & la pryer suiedit, qe le dit *John*, come traytour a dieu & heretique notoirement approve & adjudge, come peitt per un instrument l'archevesque eonsue ala dors de cest roll & come traytour a roy & son roialme, soit amesne a la *Tower* de *Londres*, & d'illoeques soit treins per my le city de *Londres*, tanque as novel surches en le paroche de *St. Giles* hors de la barre de viel *Temple* de *Londres*, & illoeques soit pendus, & ars pendant." (u)

How this nobleman was pursued by the ecclesiasties, and [144] the whole story is set down by *Walsingham*.

That which I observe in it is, 1. That the indictment is principally founded upon that article of this statute of compassing the king's death, and yet the overt-act is an assembly to levy war, and actual levying of war. 2. Altho this indictment is not expressly upon this clause of levying of war, for that is not the principal charge of the indictment, but compassing the king's death, yet the marching with a great army to *St. Giles's modo guerrino arraiati* was an express levying of war, tho there were no blow yet struck.[7] But 3. it seems their first meeting to contrive their coming to *St. Giles's*, tho it might be an overt-act to compass the king's death, and so treason within the first clause of the statute, yet was not an actual levying of war, and so not treason within that clause of the statute; but their actual marching in a body *modo guerrino & modo insurrectionis* might be a levying of war within the statute. 4. That actual levying of war, tho it be a treason, upon which *Oldcastle* might have been indicted, yet it was also an overt-act to serve an indictment for compassing the king's death, as hath been shewed at large before.

If there be an actual rebellion or insurrection, it is a levying of

(u) The author of the trial of Sir *John Oldcastle* says, that this sentence was in pursuance of an act of parliament, which appointed that punishment in those cases. See *State Tr. Vol. I. p. 49.*

war within this act; and by the name of levying of war it must be expressed in the indictment. *Co. P. C. p. 10.*

And in *Anderson's Rep. part 2 n. 2.* after *Trinity-term 37 Eliz. (x)* before the two chief justices, master of the rolls, baron *Clerk* and *Ewens*, the case was, that divers apprentices of *London* and *Southwark* were committed to prison for riots, and for making proclamation concerning the prices of victuals; some whereof were sentenced in the star-chamber to be set in the pillory and whipt; after which divers other apprentices and one *Grant* of *Uxbridge* conspire to take and deliver those apprentices out of ward, to kill the mayor of *London*, and to burn his house, and to break open two houses near the *Tower*, where there were divers weapons and arms for three hundred men, and there to furnish themselves with weapons; after which divers apprentices devised libels, moving others to take part with them in their devices, and to assemble themselves at *Bun-* [145] *hill* and *Tower-hill*; and accordingly divers assembled themselves at *Bun-hill*, and three hundred at the *Tower*, where they had a trumpet, and one that held a cloak upon a pole in lieu of a flag, and in going towards the lord mayor's house the sheriffs and sword-bearer with others offered to resist them, against whom the apprentices offered violence.

And it was agreed by the judges referees, that this was treason within the statute of 13 *Eliz.* for intending to levy war against the queen; for they held, that if any do intend to levy war for any thing, that the queen by her laws or justice ought or may do in government as queen, that shall be intended a levying of war against the queen; and it is not material, that they intended no ill to the person of the queen, but if intended against the office and authority of the queen, to levy war, this is within the words and intent of the statute, and hereupon *Grant* and divers others were indicted and executed.

And *eodem libro n. 49. (y)* the case of *Burton* mentioned by my lord *Coke, P. C. p. 10.* is reported, viz. in the county of *Oxford* divers persons conspire to assemble themselves, and move others to rise and pull down inclosures, and to effect it they determined to go to the lord *Norris's* house and others, to take their arms, horses, and other things, and to kill divers gentlemen, and thence to go to *London*, where they said many would take their parts; and this appeared by their confessions: and it was agreed, 1. That this was treason within the statute of 13 *Eliz.* for conspiring to levy war against the queen. 2. But not within the statute of 25 *E. 3.* because no war was levied, and that statute extended not to a conspiracy to levy war.

Nota; in both these cases there was a conspiring to arm themselves as well as to assemble, which had they effected and so assembled *more guerrino*, it had been a war levied, and by construction and interpretation a war levied against the queen.

If any with weapons invasive or defensive doth hold and [146] defend a castle or fort against the king and his power, this is

(x) 2 *And. 4.*

(y) 2 *And. 66.*

a levying of war against the king within this act. *Co. P. C. p. 10.*
Vide the statute 13 Eliz. cap. 1 & dicta ibid postea.

There is a great difference between an insurrection upon the account of a civil interest and a levying of war.[8]

A. recovers possession against *B.* of a house, &c. in a real action, or in an *ejectione firmæ*, and a writ of seisin or possession goes to the sheriff, *B.* holds his house against the sheriff with force, and assembles persons with weapons for that purpose, who keep the house with a strong hand against the sheriff, tho assisted with the *posse comitatus*: this is no treason either in *B.* or his accomplices, but only a great riot and misdemeanor; the like is to be said touching a man that keeps possession against a restitution upon an indictment of forcible entry.

But if *B.* either fortifies his own house or the house of [*142] another with weapons defensive or invasive purposely to make head against the king and to secure himself against the king's regal army or forces, then that is a levying of war against the king.

But the bare detaining of the king's castles or ships seems no levying of war within this statute: *vide infra 13 Eliz. cap. 1 & dicta ibidem.*[9]

If the king's lieutenant in a time of hostility or rebellion within the realm be assaulted upon their march or in their quarters as enemies, this is a levying of war; but if upon some sudden falling out or injury done by the soldiers, the countrymen rise upon them and drive them out, this may be a great riot, and if any be killed by the assailants it is felony in them; but this seems not a levying of war against the king, unless there be some traitorous design under the cover of it: and *claus. 26 E. 3. m. 24.* it appears, that an open resistance of the justices of *oyer* and *terminer* in the county of *Surrey*, viz. *resistendo justiciariis, & ipsos justiciarios, quo minus contenta in commissione nostrâ eis inde facta exequi & facere potuerunt, impediendo*, was felony, and the offenders were executed for the same as felons.

I shall conclude this matter with a consultation of the [*143] judges, where I was present. All the judges except *J. Windham* and *J. Atkins* were assembled by my lord keeper, *September 1675.* to consider of this case, as it was stated in writing by the attorney general in manner following:

"A great number of the weavers in and about *London* being offended at the engine-looms (which are instruments, that have been used above these sixty years,) because thereby one man can do as much in a day, as near twenty men without them, and by consequence can afford his ribbands at a much cheaper rate, after attempts in parliament and elsewhere to suppress them did agree among themselves to rise and go from house to house to take and destroy the engine-

[8] Carrying off or destroying the king's stores, provided for the defence of the kingdom, if done in conjunction with, or in aid of rebels or enemies, will be treason; but *secus*, if done only for lucre, or some private malicious motive. 1 *East, P. C. 66.*

[9] "That case is denied," per *Marshall, C. J. 2 Burr's Trial, 224.* It is denied by *East, P. C. 1 vol. 68.* See also *Fost. 219.*

looms; in pursuance of which they did on the 9th, 10th, and 11th of this instant *August* assemble themselves in great numbers at some places to an hundred, at others to four hundred, and at others, particularly at *Stratford-Bow* to about fifteen hundred.

“They did in a most violent manner break open the houses of many of the king’s subjects, in which such engine-looms were, or were by them suspected to be, they took away the engines, and making great fires burnt the same, and not only the looms, but in many places the ribbands made thereby, and several other goods of the persons whose houses they broke open; this they did not in one place only, but in several places and counties, *viz. Middlesex, London, Essex, Kent, and Surrey*, in the last of which, *viz. at Southwark* they stormed the house of one *Thomas Bybby*, and tho they were resisted and one of them killed and another wounded, yet at last they forced their way in, took away his looms and burnt them; the value of the damage they did, is computed to several thousand pounds.

“This they did after several proclamations made and command given by the justices of peace and the sheriffs of *Middlesex* to depart, but instead of obeying they resisted and affronted the magistrates and officers: It is true they had no war-[*144] like arms, but that was supplied by their number, and they had such weapons, as such a rabble could get, as staves, clubs, sledges, hammers, and other such instruments to force open doors.

“There was this further evil attending this insurrection, that the soldiers and officers of the militia were so far from doing their duty in suppressing them, that some, tho in arms and drawn up in companies, stood still looking on while their neighbours houses were broken open and their goods destroyed, others encouraged them, and others, to whose custody some of the offenders, who were taken, were committed, suffered them to escape, so that during all the time of the tumult little or nothing was done to suppress them, until the lords of the council were constrained at a time extraordinary to assemble, by whose directions and orders as well to the civil magistrates, as to the king’s guards, they were at last quieted.”

Five of the judges seemed to be of opinion that this was treason within the act of 25 *E. 3.* upon the clause of levying war against the king, or at least upon the clause of the statute of 13 *Car. 2. cap. 1.*[10.]

1. In respect of the manner of their assembling, who, tho they had no weapons or ensigns of war, yet their multitudes supplied that defect, being able to do that by their multitudes, which a lesser number of armed men might scarce be able to effect by their weapons; and besides, they had staves, and clubs, and some hammers or sledges to break open houses, and accordingly they acted by breaking open doors and burning the engine-looms and many of the wares made by them.

2. In respect of the design itself, which was to burn and destroy

not the single engine-loom of this or that particular person, but engine-loom in general, and that not in one county only, [*145] but in several counties, and so agreeable to *Burton's* case.

The other five judges were not satisfied, that this was treason within the clause of 25 *E. 3.* against levying of war, nor within the statute of 13 *Car. 2.* for conspiring to levy war.

1. It was agreed, that if men assemble together and consult to raise a force immediately or directly against the king's person, or to restrain or depose him, whether the number of the persons were more or less, or whether armed or unarmed, tho this were not a treason within this clause of the statute of 25 *E. 3.* yet it was treason within the first clause of compassing the king's death, and an overt-act sufficient to make good such an indictment, tho no war was actually levied; and with this accord the resolutions before cited, especially that of the insurrection in the north at *Farley* wood;(*) but no such conspiracy or compassing appears in this case, and so that is not now in question, but we are only upon a point of constructive or interpretative levying of war.

2. Here is nothing in this case of any conspiring to do any thing, but what they really and fully effected; they agreed to rise in multitudes to burn the looms, and accordingly they did it, but nothing of conspiring against the safety of the king's person, or to arm themselves; therefore if what they did were not a levying of war against the king within the statute of 25 *E. 3.* here appears no conspiring to levy such war within the statute of 13 *Car. 2. cap. 1.* for, for what appears, all was done, which they conspired to do.

3. It seemed very doubtful to them, whether in the manner of this assembling it was any levying of war, or whether it were more than a riot, for in all indictments of this kind for levying of war [*146] it is laid, that they were *more guerrino arraiati*, and upon the evidence, that they were assembled in a posture of war *armis offensivis & defensivis*, and sometimes particular circumstances also proved or found, as banners, trumpets, drums, &c. and where they were indicted for conspiring only to levy war, yet there was this circumstance accompanied it, *viz.* a confederacy to get arms and arm themselves, as in *Grant's* case, and *Burton's* case.

4. It seemed very doubtful to them, whether this design to burn engine-loom were such a design, as would make it a levying of war against the king,*[11] for it was not like the designs of altering

(*) *Vide supra* p. 120.

* By 12 *Geo. 1. cap. 34.* "If any person shall wilfully break any tools used in the woollen manufacture, not having the consent of the owner, or shall break or enter by force into any house or shop by night or by day for such purpose, he shall be adjudged guilty of felony without benefit of clergy.

[11] By the 7 & 8 *Geo. 4. c. 30. s. 3.* it is made felony, punishable with transportation or imprisonment, to damage or destroy any silk, woollen, linen, or cotton goods, being in the loom or frame, &c. or to destroy or damage any loom, frame, machine, &c. or to enter by force into any house, shop, building, &c. with intent to commit any of the said offences. *R. v. Tacey, R. & R. C. C. 452.* *R. v. Hill, id. 483.* *R. v. Ashton, 2 B. & Ad. 750.*

religion, laws, pulling down inclosures generally, as in *Burton's* case, nor to destroy any trade, but only a particular quarrel and grievance between men of the same trade against a particular engine, that they thought a grievance to them, which, tho it was an enormous riot, yet it would be difficult to make it treason. *Vide statutes* 8 *H. 6. cap. 27.* 9 *H. 6. cap. 5.*(†)

Many of them therefore concluded, that if Mr. Attorney should think fit to proceed as for a treason, the matter might be specially found and so left to farther advice, or rather that according to the clause of the statute of 25 *E. 3.* the declarative judgment of the king and both houses of parliament might be had, because it was a new case and materially differed from other cases of like nature formerly resolved.

Upon the conclusion of this debate we all departed, and Mr. Attorney upon consideration of the whole matter, it seems, thought fit to proceed for a riot, and caused many of them to be indicted for riots, for which they were convicted and had great fines set upon them, and were committed in execution and adjudged to stand upon the pillory.

Touching the laws of treason in *Ireland*, by the statute of [147] 18 *H. 6. cap. 3.* levying horse or foot upon the king's subjects against their will shall be treason; this they call cessing of soldiers upon men, and hath been often done by the lieutenants or deputies of *Ireland* by consent of the council in some cases.

Among many cumulative treasons charged upon the late earl of *Strafford* the king's deputy in *Ireland*, this one thing of cessing of soldiers upon the king's subjects in *Ireland* was the chief particular treason charged upon him.

It was insisted upon for the earl's defence, that by the statute of 10 *H. 7.* in *Ireland, cap. 22.* called *Poyning's law*, all the statutes of *England* are at once enacted to be observed in *Ireland*; and therefore the statute of 25 *E. 3.* declaring treasons, and the statute of 1 *H. 4. cap. 10.* enacting, that nothing shall be treason but what was within that statute, the treasons enacted in *Ireland* in the time of *H. 6.* and afterwards before 10 *H. 7.* were repealed, and consequently this statute of 18 *H. 6. cap. 3.*

But that seems not to be so, for the general introduction of the statutes of *England* being an affirmative law could not be intended to take away those particular statutes, that were made in *Ireland* for the declaring of treason, as this and that also of the same year, *cap. 2.* for taking *Comericke.*(z)

But surely this was no levying of war within this statute,(a) either in respect of the matter itself or of the person that did it, he being

(†) Concerning the riots committed by the *Welsh* upon the dragmen of *Severn*, *vide infra*, p. 151.

(z) That is, for taking thieves, robbers, or rebels into safeguard.

(a) Tho this were not levying of war, yet being cessing of soldiers upon the subject, it was treason within the express words of that statute; nor does our author assign any reason, why an act of lord deputy and council is not within the penalty of that law. See *Camd. Elis.* p. 219.

the king's lieutenant, neither could an act by the lord deputy and council of this nature be construed to be within the penalty of this act, if it were in force; yet for this and other cumulative treasons he was attainted by act of parliament, but that attainder was very justly repealed by the statute of 14 *Car.* 2.

Now I shall draw out some observations and conclusions [148] from the precedents and instances before given touching this obscure clause of levying war against the king.

1. A conspiracy or confederacy to levy war against the king is not a levying of war within this clause of the statute of 25 *E.* 3. for this clause requires a war actually levied. *Co. P. C.* p. 10.

And this appears *first* by those temporary laws, that were made to continue during the king's or queen's life, which made conspiring to levy war with an overt-act evidencing such conspiracy to be treason, as the statutes of 1 & 2 *Ph. & M.* cap. 10. 13 *Eliz.* cap. 1. and 13 *Car.* 2. cap. 1. and *secondly* by the resolution of the judges in the case of *Burton* 39 *Eliz.* cited by my lord *Coke*, *P. C.* p. 9, 10. [12].

2. That yet such a conspiracy or compassing to levy war against the king directly or against his forces, and meeting and consulting for the effecting of it, whether the number of the conspirators be more or less, or disguised under any other pretence whatsoever, as of reformation of abuses, casting down inclosures particular or generally, nay of wrestling, football-playing, cock-fighting; yet if it can appear, that they consulted or resolved to raise a power immediately against the king, or the liberty or safety of his person, this congregating of people for this intent, tho no war be actually levied, is an overt-act to maintain an indictment, for compassing the king's death within the first clause of the statute of 25 *E.* 3. for it is a kind of natural or necessary consequence, that he, that attempts to subdue and conquer the king, cannot intend less than the taking away his life; and indeed it hath been always the miserable consequence of such a conquest, as is witnessed by the miserable tragedies of *E.* 2. and *R.* 2. and this was the case of *Oldcastle* and *Essex*.

3. That yet conspiring to levy war, (*viz.* to do such an act, which if it were accomplished and attained its end would be an actual levying of war) and being accompanied with an overt-act evidencing it, (tho it be not treason within this clause of the act of 25 *E.* 3.) yet was treason during the queen's life by the statute of 13 [149] *Eliz.* cap. 1. and is treason at this day by the statute of 13 *Car.* 2. cap. 1. during the life of our now sovereign.

But then the overt-act (be it speaking, writing, or acting) required by these statutes to evidence the same must be specially laid in the indictment, and proved upon the evidence: thus in *Grant's* case and *Burton's* case the conspiring to fetch arms at the houses therein mentioned was an overt-act proving this conspiracy to levy war.

4. That a levying of war with all the circumstances imaginable to

[12] And the Act of 36 *Geo.* 3. c. 7. which was to continue in force during the king's life.

give it that denomination, as *cum vexillis explicatis, cum multitudine gentium armatarum & modo guerrino arraiat*, yet if it be upon a mere private quarrel between private, tho great persons, or to throw down the inclosures of such a manor or park, where the party tho without title claims a common, or upon dispute concerning the propriety of liberties or franchises, this, tho it be in the manner of it a levying of war, yet it is not a levying of war against the king, tho bloodshed or burning of houses ensue in that attempt, but is a great riot, for which the offenders ought to be fined and imprisoned; [13] and if any be killed by the rioters in the riot, it may be murder in the assailant.

This was the case of the earls of *Gloucester* and *Hereford*, anno 20 *E. 1.* tho before the statute of 25 *E. 3.* and the several great riots above-mentioned, to which we may add *Rot. Parl.* 50 *E. 3. n.* 140, 164. 11 *H. 4. n.* 36, 57. 13 *H. 4. n.* 14. 18 *H. 6. n.* 30.

5. An actual levying of war therefore against the king to make a treason, for which the offender may be indicted upon this clause of the statute for levying of war against the king, consists of two principal parts or ingredients, *viz.* 1. It must be a levying of war. 2. It must be a levying of war against the king.

6. What shall be said a levying of war is partly a question of fact, for it is not every unlawful or riotous assembly of many persons to do an unlawful act, tho *de facto* they commit the act they intend, that makes a levying of war, for then every riot would be treason, and all the acts against riotous and unlawful assemblies, as 13 *H. 4. cap.* 7. 2 *H. 5. cap.* 8. 8 *H. 6. cap.* 14. and many more (b) had been vain and needless; but it must be such an assembly as carries with it *speciem belli*, as if they ride or march *vexillis explicatis*, or if they be formed into companies, or furnished with military officers, or if they are armed with military weapons, as swords, guns, bills, halberds, pikes, and are so circumstanced, that it may be reasonably concluded they are in a posture of war, which circumstances are so various, that it is hard to define them all particularly.

Only the general expression in all the indictments of this nature, that I have seen, are *more guerrino arraiati*, and sometimes other particulars added as the fact will bear, as *cum vexillis explicatis, cum armis defensivis & offensivis, cum tympanis & tubis*: but altho it be a question of fact, whether war be levied or conspired to be levied, which depends upon evidence, yet some overt-act must be shewn in the indictment, upon which the court may judge; and this is usually *modo guerrino arraiati*, or *armati*, or conspiring to get arms to arm themselves.

And therefore in the cases of *Burton* and *Grant* before-mentioned, who were indicted and convicted upon the statute of 13 *Eliz.*

(b) See 3 & 4 *Edw. VI. cap.* 5. 1 *Mar. cap.* 12. 1 *Geo. I. cap.* 5.

cap. 1. for conspiring to levy war for pulling down inclosures, &c. there is not only a conspiracy to do the thing, but also to gain arms and weapons at the lord *Norris's* house, and elsewhere to arm themselves for that attempt.

And the reason hereof seems to be, because, when an assembly of people thus arm themselves, it is a plain evidence, that they mean to defend themselves, and make good their attempts by a military force, and to resist and subdue all power, that shall be used to suppress them; and besides, the very use of weapons by such an assembly without the king's licence, unless in some lawful and special cases, carries a terror with it, and a presumption of warlike force, and therefore under a distinct and special restraint by the statute of *Westminst.* 2.(c) and the statute(d) of 7 *E.* 1. *de defensione portandi arma.*

7. Whether the bare assembling of an enormous multitude for doing of these unlawful acts without any weapons, or being *more guerrino arraiati*, especially in case of interpretative or constructive levying of war, be a sufficient overt-act to make a levying of war within this act, especially if they commit some of these acts themselves, is very considerable and seems to me doubtful. 1. Because I have not known any such case ruled. 2. Because the acts of 3 & 4 *Ed.* 6. *cap.* 5. and 1 *Mar.* *cap.* 12. (which must be intended of such unarmed assemblies) makes it in some cases felony, in some cases only misdemeanor. 3. Because it is very difficult to determine what that number must be, that must make treason, and less than which must be only a riot; this therefore should be well considered, and the direction of the statute of 25 *E.* 3. to expect the declaration of parliament in like cases is a safe direction, and so much the rather, because the statutes of *E.* 6. and queen *Mary* seem to look the other way,(e) to which may be added the great riots committed by the foresters and *Welsh* upon the dragmen of *Severn*, hewing all their boats to pieces, and drowning the bargemen in a warlike posture. *Rot. Parl.* 8 *H.* 6. n. 30, 45. 9 *H.* 6. n. 37. upon which the statute of 9 *H.* 6. *cap.* 5. was made: I forbear therefore any opinion herein.

8. But whether the assembly were greater or less, or armed or not armed, yet if the design were directly against the king, as to do him bodily harm, to imprison, to restrain him, or to offer any force or violence to him, it will be treason within the first clause of compassing the king's death, and this assembling and consulting or practising together to this purpose, tho of but two or three, will be an overt-act to prove it; therefore all the question will be [152] only touching interpretative or constructive levying of war, whereof hereafter.

(c) I don't find any thing to this purpose in the statute of *Westminst.* 2. so suppose the statute here meant is the statute of *Northampton* 2 *E.* 3. *cap.* 3. whereby it is prohibited that any one bring force in affray of the people, or go armed by night or by day. See *Co. P. C.* p. 158 & 160. *F. N. B.* p. 552.

(d) Or rather proclamation; see the beginning of this chapter.

(e) As does also 1 *Geo.* 1. *cap.* 5.

9. If there be war levied as is above declared, viz. an assembly *more guerrino arraiati*, and so in the posture of war for any treasonable attempt; this is *bellum levatum*, tho not *bellum percussum*: and thus far touching the levying of war, as in relation to the manner of it.

10. But besides the circumstances requisite to denominate a levying of war in respect to the manner of it, there is also requisite to make a treason within this clause, that it be a levying of war *against the king*, which is the scope, end and termination thereof, for, as hath been said, there may be a levying of war between private persons upon private quarrels, which is not a levying of war against the king, and so not treason within this clause of this act.

11. A levying of war against the king therefore is of two kinds, either expressly and directly, or by way of interpretation, construction or exposition of this act: the former is, when a war is levied against the person of the king, or against his general, or army by him appointed, or to do the king any bodily harm, or to imprison him, or to restrain him of his liberty, or to get him into their power, or to enforce him to put away his ministers, or to depose him; many instances of this kind may be given, such as was in truth the riding of the earl of *Essex* into *London* armed with swords and pistols, his soliciting of the citizens to go with him to court to remove from the queen her ministers and counsellors, his fortifying of his house against the queen's officers, which were in truth a levying of war, tho his indictment was upon the first clause of compassing the queen's death, which was more clearly included within these actions.

12. Constructive or interpretative levying of war is not so much against the king's person, as against his government: if men assemble together *more guerrino* to kill one of his majesty's privy council, this hath been ruled to be levying of war against the king. *P. 16 Car. 1. Cro. 583. Bensted's case* before cited, and accordingly was the resolution of the house of lords 17 *R. 2. Talbot's case* above-mentioned.

So in the case mentioned by my lord *Coke* in the time of *H. 8. Co. P. C. p. 10.* levying war against the statute of [153] *Labourers*[14] and to inhanse servants wages was a levying of war against the king; and altho levying of war to demolish some particular inclosures is not a levying of war against the king, *Co. P. C. p. 9.* yet if it be to alter religion established by law, or to go from town to town generally to cast down inclosures, or to deliver generally out of prison persons lawfully imprisoned, this hath been held to be levying of war against the king within this act, and the conspiring to levy war for those purposes treason within that clause of the act of 13 *Eliz. cap. 1.* as was resolved in *Burton's case* and *Grant's case* above-mentioned; and the like resolution

[14] *Hawk. c. 17. s. 25. Post. 211. Lord George Gordon's case, 21. Cobbett's St. Tr. 485. Dougl. 590. A Bl. Com. 81.*

was in the case of the apprentices that assembled *more guerrino* to pull down bawdy-houses.

It is considerable how these resolutions stand with the judgment of parliament in 3 & 4 *Ed. 6. cap. 12.* which makes special provisions to make assemblies above twelve to alter the laws and statutes of the kingdom, or the religion established by law, or if above forty assemble for pulling down inclosures, burning of houses, or stacks of corn, treason, if they departed, not to their homes within an hour after proclamation, or after proclamation put any of these designs in practice, which is nevertheless reduced to felony within clergy by the statute of 1 *Mar. sess. 2. cap. 12.* These offenses being the same with those adjudged treason in *Burton's* case and some others before cited, why was it thought necessary for an act of parliament 3 & 4 *Ed. 6.* to make it treason under certain qualifications, and why reduced to felony within clergy by the statute of 1 *Mar. cap. 12.* and the statute of 3 & 4 *E. 6.* repealed? It seems that altho the unlawful ends of these assemblies thus punished by 3 & 4 *Ed. 6.* and 1 *Mar.* were much the same with those of *Burton* and *Grant* and others, that were adjudged treason, yet the difference between the cases stood not in that, but in the manner of their assembly; those that were adjudged treasons in *Burton's* and *Grant's* case were, because it was a conspiracy to arm themselves and levy a war *more guerrino*.

But those, that were thus heightened to treason by 3 & 4 [154] *E. 6.* and reduced to felony by 1 *Mar.* were not intended of such, as were *more guerrino arraiati*, nor a levying of war, tho their multitudes were often great, and tho they they did put in ure the things they conspired to effect, and so were but great riots and not levying war within this clause of 25 *E. 3.* and therefore those acts inflicted a new and farther punishment on them.

III. *En son realme*: hitherto it hath been said what is a levying of war; we are now to consider the place, *En son realme*.

The realm of *England* comprehends the narrow seas, and therefore if a war be levied upon those seas, as if any of the king's subjects hostilely invade any of the king's ships, (which are so many royal castles) this is a levying of war within his realm, for the narrow seas are of the ligeance of the crown of *England*: *vide Selden's Mare clausum*.

And this may be tried in the county next adjacent to the coast by an indictment taken by the jurors for that county before special commissioners of *oyer and terminer, de quo vide infra*, and in the chapter of piracy: *vide 5 R. 2. Trial 54.*

It is true, before the statute of 28 *H. 8. cap. 15.* those treasons were usually inquired and tried by special commission, wherein the admiral and his lieutenant were named, as likewise other felonies committed upon the sea.

But divers instances were in the time of *E. 3.* whereby such offenses upon the sea were punished as treason or felony in the king's bench. 40 *Ass. 25.* A *Norman* captain of a ship robs the king's

subjects upon the sea, he being taken was hanged as a felon, but the *English* that assisted him were drawn and hanged as traitors; and by the statute of 28 *H. 8. cap. 15.* there is a direction of a special commission to try them in such counties or places as shall be assigned by such commission according to the method of trials of such offenses at the common law, but before that statute they might be tried by special commission at the common law, and according to the course of the common law; but of this *alibi in tractatu de Admiraltate.*

For treasons and other capital offenses in *Scotland* there is a provision made by the statute of 4 *Jac. cap. 1* and 7 *Jac. [155] cap. 1.*

Ireland, tho part of the dominions of the crown of *England*, yet is no part of the realm of *England*, nor *infra quatuor maria*, as hath been ruled *temp. E. 1. Morrice Howard's case*: the like is to be said for *Scotland* even while it was under the power of the crown of *England*, as it was in sometimes of *E. 1.* and some part of the time of *E. 3. 8 Rich. 2. Continual claim 13.*

For *Ireland* hath the same laws for treason that *England*, tho it hath some more; yet for a levying war, or other treason in *Ireland* the offender may be tried here in *England* by the statute of 35 *H. 8. cap. 2.* for treasons done out of the realm, as was resolved in the case of *O-Rork, H. 33. Eliz. (*)* and after that in *Sir John Perrot's case, (f) Co. P. C. p. 11. 7 Co. Rep. Calvin's case, 23. a.*

In the case of the lord *Macguire (g)* an *Irish* peer, who was indicted in *Middlesex* for high treason for levying war again the king in *Ireland*, he pleaded to the indictment, that he was one of the peers and lords of parliament in *Ireland*, and demanded judgment, if he should be arraigned in *England* for a treason committed in *Ireland*, whereby he should lose the benefit of trial by his peers; but it was resolved, 1. That for a treason in *Ireland* a man may be tried here in *England* by the statute of 35 *H. 8.* for it is a treason committed out of the realm. 2. That altho *Macguire*, if tried in *Ireland* for his treason, should have had his trial by his peers, as one of the lords in parliament, which he cannot have here, but must be tried by a common jury, yet that altered not the case; he was therefore put upon his trial by a *Middlesex* jury, and was convicted and had judgment, and was executed. *H. 20 Car. 1. B. R.* so that the opinion 20 *Eliz. Dy. 360. b.* was ruled no law: *vide Co. Litt. 261.*

And the same that is said of *Ireland* may be said in all particulars of the isle of *Man, Jersey, Guernsey, Sark,* and [156] *Alderney*, which are parcel of the dominions of the crown of *England*, but not within the realm of *England* as to this purpose concerning treason; yet they have special laws of their own applicable to criminals and jurisdiction for their trials: as touching treason committed in *Wales* before the statute of 26 *H. 8. cap. 6.* no treason,

(*) *Camd. Eliz. p. 458.*

(f) See his trial in *State Tr. Vol. I. p. 181.*

(g) *State Tr. Vol. I. p. 928.*

murder, or felony committed in *Wales* was inquirable or triable before commissioners of *oyer* and *terminer*, or in the king's bench in *England*, but before justices or commissioners assigned by the king in those counties of *Wales* where the fact was committed. *P. 2 H. 4. Rot. 18. Salop'*: "*Johannes Kynaston* indictatus fuit quod ipse consentiens fuit ad falsam & proditionem insurrectionem *Oweyn Glyndour* & aliorum *Wallicorum*, & sciens de toto proposito eorundem; qui proditione combusserunt villas de *Glyndour Dynby*, &c. & quod proditione misit *Johannem* filium suum bene armatum & arraiatum pro guerra & *Willelmum Hunte* sagittarium ad prædictum *Oweyn* & exercitum *Wallicorum*, &c. dicit quod prædictæ villæ, in quibus supponitur proditiones prædictas factas fuisse, sunt infra terram *Walliæ* & extra corpus com' *Salop'* & legem terræ *Angliæ*, unde non intendit quod dominus rex de proditionibus prædictis in hoc casu ipsum impetire velit, seu ipsum ponere velit inde responsurum, & quia plenarie & certitudinaliter testificatum est, quod prædictæ villæ sunt infra terram *Walliæ* & extra corpus comitatus *Salop'* & legem terræ *Angliæ*, & *Thomas Covele* attornatus ipsius regis coram ipso rege inde examinatus hoc non dedicit, & sic justiciarii ad inquirendum de proditionibus prædictis infra *Walliam* factis virtute commissionis prædictæ inquirere minimè potuerunt nec proditiones prædictæ sic in terrâ *Walliæ* factæ per legem terræ *Angliæ* triari nec terminari possunt, consideratum est, quod quoad prædictas proditiones prædictus *Johannes Kynaston* eat inde quietus, &c." But it is true by the statute of 26 *H. 8. cap. 6.* counterfeiting of coin, washing, clipping or minishing of the same, felonies, murders, wilful burnings of houses, manslaughters, robberies, burglaries, rapes, and accessaries of the same and other offenses feloniously done [157] in *Wales*,^(h) or any lordship marcher may be inquired of, heard and determined before the justices of gaol-delivery and of the peace and every of them in the next adjacent county: this act is confirmed by the great statute of *Wales* 34 & 35 *H. 8. cap. 26.* which settles the grand sessions and justices thereof, and gives the justices of the grand sessions power to hold all manner of pleas of the crown, and to hear and determine all treasons, felonies, &c. within the precinct of their commissions, as fully as the court of king's bench may do in their places within the realm of *England*; so that as to those offenses enumerated in the statute of 26 *H. 8.* the justices of gaol-delivery in the adjacent counties, viz *Gloucester, Hereford, Salop* and *Wigorn*, had thereby a concurrent jurisdiction with the justices of the grand session.⁽ⁱ⁾

But whether the statute of 26 *H. 8.* extended to treason for compassing the king's death or levying of war,^(k) or whether the same

^(h) For this act extends to all the antient counties of *Wales*, as well as the lordships marchers; and so it was resolved in *Altloe's* case for a murder in *Pembrokeshire*. *T. 9 Geo. I. B. R.*

⁽ⁱ⁾ 1 *Mod.* 64, 68.

^(k) It should seem that it did not, and that was one reason of making the statute of 32 *H. cap. 4.* whereby all treasons or misprisons of treasons committed in *Wales* may be presented and tried in such shires and before such commissioners as the king shall appoint, in like manner as if the facts had been committed in such shires.

remained only triable by the justices of the grand sessions, seems doubtful, and the rather, because that statute is not construed by equity, and therefore it extends not to an appeal of murder in an adjacent county, and so it was adjudged *Hil. 7 Car. B. R. Semly and Price*; (l) but at this day 26 *H. 8. cap. 6.* stands repealed by 1 & 2 *Ph. & M. cap. 10.* as to the trials of treason. (m)

It is true, that in other criminal causes, that are not capital, as in cases of indiotments of riots, they may be removed by *certiorari* into the king's bench, and when issue is joined they may be tried in the next *English* county; *T. 16 Jac.* Sir *John Carew's* case (n) and divers others, as well as in a *quo minus*, which is at the king's suit: but whether a *certiorari* lies into *Wales* upon an [158] indictment of treason or felony hath been doubted *M. 9*

Car. B. R. Chedley's case: (o) it seems a *certiorari* may issue for a special purpose, as to quash the indictment for insufficiency or to plead his pardon, but not as to trial of the fact, (p) but it shall be sent down by *mittimus* according to the statute of 6 *H. 8. cap. 6.* because it is in a manner essential for felony or treason, to be tried in the proper county, unless where a statute particularly enables it, which it did in the case of 26 *H. 8.* only whilst it was in force, where the indictment as well as the trial is in the adjacent county.

But certainly *Wales* is within the kingdom of *England*, (q) and therefore not within the statute of 35 *H. 8. cap. 2.* for trial of foreign treasons.

If a felony or treason be committed in *Durham*, a *certiorari* lies to remove it into the king's bench out of *Durham* directed to the justices of peace, *oyer* and *terminer*, or gaol-delivery there; for since the statute of 27 *H. 8. cap. 24.* they are all made by the king's commission, and so the proceedings before them are his own suit, and thus it was done in *Ruttabie's* case (r) upon debate; but if the party plead not guilty it shall be sent down thither to be tried, as was done in that case. *T. 1653.* They of *Durham* claim a privilege not to be sworn out of the precinct of the county palatine. *Vide* the statute of 2 *H. 5. cap. 5.* 9 *H. 5. cap. 7.* 11 *H. 7. cap. 9.* for treasons and felonies in *Tindal* and *Hexamshire*. [15]

(l) *Cro. Car.* 247. *W. Jones* 255.

(m) The 1 & 2 *Ph. & M.* reducing all trials for treason to the order and course of the common law is a virtual repeal of 26 *H. 8.* and by the same reason of 32 *H. 8.* also as to treason.

(n) *Cro. Jac.* 484. 2 *Roll.* 28. 1 *Roll. Abr.* 394.

(o) *Cro. Car.* 331.

(p) But yet it has been done in felony as to the trial of the fact, as in the case of *Morris* 1 *Ven.* 93, 146. *Herbert's* case, *Latch.* 12.

(q) 2 *Roll.* 28.

(r) *Vide infra*, p. 467. and *Part II.* p. 212.

[15] As to the place at which the accused is to be tried, the Constitution of the *United States*, (*Art. 3. Sect. 2, c. 3.*) provides that the trial shall be held in the State where the crime shall have been committed; but, when not committed within any State, the trial shall be at such place or places as Congress may by law have directed. By *sect. 29th* of the Act of Congress of 24th Sept. 1789. *Sess. 1. ch. 20.* in cases punishable with death, the trial shall be held in the county where the offence was committed, or when that can-

And thus far concerning treason in levying of war against the king.[16]

not be done without great inconvenience, twelve petit jurors at least shall be summoned from thence. By the 8th. sect. of the Act of 30th April, 1790, if any person shall commit upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular State, any offence which if committed within the body of a county, would by the laws of the United States be punishable with death, &c., the trial shall be in the district where the offender is apprehended, or into which he may be first brought. See *Ex parte Bollman v. Swartwout*, 4 Cranch. 136. *Serg. on Cons.* 246.

There seems to have been no regular mode at common law for the trial of treasons committed out of the realm. It is said that if the court remove into a different county from that wherein the indictment was found, the trial must still be by jurors returned from the first county, agreeable to the rules of the common law. 1 *East. P. C.* 103.

[16] Levying of war, under the statute of *Edw. 3.* is either direct, or constructive. Direct, when it is levied against the person of the king; to dethrone, or imprison him, or to get possession of his person, or to oblige him to alter his measures of government, or to remove evil counsellors, &c., and this, whether attended with the pomp and circumstance of open war or no. And every conspiracy to levy war for these purposes, though not treason within the clause of levying war, is yet an overt act within the other clause of compassing the king's death. *Fost.* 210. *Ante*, 131. *Hawk. c. 17. s. 23. Arch. C. P.* 463. 1 *East, P. C.* 66. In case of war levied directly against the king, all persons assembled and marching with the rebels are guilty of treason, whether they are aware of the purpose of the assembly, or aid and assist in committing acts of violence or not. *R. v. The Earls of Essex and Southampton, Moor*, 621; unless compelled to join and continue with them *pro timore mortis. Ante*, 139. 3 *Ins.* 10. *Fost.* 13. 216. But in the case of a constructive levying of war, those only of the rabble who actually aid and assist in doing those acts of violence which form the constructive treason are traitors; the rest are merely rioters. See *R. v. Messenger et al. Kel.* 70. 79. 1 *Sid.* 358, 2 *St. Tr.* 585. 594. *R. v. Green & Beddell, O. B.* 20 *Car.* 2.

Constructive levying of war is levelled, not against the king's person, but against his royal majesty, or government. *Ante*, 152. *Fost.* 211. 1 *East P. C.* 72. This is when an insurrection is raised to reform some national grievance, to alter the established law, or religion, to punish magistrates, to introduce innovations of a public concern, to obstruct the execution of some general law by an armed force, or for any other purpose which usurps the government in matters of a public and general nature; also, assembling together for the purpose of destroying all meeting houses, all bawdy houses, all enclosures, &c., or to reduce by force the general price of victuals, to enhance the common rate of wages, to expel all foreigners, to release all prisoners, or to reform by numbers or an armed force any real or imaginary grievance of a public and general nature, in which the insurgents have no peculiar interest. 1 *East, P. C.* 73. But a rising for the purpose of throwing down the enclosures of a particular manor, park, common, &c., or to remove a local nuisance, to release a particular prisoner, unless imprisoned for treason, or even to oppose the execution of an act of parliament, if it only affect the district of the insurgents, as in the case of a turnpike act, is not treason; nor is a private quarrel between subject and subject, though they meet in battle array. 1 *East, P. C.* 76. *Fost.* 219. 4 *Bl. Com.* 81.

The term, levying war, is a technical term, borrowed from the English law, by the framers of the Constitution of the United States, and has the same meaning as when used in the statute 25 *Edw. 3.* which is to be collected, as well from adjudged cases, as from the writings of approved elementary authors. 2 *Burr's Tr.* 402. *Tr. of Fries*, 167. Any insurrection or rising of any body of the people within the United States to attain or effect, by force or violence, any object of a great public nature, or of a public and general concern, is a levying of war against the United States, *Tr. of Fries*, 196; or opposing by force of arms an Act of Congress with a view of defeating its efficacy, and thus defying the authority of the government; *Id.* 168. *U. S. v. Vigol*, 2 *Dall.* 347. Any combination to subvert by force the government of the United States, violently to dismember the Union, to compel a change in the administration, to coerce the repeal or adoption of a general law, is a conspiracy to levy war; and if the conspiracy be carried into effect by the actual employment of force, by the embodying and assembling of men for the purpose of executing the treasonable design which was previously conceived, it amounts to levying of war. And it has been held that arms are not essential to levying

of war, provided the force assembled be sufficient to attain, or perhaps to justify attempting the object without them. 2 *Burr's Tr.* 421. 4 *Cranch.* 26. 1 *Paine, C. C. R.* 271. *Tr. of Fries*, 197. An insurrection, the object of which is to suppress an office of excise, established under a law of the *United States*, and to compel the resignation of the excise officer, and marching with a party to the house of such officer in arms, marshalled and arrayed, and committing acts of violence and outrage there, with a view to render void an Act of Congress, or to prevent its execution, by force or intimidation, is a levying of war against the *United States*. *U. S. v. Vigol*, 2 *Dall.* 346. *U. S. v. Mitchell*, 2 *id.* 355. The travelling of individuals, either separately or in bodies, to the place of rendezvous in pursuance of the conspiracy to levy war, but not in military form, would not, it seems, constitute levying of war; but the meeting of particular bodies, and marching in a military form, or embodying in that form in the first instance, would be sufficient to constitute it. *U. S. v. Burr*, 4 *Cranch*, 485. To make an assemblage treasonable, it must be in force and in a warlike posture; it must be in a condition to make war, and with such appearance of force as would justify the opinion, that they met for that purpose; otherwise, an assemblage, be the design ever so treasonable, is not treason by levying war. It is not indispensably requisite that such an assembly should have arms, nor that hostilities should have commenced by engaging the military force of the *United States*, or that force or violence should be applied; except, perhaps, where the design is, not to overturn the government, but to resist the execution of a law; for then the judges of the *United States* seem to have required force. But when a body of men are assembled for the purpose of making war against the government, and are in a condition to make that war, the assemblage is an act of levying war. So, if men be enlisted, and march prepared for battle, or in a condition for action, it is an overt act of levying war, though they do not come to battle or action. So, cruising under a commission from an enemy, in a warlike form, and in a condition to assail those of whom the cruiser is in quest. *U. S. v. Burr*, 4 *Cranch*, 475. 487. And if a territory of the *United States* were to be revolutionized, though only as a means for an expedition against a foreign power, the act would be treason. 1 *Burr's Tr.* 15. It was the opinion of the Court in the trial of *Fries*, (pp. 197. 403.) that force is necessary to complete the crime of levying war; though the quantum of force is immaterial. But the case before the Court was a levying of war, by resisting the execution of an Act of Congress.

The assembling of bodies of men, armed and arrayed in a warlike manner for purposes only of a private nature, is not treason; although the judges and other peace officers should be insulted or resisted. *Tr. of Fries*, 197. 1 *Paine, C. C. R.* 265. With regard to the persons who are to be considered as levying war. All those who perform the various and essential military parts of prosecuting the war, which must be assigned to different persons, may with correctness and accuracy be said to levy war. 2 *Burr's Tr.* 403. If war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable object, all those who perform any part, however minute or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. *Ex parte Bollman & Swartwout*, 4 *Cranch*, 126. If an army should be actually raised for the avowed purpose of carrying on an open war against the *United States* and subverting their government, the point must be weighed very deliberately, before a judge would venture to decide that an overt act of levying war had not been committed by a commissary of purchases, or by a recruiting officer holding a commission in the rebel service, who, though never in the camp, executed the particular duty assigned to him. *Per Marshall, C. J.* 2 *Burr's Tr.* 402. The true criterion to determine whether acts committed are treason, or a less offence, is the *quo animo* or the intention with which the people assembled. When the intention is universal or general, as to effect some object of a general public nature, it will be treason; and cannot be considered, construed, or reduced to a riot. *Per Chase, J., Tr. of Fries*, 197. See also *Serg. on the Const.* 367. *Rawle on the Const.* 139. *Davis' Virg. C. L.* 54.

Levying war, in the Constitution of the *United States*, seems to comprehend only, what in the *English* books, is called constructive levying of war. Direct levying of war being aimed at the person of the king, the authorities which come within that branch of treason, are of course, inapplicable here; for instance, a conspiracy to levy war, if direct, is an overt act of compassing the king's death; but if constructive, is no treason at all. Again, in case of constructive levying of war, persons joining with rebels, not being privy to their intent at the time, if they commit no act of force, or be not aiding or assisting the rest, their being present is no presumption of guilt. *R. v. Green & Beddell*, at the *Old Bailey*, 20 *Car. 2.*; but if it be a direct levying, they are all traitors.

R. v. The Earl of Essex et al. Moor, 621. And the *English* cases of constructive levying of war have been always cited in the *American* courts and admitted by the judges as authorities. Judge *Chase*, in the *Tr. of Fries*, p. 180, said, that the court would admit of quotations which referred to what constituted constructive levying of war against the king of *Great Britain* in his regal capacity; or in other words, of levying war against his government, but not against his person. He begged the attorney to read only those parts of the cases which referred to what could be treason in the *United States*; and nothing which related to compassing the king's death. See the arguments in this case, of *Messrs Dallas* (91) and *Rawle* (161.) *Davis' Virg. Crim. Law*, 56. *Rawle on Const.*, 141.

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CHAPTER XV.

CONCERNING TREASON IN ADHERING TO THE KING'S ENEMIES WITHIN THE LAND OR WITHOUT.

THE words of the statute of 25 E. 3. go on, *viz.* *On soit aidant al enemies nostre dit seigneur le roy en son royaume douant a eux ayd ou comfort en son royaume ou per ailliors.*

I. Therefore we shall inquire what shall be said *enemies of the king*: those that raise war against the king may be of two kinds, subjects or foreigners: the former are not properly enemies but rebels or traitors, the latter are those that come properly under the name of enemies.

This gives us occasion to consider somewhat of the nature of war and peace.

The power of making war or peace is *inter jura summi imperii*, and in *England* is lodged singly in the king, [1] tho it ever succeeds best when done by parliamentary advice.

Peace is of two kinds, *viz.* 1. Positive or contracted. 2. Such a peace, as is only a negation or absence of war: that peace, which I call positive, is such as ariseth by contracts, capitulations, leagues, or truces between princes or states, that have *jura summi imperii*, and is of two kinds: 1. Temporary, which is properly a truce, which is a cessation from war already begun, and then the term being elapsed the princes or states are *ipso facto* in the former state of war, unless it be protracted by new capitulations, or be otherwise provided in the instrument or contract of the truce. 2. Perpetual, *sine termino* or indefinite, which regularly continues according to the tenor or conditions of the agreement, until some new war be raised between the princes or states upon some emergent injury supposed to be done by the one party or the other; and this is properly called a league *foedus*, and makes the princes and states *confederati*, and tho this may be variously diversified according to the capitulations,

[160] conditions and qualifications of such leagues, yet they are ordinarily of these kinds: 1. Leagues offensive and defensive, which oblige the princes not only to mutual defense, but also to

[1] See 1 *Bl. Com.* 157. 1 *Kent's Com.* 51.

be assisting to each other in their military aggresses upon others, and makes the enemies of one in effect the common enemies of both. 2. Defensive, but not offensive, obliging each to succour and defend the other in cases of invasion or war by other princes. 3. Leagues of simple amity, whereby the one contracts not to invade, injure, or offend the other, which regularly includes also liberty of mutual commerce and trade, and safeguard of merchants and traders in either's dominions, tho this may be diversified according to such contracts as are made in such leagues; and therefore in the league between king *James of England* and the king of *Spain* there was a tacit exception on the part of the *Spaniard* by the wary penning of the articles, whereby the freedom of our trade into the western plantations of the king of *Spain* hath been supposed by the *Spaniard* to be restrained.

2. A peace, which is only a negation or absence of war, is that which I call a negative peace, because it is only an absence or negation of war, there intervening no league nor articles of peace, nor yet any denunciation of war, for it is regularly true, *ubi bellum non est, pax est*, tho neither prince is under any capitulation or contract; for there are divers princes in the world, that never capitulated one with another, and yet there is no state of war between them; and therefore the war by the *Spaniards* upon the *Indians*, tho under pretense of religion, without any just provocation hath been held injurious and an unjust aggression, tho there intervened no former articles of peace between them.

War was antiently of two kinds, *bellum solemne vel non solemne*: a solemn war among the *Romans* had many circumstances attending it, (a) and was not presently undertaken upon an injury received without these solemn circumstances. 1. *Clarigatio* (b) or demanding reparation for the injuries received. 2. That [161] being not done there followed indiction or denunciation of war. 3. Dilation or a space of thirty-three days before actual hostility was used; but most times necessity and politic considerations both among them and other nations did dispense with these solemnities, which were found oftentimes too cumbersome and inconvenient, especially where the delays might occasion surprisal or irreparable damage to the commonwealth, as where the adverse party made preparations, which, if not suddenly repressed, might prove more dangerous and irresistible.

But these solemn denunciations of war had place only in offensive or invasive wars, and even then had many exceptions.

1. If a war be actually between two princes or states, and a temporary truce be made as for a year or two, that term being elapsed they are in a state of war without any denunciation, for they are in the former condition, wherein they were before the truce made.

(a) See the manner of it described by *Dionys. Hal. Lib. II. Angel. Lib. XVI. cap. 4.* and *Liv. Lib. I. § 32.* whereby it appears, that the thirty-three days of dilation intervened between the demanding reparation and the indiction.

(b) See *Plin. Lib. XXII. cap. 2.*

2. In case a foreign prince in peace violate that peace and becomes the aggressor, or invades the other, tho without any denunciation, the prince that is upon his defense was not bound, neither was it necessary for him to make a solemn denunciation or proclamation of war, for this solemnity of denunciation was thought only requisite on the part of the aggressor.

3. If after reparation of injuries sought, instead of reparation of the former, new are committed by the adverse prince, as killing of an ambassador, contemptuous rejection of all reparation or mediation touching it, great provisions of hostility, or the like; there, this denunciation or dilation was not requisite in the aggressor; but when all is done, supreme princes or states take themselves to be judges of public injuries, and of the manner, means and seasons for their reparations, and what they judge safest and most for their advantage is most commonly done in these cases, and they seldom want fair declarations to justify themselves therein.

And therefore whether these handsome methods be ob-
 [162] served or not, yet if *de facto* there be a war between princes, they and their subjects are in a state of hostility, and they are in the condition of enemies (*hostes*) to each other; but now for the most part these antient solemnities are antiquated, I come therefore to the practice of our own country and modern arms, and what we may observe from our own books, history, and monuments.

We may observe in the wars we have had with foreign countries, that they have been of two kinds, *viz.* special and general: special kinds of war are that, which we usually call *marque* or reprisal, and these again of two kinds, 1. Particular, granted to some particular persons upon particular occasions to right themselves, for which *vide* statute 4 *H. 5. cap. 7.* but this is not the proper place to treat touching it. 2. General *marque* or reprisal, which tho it hath the effect of a war, yet it is not a regular war, and it differs in these two instances: 1. Regularly it is not lawful for any person by aggression to take the ship or goods of the adverse party, unless he hath a commission from the king, the admiral, or those that are specially appointed thereunto. 2. It doth not make the two nations in a perfect state of hostility between them, tho they mutually take one from another, as enemies, and many times in process of time these general reprisals grow into a very formed war: and this was the condition of the war between us and the *Dutch* 22 February anno 1664. the first beginning whereof was by that act of council, which instituted only a kind of universal reprisal, and there were particular reasons of state for it; but in process of time it grew into a very war, and that without any war solemnly denounced; and therefore by the statute of 17 *Car. 2. cap. 5.* *Doleman* and others, that were in *Holland*, were declared to have traitorously adhered to the king's enemies, and were attainted of treason, unless they rendered themselves by a day certain, and all others, that served the states of the united provinces during the continuance of the war, soldiers or seamen, by sea or land, and not returning by a time certain, were attainted of treason; and this had all the effects

of war and hostility: the goods of the *English* taken by the *Dutch* and brought *intra præsidia* the property was wholly changed, and tho retaken again, should not be restored again to the first owner, according as in captures by enemies, 7 *E.* 4. 14. 22 *E.* 3. 16. and so it was practised during that war.

A general war is of two kinds: 1. *Bellum solemniter denuntiatum*; or *bellum non solemniter denuntiatum*; the former sort of war is, when war is solemnly declared or proclaimed by our king against another prince or state; [2] thus after the pacification between the king and the *Dutch* at *Breda*, upon new injuries done to us by the *Dutch* the king by his printed declaration 1671. declared war against them; and this is the most formal solemnity of a war, that is now in use.

A war that is *non solemniter denuntiatum* is, when two nations slip suddenly into a war without any solemnity, and this ordinarily happeneth among us; the first *Dutch* war was a real war, and yet it began barely upon general letters of *marque*: again, if a foreign prince invades our coasts, or sets upon the king's navy at sea, hereupon a real, tho not solemn war may and hath formerly arisen, and therefore to prove a nation to be in enmity to *England*, or to prove a person to be an *alien enemy*, there is no necessity of showing any war proclaimed, but it may be averred, and so put upon trial by the country, whether there was a war or not; and therefore *P.* 31 *Eliz.* in justice *Owen's* reports, (c) in an action of debt the defendant pleaded, that the plaintiff was an *alien* born in *Gaunt* under the obedience of the king of *Spain*, enemy of the queen, the plea was ruled good, tho he shewed not, that any war was proclaimed between the two realms; and according is the pleading 7 *E.* 4. 13, *Rastel's Entries, Trespass per alien.* (d)

And in very deed there was a state of war between the crowns of *England* and *Spain*, and the *Spaniards* were actual enemies, especially after the attempt of invasion in 88. by the *Spanish Armada*, and yet there was no war declared or proclaimed between the two crowns, as appears by *Camden sub anno* 31. (e) *ibidem* p. 404. & *ibidem* p. 466. (f) so that a state of war may be [164] between two kingdoms without any proclamation or indication thereof or other matter of record to prove it.

And therefore in the case in question touching treason it shall upon the trial be inquired by the jury, whether the person, to whom the party indicted adhered, were an enemy or not, and in order to that, whether there were a war between the king of *England* and that other prince, whereunto the party adheres, this is purely a question of fact and triable by the jury, [3] and accordingly is the book 19

(c) *Owen*, 45.

(e) *Viz.* 1588.

(d) *Rast. Entr.* p. 605. d. 252. b.

(f) *Sub anno* 1592.

[2] See *Anstey's Cons. of Engl.* 316. *Grot. L.* 3. c. 3. a. 11.

[3] The fact of the persons adhered to being enemies, may be proved by the production of the gazette containing the proclamation, if war were formally declared; or public notoriety is sufficient evidence of it. *Fost.* 219.

E. 4. 6. and the reason is plain, because it may fall out, that tho there were a league between the king of *England* and a foreign prince, yet the war may be begun by the foreign prince; again, suppose we, that the king of *England* and the king of *France* be in league, and no breach thereof between the two kings, yet if a subject born of the king of *France* makes war upon the king of *England*, a subject of the king of *England* adhering to him is a traitor within this law, and yet the *Frenchman*, that made the war, is not a traitor but an enemy, and shall be dealt with as an enemy by martial law, if taken: [4] this was the case of the duke of *Norfolk* adhering to the lord *Herise* a subject of the king of *Scots* in amity with queen *Elizabeth*, that made an actual invasion upon *England* without the king's commission. *M.* 13 & 14 *Eliz.* Co. P. O. p. 11. *Camd. Eliz.* sub anno 1571, (g) 14 *Eliz.* p. 175. and the case of *Perkin Warbeck* a *Frenchman*, 7 Co. Rep. *Calvin's* case. (h) 6 *Dy.* 145. a. *Sherley's* case; (i) so that an enemy extends farther than a king or state in enmity, namely an alien coming into *England* in hostility.

II. In the next place I shall consider what shall be said a *person adhering*, and also what shall be *adhering*.

If a foreign prince be in actual war against the king of *England*, any subject of that prince under his protection is presumed to be adhering to him, but he is not a person within this act, for [165] if he be taken, he shall be dealt with as an enemy, viz. he shall be ransomed, and his goods within this realm seised to the used of the king. When king *John* was divested of the duchy of *Normandy* by the king of *France*, and thereupon the *Normans* forsook the alligiance of the king of *England*, which was due to him, as duke of *Normandy*, all the lands of the *Normans* in *England* were seised into the king's hands, and thence grew first the escheat *de terris Normannorum* mentioned *prærogativa regis* (k) cap. 12. and the style of such forfeiture was usually, *quia recessit à servitio nostro & adhæsit inimicis nostris in Normannia*, *Claus. & John. m.* 19. *pro Eustachia uxore Lurce fil' Johannis*, *Claus. & John. m.* 5. *pro Abbate Cluniacensi*: see the reason thereof before cap. 10. they were *ad fidem utriusque regis*.

If there be war between the king of *England* and the king of *France*, those *Englishmen*, that live in *France* before the war, and continue there after, are not simply upon that account adherents to the king's enemies, unless they actually assist him in his wars, or at least refuse to return upon privy seal, or upon proclamation and notice thereof into *England*; and this refusal, tho it is an evidence of adherence, seems not to be simply in itself an adherence: this appears plainly by the statute of *Magna Charta*, cap. 30.

If a subject of a foreign prince hath lived here in *England* under

(g) And also sub anno 1572. in principia.

(i) 7 Co. *Calvin's* case, 6. a.

(h) 7 Co. 6. b.

(k) 17 E. 2.

[4] Judge *Tucker* doubts whether this would be treason within the Constitution of the *United States*. 4 *Tuck. Bl. Com. Apdx.* 33.

the protection of the king of *England*, and so continues after a war proclaimed, and partakes of all the benefits of a subject, and yet secretly practiseth with the king of *France*, and assists him before he hath left this kingdom, or openly renounced his subjection to the crown of *England*, this man seems to be an adherent within this act, and commits treason thereby: [5] *tamen quære, vide Dy. 144. a Sherley's case*; and the like law seems to be of an enemy coming hither and staying here under the king's letters of safe conduct: *quære, vide statute 18 H. 6. cap. 4. 20 H. 6. cap. 1.*

If there be a war between the king of *England* and *France*, and then a temporary truce is made; and within the time of that truce an *Englishman* goes into *France*, and stays there and returns before the truce is expired, this is not an adherence to [166] an enemy within this statute, *Claus. 7 E. 3. part 1. m. 9. pro Johanne Poynter*, who had an *amoveas manus cum exitibus*, his lands having been seized for that cause: but this record implies, that if during his stay (it was in *Scotland*) he had confederated or conspired with the enemy or assisted them in order to their further hostility, this might have been an adherence: *nota*, the reason, "*Quia prædictus Johannes tempore treugarum inter patrem nostrum & Robertum de Bruys ivit in Scotiam per præceptum Andreæ de Harcla ad pictandum quandam imaginem, quo tempore benedixit unicuique de Angliâ intrare in Scotiam per licentiam & literas de conductu custodis Marchiæ, & quod idem Johannes habuit tales literas Andreæ de Harcla, & ibidem taliter moram fecit per unum annum absque eo, quid aliquo tempore Scotis prædictis fuit adhærens, & quod idem Johannes rediit in Angliam durantibus treugis prædictis, & semper hactenus fuit ad pacem nostram & patris nostri.*" *Nota*, this *Andrew Harcla* having been created earl of *Carlisle* was by an extrajudicial military sentence first degraded, and then had judgment of high treason given against him. *H. 18 E. 2. Rot. 34 in dorso rex.*

If the king of *England* and the king of *France* be in amity, yet if a subject of the king of *England* solicits by [167] letters the king of *France* to invade this realm, this is high treason: it was the case of cardinal *Poole*, who wrote a book to that purpose to *Charles* the emperor. *Co. P. C. p. 14.* It is certainly an overt-act to prove treason in compassing the king's death, but it seems not an overt-act to convict him of adhering to the king's enemies, for at the time of this act done the emperor was not an enemy. *Co. P. C. p. 14.*

If an *Englishman* during war between the king of *England* and *France* be taken by the *French*, and there swear fealty to the king of *France*; if it be done voluntarily, it is adhering to the king's enemies; but if it be done for fear of his life, and that he returns, as soon as he might, to the allegiance of the crown of *England*, this is not an adherence to the king's enemies within this act. [168] *Claus. 7 E. 3. part 1. m. 15. John Culwin's land being*

seised upon this account there was *ouster le main cum exitibus*, "Quia compertum est per inquisitionem, &c. quod *Johannes* ad fidem & pacem nostram extitit, quod-que idem *Johannes* captus fuit de guerrâ per *Scotos* inimicos nostros, & in prisonâ in *Scotiâ* per dictos inimicos nostros, & pro vitâ suâ salvandâ ad fidem dictorum *Scotorum* per dimidium annum extitit, quodque idem *Johannes* postea in *Angliam* rediit, & ad fidem & pacem nostram a tempore prædicto hætenus extitit;" tho this was before 25 E. 3. yet the instance is useful, because adhering to the king's enemies was then treason.

If a captain or other officer, that hath the custody of any of the king's castles or garrisons, shall treacherously by combination with the king's enemies, or by bribery or for reward deliver them up, this is adherence to the king's enemies. This was the case of *William Weston* for delivering up the castle of *Oughtrewicke*, and *John de Gomeney*s for delivering up the castle of *Ardes* in *France*, both which were impeached by the commons, and had judgment of the lords in parliament, *Rot. Par. 1 R. 2. n. 40.* namely *William Weston* to be drawn and hanged, but execution was respited, *que le roy n'est uncore enforme del manner de cest judgement*: *Gomeney's* judgment was thus, Les seigneurs in plein parlement vous adjudgent a la mort, & pur ceo qu'estes gentlehome & banneret & aves serve le aiel le roy en ses guerres, & n'estes lige home nostre seigneur le roy, vous seres decolle sans autre justyce auer, but execution was respited. (m)

And note, tho the charge were treason, and possibly the proofs might probably amount to it, and *Walsingham sub anno 1 R. 2.* tells us it was done by treason; yet the reason expressed in the judgment against *Weston* is only, que surrendists le dit castle de *Oughtrewicke* al enemies nostre seigneur le roy avant dits sans nul duresse ou defalt de victuals contre vous ligeance & emprise: and the like reason is exprest in the judgment against *Gomeney*s, Vous emprists a sauement garder sans les surrendy a nully, &c. [169] & ore vous *Johan* sans nul duresse ou defalt de victuals ou de artillery ou autres choses necessaries pur le defence de dits ville & castle de *Arde* sans commandment nostre seigneur le roy malement l'auets delivers & surrendres al enemies nostre seigneur le roy per vostre defalt demesne contre tout plain de droit & reason, & encountre vostre emprises suisdits, &c.

The truth is, if it were delivered up by bribery or treachery, it might be treason, but if delivered up upon cowardice or imprudence without any treachery, tho it were an offense against the laws of war, and the party subject to a sentence of death by martial law, as it once happened in a case of the like nature in the late times of trouble, (n) yet it is not treason by the common law, unless it was done by treachery; but tho this sentence was given *in terrorem*, yet it was not executed: it seems to be a kind of military sentence, tho

(m) See these cases *State Tr. Vol. I. p. 795.*

(n) This was the case of Col. *Fiennes*, parliament governor of *Bristol* for cowardly surrendering the same to the king's forces. See *State Tr. Vol. I. p. 745.*

given in parliament, like unto that of the baron *Graystock* governor of *Berwick*,^(o) who travelled into *France* without the king's commandment, and left the care of the garrison to *Robert de Ogle* a valiant knight, who used all imaginable courage in defense thereof, but it was lost in the absence of the baron of *Graystock*, who was thereupon sentenced to death, because he had undertaken that charge, and yet went from it without the king's command, and in his absence it was lost: this also seems rather a sentence of council of war, than a judgment of high treason; and thus far touching the treason of adhering to the king's enemies within the land and without.

Touching the trial of foreign treason, viz. adhering to the king's enemies, as also for compassing the king's death without the kingdom at this day, the statutes of 35 *H. 8. cap. 2.* hath sufficiently provided for it.^(p.) *P. 13. Eliz. Dyer, 298, 300. Story's case;* but at common law he might have been indicted in any [170] county of *England*, and especially where the offender's lands lie, if he have any. 5 *R. 2. Trial 54.*

And it seems, if the adhering to the king's enemies were upon the narrow seas, this is an adherence to the king's enemies within the realm, and tho it be triable by a special commission at this day grounded upon the statute of 28 *H. 8.* yet at common law it might have been indicted and tried in any adjacent county by a special commission of *oyer and terminer*, for the narrow seas are within the king's alligance, and part of the realm of *England*. 6 *R. 3. Protection 46. Co. Lit. 260.*[6]

(o) See this case *State Tr. Vol. I. p. 797.*

(p) This statute gives power to try such treasons in the king's bench or by commissioners in any county appointed by the commission, and continues in force notwithstanding 1 & 2 *Ph. & Mar. cap. 10.* which reduces the methods of trial for treason to the course of the common law, because it is not introductive of a new law, but only settles a point, that was before doubtful at common law; and it was accordingly so resolved in *Storie's case, Dyer 298. b. Co. P. C. p. 24.*

[6] The following have been laid down as overt acts of adhering to the king's enemies. Every assistance given by the king's subjects to his enemies, unless given from a well grounded apprehension of immediate death in case of a refusal, *Fost. 216. Hawk. c. 17. s. 28;* to join the king's enemies in acts of hostility against his allies, *Fost. 210. R. v. Vaughan, Salk. 635;* to join the enemy's forces, although no acts of hostility be committed by them either against the king or his allies, *Fost. 218. Salk. 634. 5 St. Tr. 17;* to raise troops for the enemy, *R. v. Harding. 2 Ventr. 316;* to deliver up the king's castles, forts, or ships of war to the enemy through treachery, or in combination with them, *Fost. 219. 3 Inst. 10. ante, 168;* to detain the king's castles, &c. if done in confederacy with the enemy, *Fost. 219;* to send money, arms, intelligence, or the like, to the king's enemies, *Fost. 217,* although such money, intelligence, &c. be intercepted and never reach them. *R. v. Gregg, 10 St. Tr. Appdx. 77. Fost. 198. 217. R. v. Hensey, Burr. 642. R. v. Lord Preston, 4 St. Tr. 455. R. v. Stone, 6 T. R. 527.*

Every species of aid and comfort, in the words of the statute, which when given to a rebel within the realm, would make the person guilty of levying war, if given to an enemy, whether within or without the realm, will make the party guilty of adhering to the king's enemies. 1 *East, P. C. 78.* Refusing personal assistance to the king, either against rebels or an invading enemy, is not an adherence within the statute, though a high misdemeanor. 1 *East, P. C. 80.* Continuing in an enemy's country, not of itself an adherence; unless the party voluntarily swears fealty to the enemy, or actually assists them

in the war, or unless he refuses to return home upon privy seal, or proclamation, or notice thereof; though such refusal is only evidence of an adhering. 1 *East, P. C.* 81. It is no treason to relieve a rebel out of the realm. *id.* 77.

The words "adhering to their enemies, giving them aid and comfort," in the Constitution of the *United States*, having been taken from the 25 *Edw. 3.* must receive, it is conceived, the same construction which is given to them in that statute, 2 *Burr's Tr.* 402. In 1778 and 1781, there were trials for treason in *Pennsylvania*, in adhering to the enemies of the State and of the *United States*. 1 *Dall.* 33. 89. 2 *id.* 86. *The United States v. Pryor*, 3 *W. C. C. R.* 234, and *The People v. Lynch, et al.* 11 *Johns.* 549, are the only two cases that have happened, since the framing of the Constitution, of this species of treason. The former was an indictment for treason in adhering to the enemy, charging the defendant, amongst other things, with going from the *British* squadron to the State of *Delaware*, with intention to procure provisions for the squadron. It was held that the going from the squadron to the shore for the purpose of peaceably procuring provisions for the enemy, did not amount to an act of treason; as this act rested in intention only, which is not punishable by our laws. *Aliter*, if a person has carried provisions towards the enemy, with intent to supply him, though that intention should be defeated. If the intention of the defendant had been to procure provisions for the enemy, by uniting with him in hostilities against the citizens of the *United States*, his progressing towards the shore would have been an overt act of adhering to the enemy, though no other act was committed. In *The People v. Lynch*, the defendants were acquitted, on the ground that the offence of adhering and giving aid and comfort to the public enemies of the *United States*, is not treason against the people of the State of *New York*. See 4 *Tucker's Bl. Com. Apdx.* 32.

CHAPTER XVI.

CONCERNING TREASON IN COUNTERFEITING THE GREAT SEAL OR PRIVY SEAL.

FIRST, I shall upon this article consider how the common law stood before this statute, and what kind of offense this was antiently, and how punished. *Secondly*, I shall consider how the law hath been taken touching this offense since the statute, and how punished.

I. The *great seal* of *England* is the great instrument, whereby the king dispenseth the great acts of his government and the administration of justice; under this seal the great commissions to his justices and others are passed; original writs and mandates, and those processes that issue out of chancery, all the king's grants and charters of lands, liberties, franchises, honours, pardons are passed under this seal.[1].

There is or should be always a *memorandum* made upon [171] the close rolls of the breaking of the old seal and making and delivering of the new; and by the very delivery of this seal the office of keeper of the great seal is constituted, and most ordinarily is to the same person, that is lord chancellor: sometimes the custody of the great seal is in one person, and the office of lord chancellor in another; but always a *memorandum* of the delivery thereof entered upon the close rolls. The great seal consists ordinarily of two impressions, the one the very great seal itself with the

[1] 2 *Bl. Com.* 305. 346.

king's effigies instamped on it, the other is commonly called *pes sigilli*, and sometimes in our old books called *le targe*, which is the impression of the king's arms in the figure of a target, which is used in matters of smaller moment as certificates, which are usually pleaded *sub pede sigilli*.

Antiently, when the king travelled into *Normandy, France*, or other foreign kingdoms upon occasion of war or the like, there were two great seals, one went along with the king, the other was left with the *custos regni*, or sometimes with the chancellor, if he went not along with the king, for the dispatch of the affairs of the kingdom, and then the king upon his return sometimes redelivered the old seal and took in the new, *Claus. 20 E. 3. part 2. m. 26. dors. Claus. 19 E. 3. part 2. m. 23 & 10. dors. Claus. 20 E. 3. part 2. m. 18. dors. & frequentissime alibi in dorso clausorum.*

The *privy* seal is ordinarily a warrant for the passing of things under the great seal, sometimes a warrant to issue treasure, to make allowances, &c. *vide 11 Co. Rep. 92.* the earl of *Devonshire's* case; and this seal is ordinarily in the custody of the lord keeper of the privy seal or commissioners thereunto appointed.

Besides these seals of greater moment there are other seals of the king, as the *privy signet*, [2] the particular seals of the several courts, that of the *king's bench* and *common pleas* in custody of the chief justices of either court, or their clerks appointed for that purpose, the seal of the *exchequer* in the custody of the chancellor of the exchequer, the seal of the duchy of *Lancaster* in the custody of the chancellor of the duchy, the seal of the county palatine [172] of *Lancaster* in the custody of the chancellor of the county palatine, which are sometimes in the same person, the seals of county palatine of *Chester*, of the several justices of assise, *oyer* and *terminer* and gaol-delivery, the king's seal of statutes and recognizances, the seal of the cocket; and for the most part these seals are delivered by the king's order signified sometimes by his privy signet, sometimes by his secretaries, but antiently the most of them were delivered by the king in person to the several persons, that had the custody thereof, and a *memorandum* made thereof upon the back of the close roll. *Claus. 43. E. 3. m. 18. dors.*

The antient manner of delivery of the seal for statutes merchant, and probably for other seals of like nature was by the king in person as before, or by a close writ and *memorandum* under the great seal. *T. 19 E. 1.* it is commanded, that for the future it should be delivered under the seal of the chancellor of the *exchequer*.

The manner antiently of delivering the judicial seals of the king's bench and common pleas was by the king or chancellor to the chief justices respectively, and in like manner the judicial seal of the exchequer to the chancellor of the exchequer; these were ordinarily

[2] For the nature of the signet and privy seals, see the case *Re Nickels' Patent*, 1 *Phill. Ch. Rep.* 36.

in two pieces, *Claus. 43 E. 3. m. 18. dors.* The profits of the seals belonged to the king, except the seventh penny, which is the fee of either chief justice; (a) and when the king farmed out the profits of the seal of either court, sometimes one piece remained with [173] the chief justice or his deputy, the other piece remained with the farmer or his deputy: these profits of the seals of the courts of the king's bench and common pleas were let for 1000*l.* per annum (b) by the king. *M. 18 E. 3. Rot. 85. Rex. P. 20 E. 3. Rot. 87. T. 22 E. 3. Rot. 115. M. 23 E. 3. Rot. 31. coram rege.* (c)

(a) The ancient fee to the chief justice was one penny for every writ, as appears from two of the records here quoted by our author, viz. *20 E. 3. Rot. 87. 22 E. 3. Rot. 115.* the first of these is a grant to *Walter of Yarmouth* of the profits of the seals for ten years, in consideration that the said *Walter* should pay to the clerk of the hanaper for the king's use 250 marks every year, and should likewise discharge a debt of the king's of 2000*l.* by the yearly payment of 200*l.* the said *Walter* to be allowed every year cent *solds* for his expenses in sealing writs; all writs *ad sectam regis*, &c. to pay no fees, *Et que les justices preignent en denier du brief per leur sealx en manere come ad este use en temps passe.*

The latter is a grant of the king (upon his having resumed the seals on account of some misdemeanor committed by *Walter of Yarmouth*) to *John de Padebury* and *Henry de Sulihull*, reddendo inde regi de clarò per annum ducentas & quater viginti marcas per manus clerici hanaperii, writs *ad sectam regis*, &c. to pay no fees, & quod justitiiarii nostri in placeis illis percipiant unum denarium de brevi pro sigillis suis, prout ibidem hactenus est usitatum: it should seem therefore, as if the person employed by our author to consult the record mistook the word *vn* in the first grant for a numeral *vii*, and that this was the occasion of his making the seventh penny to be the fee of the chief justice.

(b) These profits were not let for above three or four hundred pounds per annum, as appears not only from the above-mentioned cases, (the highest of which is 200*l.* and 250 marks per annum, which is no more than 366*l.* 13*s.* 4*d.*) but also from the *18 E. 3. Rot. 85.* where the king signifies by writ 20 Octob. to his justices, that he had granted to *Matthew Canaceon* and his assigns totum proficuum ad se de sigillis omnium brevium judicialium de banco suo & banco comuni exeuntium pertinens, usque ad terminum decem annorum, in valorem trescentarum librarum per annum, de quibus ipsi solvent ad opus regis custodi hanaperii cancellarie quolibet dictorum decem annorum centum libras de exitibus brevium prædictorum, & reservabunt penes se totum proficuum residuum de brevibus supradictis durante dicto termino in recompensationem decem [duo] milliũ librarum sterlingorum, de quibus prædictus *Mattheus* in debitis, in quibus rex certis personis in ducatu *Aquitanie* tenebatur, assumpsit regem acquietare & exonerare; ita semper quod brevia ad sectam & pro commodo regis per visum & testimonium illorum, qui pro rege prosequuntur ac brevia pro hominibus de curiis regis, & pauperibus hominibus facta & facienda absque aliquo inde solvendo deliberentur, prout hactenus in cancellaria fieri consuevit. Et sciendum quod eodem 20 die Octob. *Robertus de Sadyngton* Cancellar' domini regis liberavit *Willielmo Scot* [capitali justitiario] apud *Westm'* quoddam sigillum domini regis pro brevibus prædictis in banco domini regis sigillandis, cujus unam partem idem *Willielmus Scot* liberavit cuidam *Rogero de Merlawe*, deputato dicti *Matthei Canaceon* jurato, aliam vero partem ejusdem sigilli penes se ipsum retinendo; Et dictum est eidem *Rogero*, quod officio prædicto bene & fideliter intendat secundum formam & conditionem in brevi prædicto contentas periculo quod incumbit, &c.

Altho the consideration is here said to be the discharging of a debt of ten thousand pounds, (which probably led our author to think the profits were let at 1000*l.* per annum, so that in ten years time that debt might be discharged) yet the annual produce of the seals being no more than 300*l.* one hundred whereof was to be paid yearly for the king's use, it seems to me pretty plain, that the king's debt, which he undertook to pay, could be only two and not ten thousand pounds; what strengthens this observation is, that the indentures of agreement being in *French*, it was very easy to mistake *deux* for *dix*.

(c) This was a grant of the seals of the king's bench and common pleas to *Anthony Buche* for seven years in recompensationem septingentarum marcarum (due to him on an annuity formerly granted) at the rate of 200*l.* per annum for the two first years of the said term, and 200 marks per annum for the five remaining years, the said *Anthony* to

Many times the justices issued process under their own seals unto the sheriffs: this was complained of *inter petitiones parliamenti* 12 E. 3. n. 6. by the chancellor of the *exchequer* [174] and clerk of the hanaper, as a derogation to the king's profit, and contrary to the duty of the sheriff, who, by his oath, is bound to receive no writs, but under the king's seal; the answer is, Soit briefe mand' a justic' de common banc contenant l'effect de petition, & quilz pur leur advisement facent tiel remedy en leur place, come ils verront, qe soit a faire a profit du roy.

And it seems most usual, that since that time judicial process not only in those greater courts, but in most other courts issued under the king's seals thereunto deputed, yet justices of assise and gaol-delivery sometimes make their precepts under their own seals; *vide Judicial Register*, 34, 35, 41, 43, 73, 84. *vide pur ceo Rot. Parl.* 25 E. 3. n. 25. a petition that judicial process out of the king's bench and common pleas might issue under the seal of the chief justices, as is used in *eyre, assises, & oyer & terminer*, but denied.

But to return to the business of the great and privy seal.

The great seal which *Matthew Paris*(d) *sub anno* 1250. well calls (*clavis regni*) hath been with great care and solemnity kept and used, and therefore antiently, when there was any change made of the great seal, there was not only a *memorandum* made thereof *in dorso clausorum cancellariæ*, and a public notification thereof in the court of chancery, but public proclamation was made thereof. *Claus.* 1 E. 3. *part 2 m.* 11. *dorso*.

Yet in cases of speed and necessity, and sometimes for distinction's sake the king used a private seal for such occasions, which were to be passed under the great seal.

King *John* died, his son king *Henry III.* being but about ten years old, from the beginning of his reign until 3 H. 3. all grants passed under the seal of the earl marshal, that was his protector or guardian, but in the king's name, *viz.* In cujus rei testimonium has literas nostras sigillo comitis mariscalli rectoris nostri & regni nostri sigillatas, quia nondum sigillum habuimus, vobis mittimus, teste *Wilhelmo* comite mariscallo. This seal he continued till the third year of his reign, *Claus.* 3 H. 3. *m.* 14. *hic incepit sigillum regis currere*: and in the same third year, *viz.* *Pat.* 3 H. [175] 3. *m.* 6. there was a provision made in parliament for the discrimination of those charters, that passed during his minority and after his full age, in these words: *Henricus dei gratia, &c.* Sciatis quod provisum est per commune consilium regni nostri, quod nullæ cartæ, nullæ literæ patentes de confirmatione, alienatione, venditione vel donatione, seu de aliqua re, quæ cedere possit in perpetuitatem, sigillentur magno sigillo nostro usque ad ætatem nostram completam, *Teste, &c.*" and after the setting down of divers witnesses are these

pay to the clerk of the hanaper for the king's use one [two] hundred marks *per annum* for the two first years, and one hundred marks *per annum* for the five remaining years; and the king thereupon sends his writ de admittendo prædictum *Antonium* vel ejus attorn' ad officium prædictum modo debito faciendum; and he was admitted accordingly.

words, "Provisum est etiam per commune consilium regni nostri & coram omnibus prædictis, quòd si aliquæ cartæ vel aliquæ literæ patentes factæ secundum aliquam prædictarum formarum sigillatæ inveniantur prædicto sigillo, irritæ habeantur & inanes, testibus prædictis."

It appears *Claus. 20. E. 2. m. 3. dors.* in the beginning of that miserable tragedy, that the 26th of *October 20 E. 3.* the king flying from his wife and son, who was afterwards king, a great number of lords and others chose *Edward* the king's eldest son to be *custos regni*, supposing the king to be out of the kingdom; at that time the chancellor, together with the great seal were with the king, and the new *custos regni* ea, quæ juris fuereat, sub sigillo suo privato in custodia domini *Roberti de Wyvill* clerici sui existent; eo quòd aliud sigillum pro dicto regimine ad tunc non habuit, exercere incepit postmodum vero 20 die *Novemb.* proximè sequent, captis inimicis prædictis & dicto rege in regnum revertente, upon a message sent to the king for the seal the king thereupon sent the great seal to his wife and son, ut non solum ea, quæ pro jure & pace essent faciendæ, sed etiam quæ gratiæ forent, fieri facerent; the seal was brought to them 26 *Novemb.* and the morrow being the feast of *St. Andrew* it was opened by the queen and her son, and delivered to the bishop of *Norwich*: and it is to be observed, that a parliament was summoned between the 26th of *October* and the 26th of *November* in the name of the king, but to be held before the queen and the *custos regni in quindena sancti Andreæ*, which summons must needs be [176] under his own private seal; but the 3d of *December* the great seal being then in their power it was prorogued unto the morrow of *Epiphany*: the first summons is recited in the writ of *prorogation*, but it is not entered of *record*, for it was a hasty confused business, neither had the rolls of the chancery in their hands to make any entry of it; and if they had had them, yet it would have been irregular, and not have amended the matter: all that I shall farther add concerning these two instances is, that neither the seal of *William* earl *Marshal* used by *Henry III.* nor the private seal of prince *Edward* were great seals within this statute, whereof the counterfeiting might be high treason.

When the king dies, tho the office of keeper of the great seal expires, as well as all commissions to sheriffs and justices, yet the great seal of the last king continues the great seal of *England*, till another be made and delivered.

King *Edward III.* began his reign the 25th of *January*, he made the bishop of *Ely* his chancellor the 28th of *January*, it was not possible a new seal could be made in that time, and besides the seal was not altered till the 3d of *October eodem anno*, as appears by the proclamation thereof, *Claus. 1. E. 3. part 2. m. 11. dors.* so that all that while the old seal with the old inscription stood; the method of which alteration was thus: The king by his proclamation bearing *teste 3 Octob. anno 1.* directed to all the chief sheriffs of *England*, signifying, that he had made a new great seal, and that it was to take place from the fourth day of that month of *October*, sends them the impression of the new seal in wax, commands them to publish it, and that

after the fourth day of *October* they should give faith to it, and receive no writs but under the new seal after that day.

The fourth day of *October* being *Sunday* the bishop of *Ely* chancellor produceth the new seal, declares the king's pleasure, that it should be from thenceforth used; the *Monday* after the old seal is broke, *præcipiente rege*, and the pieces delivered to the Spigurnel. (e)

Again, king *Henry V.* died 30 *Augusti anno sui decimo*, a parliament was summoned by writ bearing *teste 29 Sep. [177] temb. anno primo H. 6.* to be held *die lunæ ante festum Martini*, a commission issued to the duke of *Gloucester* bearing *teste 6 Novemb. 1 H. 6. ad inchoandum parliamentum, &c.* and the bishop of *Durham* chancellor to *Henry V.* delivered up the seal to the king 28 *Septemb.* The new seal with the new inscription was in that parliament ordered to be made, the bishop of *Durham* was made chancellor by commission under the great seal dated 16 *Novemb.* the new seal was not made till some time after, therefore the old seal of *Henry V.* was used in the summons of the parliament and all the transactions till the new seal was delivered: indeed when *Edward IV.* assumed the crown, the seal of *Henry VI.* was not used, for it could not be had, and if it could, yet *Henry VI.* being declared an usurper, there was no reason for *Edward IV.* to give any countenance to that usurpation by using of his seal, who was declared an usurper and attainted of treason. [3]

So that (except the last case of an usurper) till a new great seal be made, the old seal, being delivered to the keeper and used and employed as the great seal, is the great seal of *England* within this statute, notwithstanding the variance in the inscription, *portraiture*, and other substantials from the state of the present governor.

But then, what shall we say of the old seal, when the new seal is made and delivered of record to the keeper, and the old seal broken? To this I say, 1. It was once the great seal of *England*, and therefore the counterfeiting of that seal and applying it to an instrument of that date, wherein the old seal stood, or to an instrument without date, is high treason; nay, if in the time of *Edward IV.* a man should counterfeit the great seal of *Henry VI.* and apply it to a patent or other instrument of his time, it had been high treason, tho *Henry VI.* were an usurper, and his seal in the time of *Edward IV.* of no value. 9 *E. 4.* (f)

But what if in the case before instanced in, after the 4th of *October 1 E. 3.* a man had forged a grant by king *Ed- [178] ward III.* (g) bearing *teste 2 E. 3.* when the old seal was out

(e) The *Spigurnel* was an officer, whose place was to seal the king's writs. *Cambd. Remains*, p. 126.

(f) This is *Bagot's case*, 9 *E. 4.* 1 b. where it is said by the counsel, "That a man shall be arraigned in the time of *E. 4.* for treason done against *H. 6.* in compassing his death, &c."

(g) This must be understood under the old seal.

[3] For an account of the difficulties the parliament got into, when Lord Keeper *Lil- leton* carried off the great seal to the king at *York*, see 3 vol. *Lord Campbell's Lives of the Chancellors*. p. 1. et seq.; 2 *Hallam's Cons. His.* 222.

of date, or in the time of *Edward IV.* had forged a grant by *Edward IV.* and counterfeited the seal of *Henry VI.* thereunto; this seems not to be a counterfeiting of the great seal of *England*, if the difference appear very legible and conspicuous, for at the time, whereunto it relates, there was no such great seal in being; but if the difference between the seals be such as be not evident to the view of every man's eye, it may be more doubtful; *sed vide de hoc infra.*

This statute speaks only of the great seal, and privy seal, and therefore no other seals were within this statute.

But by the statute of 1 *Mar. sess. 2 cap. 6.* "If any do falsely forge or counterfeit the queen's sign manual, privy signet or privy seal, every such offense shall be high treason, and the offenders herein, their counsellors, procurers, aiders and abettors being convict according to the course of law shall be adjudged traitors against the queen, her heirs and successors." But now what shall be said concerning these other seals above-mentioned, as the seals for the writs of the courts of king's bench, common pleas, and exchequer, the seal for statute-merchant, &c.

By the old law, it seems that counterfeiting any of the king's seals, wherewith writs were sealed, was petit treason, tho' it came under the name of *crimen falsi.* *Glanvil*, that wrote in *Henry II.*'s time, *Lib. XIV. cap. 7.* "Distinguendum est, utrum fuit carta regia an privata, quia si carta regia, tunc is, qui super hoc convineatur (scilicet de falsificatione) condemnandus est tanquam de crimine læsæ majestatis; si vero fuerit carta privata, tunc cum convicto mitius agendum est, sicut in cæteris minoribus criminibus falsi, in quorum judiciis consistit eorum condemnatio in membrorum solummodo amissione, pro regia tamen voluntate." *Bracton*, that wrote in the time of *Henry III.* *Lib. III. cap. 3. de crimine læsæ majestatis, § 2.*

"Est & aliud genus criminis læsæ majestatis, quod inter graviora numeratur, quia ultimum inducit supplicium & mortis occasionem, scilicet crimen falsi in quâdam sui specie & quod tangit coronam ipsius regis, ut si aliquis accusatus fuerit vel convictus, quod sigillum domini regis falsaverit consignando inde cartas vel breviam, vel si cartas confecerit & breviam & signa apposuerit adulterina, quo casu si quis inde inveniatur culpabilis vel seiscitus, si warrantum non habuerit, pro voluntate regis judicium sustinebit, & si warrantum habuerit & warrantizaverit, liberabitur & tenebitur warrantus:"

Fleta, that wrote in the time of *E. 1.* *Lib. I. cap. 22. de crimine falsi*, tells us, "Crimen falsi dicitur, cum quis accusatus fuerit, quod sigillum regis, vell appellatus, quod sigillum domini sui, de cujus familiâ fuerit, falsaverit & breviam inde consignaverit, vel cartam aliquam vel literam ad exhæredationem domini vel alterius damnum sic sigillaverit, in quibus casibus si quis inde convictus fuerit, detractari meruit & suspendi. § 3. Item crimen falsi dicitur, cum quis illicitus, cui non fuerit ad hoc data autoritas, de sigillo regis rapto vel invento breviam cartasve consignaverit:" *Britton*, that wrote in the time also of *E. 1.* *cap. 4.* "Soit inquire de tous ceux, qui ascun fausiu averont fait a nostre seale, come de ceux qui per engin ont

nostre seale pendu a ascun charter sauns conge, ou que nostre seale ount emble ou robbe, ou autrement troue eient ensele brefs sauns autre auctorite, and *cap.* 8. Graund treson est a fauser nostre seal, &c.”

Upon these old books there is no difference made touching the king's seals, but generally the crime of treason was supposed in counterfeiting any of them, but most certainly the statute of 25 *E.* 3. extends only to the great and privy seal, as to the point of treason; but then whether that, which was a treason before, remain not still a felony at the common law (for all treasons include felony. 3 *H.* 7. 10. *Co. P. C.* p. 15.) is considerable.

M. 2. *H.* 4. *B. R. Rot.* 2. as I take it, *Visum est curiæ, quod contrafactio sigilli regis pro recognitionibus non est nisi feloniam*:(*h*) but tho they held it not treason, they do not positively affirm it felony since the statute of 25 *E.* 3. but only *non est nisi* [180] *felonia, viz.* that at most it can be only felony.

P. 6 *E.* 2. *B. Rot.* 2. *Essex.* *Johannes de Bosco* per cur' est culpabilis pro falsitate, eo, quod cepit cultellum suum & calefaciebat eum apud ignem & aperuit breve regis & imposuit aliud fictum, dicit quod est clericus, & traditur ordinario *Westm'.*(*i*) *Simile P.* 18 *E.* 2 *B. R. Rot.* 25 *Rex.*(*k*)

(*h*) There is no such entry to be found either on the second or seventh roll of the plea or crown-roll of that term, but the words cited by our author are in the abstract of the rolls of the king's bench of *Mich.* 2 *H.* 4. *Rot.* 7. but upon what authority is uncertain, being in a different and more modern hand than that of Mr. Agard, who in the reign of *James I.* abbreviated the king's bench rolls.

(*i*) The record of this case is thus, “*John de Bosco* was arraigned pro falsitate sigilli & brevis domini regis, eo quod ixit cum brevi [*de cancellaria*] ad ignem & calefaciebat cultellum, & cum illo cultello ceram dicti brevis findebat, and amoto illo brevi imposuit aliud breve [*this was a Supersedeas to the sheriff of Essex*] & illud in eadem cera inclusit & tradidit servienti suo illud breve vicecomiti *Essex* deferendum, qui quidem serviens in præsentia prædicti *Johannis de Bosco* liberavit eidem vicecomiti falsum breve prædictum; Dicit quod clericus est:” upon which he was claimed by the abbot of *Westminster* his ordinary; “Sed ut sciatur pro quali eidem ordinario liberari debeat,” a jury *ex officio* pass upon him, who find him guilty “de prædicta falsitate, findendo cum cultello suo prædicto ceram prædictam & imponendo falsum breve prædictum, sicut ei superius imponitur: Ideo inde ad iudicium, &c. & interim committitur maresch’, &c.” There is no judgment entered upon the roll; so that from this record, which is not in usual form, it is doubtful whether he had his clergy or not, tho from a jury passing upon him *ex officio* it is most probable he had; but yet it should seem from the case of *Geoffrey de Huntinton* & *Richard de Clynton*, which was but six years afterwards, as if this offense was not so much as felony; they were charged “pro contrafactione sigilli regis & cartæ sub sigillo regis, sic contrafacto,” which was found in their custody; afterwards they plead the king's pardon “pro omnibus feloniam & transgressionibus, & quia inspecta carta prædicta, quæ dicitur esse contrafacta, compertum est quod carta non est de forma in cancellaria regis usitata, inspecta etiam cera ejusdem cartæ suspectæ compertum est, quod cera illa impressa est sigillo regis cancellar’, sed prius apposita fuit cuidam alteri literæ regis patenti, quod citius dici potest transgressio, quam contrafactio. Et dominus rex perdonavit eis partem pacis suæ, quæ ad ipsum pertinet, de omnimodis feloniam & transgressionibus, &c.—jam per tres annos in præsencia regis steterint occasione prædicta & non alia causa, dictum est——quod deliberet eos, &c. & ipsi cant inde quieti, &c. Et carta illa cancellatur in cur.” *Mich.* 11 *E.* 2 *B. R. Rot.* 156. *Heref.* from hence it appears that the judgment afterwards in *Leake's* case 4 *Jac.* 1. was agreeable to the antient resolutions.

(*k*) This is the case of *Philip Burden*, but is by no means similar to that of *John de Bosco*, for this was a direct actual counterfeiting of the great seal: *vide infra in notis.*

It appears not, whether it were a writ under the great seal [181] or a judicial writ of some court, but whether it were the one or the other, it seems to be capital, for he had the benefit of clergy, which in those times was allowable in some cases of treason; so that it seems a counterfeiting of any of the king's seals was felony at common law, but whether it so continues, notwithstanding the statute of 25 E. 3. hath degraded it from treason, unless it be the great or privy seal, shall be farther examined.

II. Having thus considered the seals, it remains to consider what shall be said *a counterfeiting* of the great or privy seal.[4]

A conspiracy or compassing to counterfeit the great or privy seal is not a counterfeiting nor treason within this act, for it must be an actual counterfeiting, *Co. P. C. p. 15.*

A taking the great seal off from a true patent and clapping it on a forged patent in former times hath been held high treason; in 40 Ass. 33. it is plainly held to be high treason, (tho my lord Coke(l) saith otherwise) for the woman, that did it, could not be let to mainprize, which if it had been only a great misprision, she had been bailable upon that indictment.(m)

2 H. 25. which is entered H. 2. H. 4. B. R. Rot. 16. Midd. Clement Petilson's case, the taking off the true seal from one patent and fixing it to a forged patent is adjudged high treason; yet the judgment is only *quod distrahatur & suspendatur*, which is the judgment in petit treason.

This case and the reporting of it is disliked by my lord Coke *P. C. p. 15.;*(n) but *Stanf. Pl. C. p. 3.* seems to agree with this resolution.

See also another case to this purpose for counterfeiting the privy seal, *Rot. part. 6. E. 2. part. 2, m. 18.* "John de Redynges was arraigned and tried coram senescallo & marescallo hospitii domini regis pro contrafactione privati sigilli domini regis, & pro quibusdam litteris prædicto sigillo contrafactis [*contrafacto*] consignatis cum eo inventis," and being found guilty had judgment, "Quod pro prædicta seductione [*seditione*] sit detractus, & pro manu opere cum sigillo prædicto postea suspensus." *Vide Ryley's Placita Parliamentaria, p. 542—545.*

(b) *Co. P. C. p. 115.*

(m) This argument of our author is very far from being conclusive; for by the statute of *Westm. 1. cap. 15.* where the offense is *open and manifest* (which for what appears was the case here) the offender is not bailable, altho it were only a misprision. 2 *Co. Inst. 188, 189.*

(n) And well it might be, for that case appears by the record to have been thus: "Clement Peytenyn was indicted, quod contrafecit magnum sigillum domini regis falso & malitiose & proditorie, & cum dicto sigillo sic contrafacto quasdam litteras, quæ præsent' prædict' sunt consut', sigill'. he pleads not guilty, the jury find, quod quoad contrafactionem sigilli prædicti idem Clemens in nullo est culpabilis, sed dicunt, quod idem Clemens falso & deceptorie & in deceptionem populi de assensu aliorum de covina sua

[4] Neither the Congress of the *United States*, nor the legislature of the Commonwealth have as yet declared the bare counterfeiting the public seal of the federal or state government, to be an offence, of itself. But if such seal were used in the counterfeiting or forging any certificate, indent, or other public security, to which a seal was by law necessary to be affixed, it might bring the offence under the laws which respect counterfeit and forgeries. Act of Congress, April 30, 1790, *ch. 19. sect. 14. Laws of Virg. 1794. ch. 133. sect. 3, 4 Tucker's Bl. Com. - 83.* Several of the States have passed laws against counterfeiting the seals of the State, courts, &c.

But the later authorities are against it, and that it is only a great misprision and offense, but not high treason, nor yet felony, as it seems by the book hereafter cited.

37 H. 8. B. *Treason* 3. A chaplain taking a good seal off from an old patent, and fixing it to a forged dispensation of non-residence no treason, but only a great misprision punishable by fine and imprisonment.

H. 4 Jac. cited by lord Coke, P. C. p. 16. *Leake's* case, who joined two parchments together with glew so close, that it could not be discerned, and put a label through both, and on the one a true patent granted, which passed the seal, and then afterwards upon the other parchment wrote a forged patent; then he cut off the true patent and published the other as a true patent; this was ruled by the advice of all the judges, 1. That this was no counterfeiting of the great seal, nor treason within this act. 2. But if it had been a counterfeiting of the seal, he might have been generally indicted of treason for counterfeiting the great seal, but it was ruled to be a great misprision or offense, but not high treason; and with this opinion agrees my lord Coke, and it is the safer and later opinion and fit to be followed.

If the patentee of the king, of lands under the great seal, raze the name of one of the manors and make it another name, this is not counterfeiting of the seal nor treason within this sta- [183] tute, but a great offense or misprision, for which the abbot of *Bruer* was sentenced before the king and his council, and the abbot delivered up the charter to be cancelled. *Claus. 42 E. 3. m. 8. dors. Co. P. C. p. 16.*

If the chancellor or keeper affix the great seal to a charter without warrant, tho this be a misdemeanor in him, it is not treason within this statute, tho *Britton* and *Fleta ubi supra* make it treason at common law; and altho it should be supposed treason at common law, but not comprised within the statute, yet it is not now felony; therefore the rule taken 3 H. 7. 10. that those treasons at common law, which are not within the declaration of 25 E. 3, yet remain felony, is not true, as might be made appear by many instances.

scribi fecit, & finxit literas illas pendi fecit. sigillum magnum domini regis, quod antea pendebat super aſiam magnam patentam domini regis, & sigillum domini regis prædictum subtiliter & private consui fecit super literas falsas prædictas, & illas falsas literas una cum sigillo domini regis prædicto in diversis partibus regni Angliæ tanquam veras literas patentes, prout eadem literæ faciunt mentionem, usus est & exercebat in deceptionem domini regis & populi sui; propter quod pro eo, quod curia non avisatur, quale iudicium prædictus Clemens in hac parte subire debeat, remittitur prisonæ maresch'. Afterwards in the *Easter* term next following, viso indictamento necnon veredicto prædictis videtur curiæ hic, quod falsæ literæ prædictæ sic in deceptionem domini regis & populi sui factæ & sigillatæ, una cum usu & exercitio earundem, *alta proditio* sunt, consideratum est, quod prædictus Clemens *Peylenyn* distrahatur & suspendatur." This must be owned to be a very extraordinary case, for as lord Coke justly observes, whatever offense this were, yet this judgment ought not to have been given upon this verdict, for the jury had expressly acquitted him of the offense charged in the indictment; not to mention, that it is directly contrary to the case above-mentioned of *Geoffrey de Huntyn-ton*; there is likewise another irregularity in this case, that tho the offense was committed after the 25 E. 3. and is laid to be done *proditorie*, yet it is not laid to be *contra formam statuti*, as since that statute all treasons ought to be.

And upon the same account it seems, that altho, by *Fleta* and *Britton*, if a man find casually the great seal; and seal a forged charter, this was treason at common law; yet it is neither felony nor treason at this day, for here is no counterfeiting of the great seal, it is therefore only a great misdemeanor, *Co. P. C. p. 16.*

And altho it seems, by the old books above cited, that counterfeiting of the judicial seal of the king used for writs was then treason, yet very lately in the king's bench it was ruled to be no felony at this day, but only a great misdemeanor punishable by fine and imprisonment, or by standing in the pillory; or both, so that the book of 3 *H. 7.* is not in all points agreeable to law, for many things were treason before 25 *E. 3.* which are thereby declared not to be treason, and yet remain not felony at this day; and the like for counterfeiting the seal of a statute merchant.

If a man grave the sculpture of the great seal without warrant from the king, but never use it or apply it to seal any thing, this seems to be no counterfeiting of the great seal, tho it be with design and preparatory to such an attempt; for tho in truth the instrument itself be the seal, as appears by the usual expression *sigillo meo sigillat*, and by the frequent proclamations *de sigillo amisso*, when either the king or a subject lost his seal casually, yet it seems not a seal within this statute till an impression made in wax in [184] testimony of some writing, no more than the forging of a stamp for money is a counterfeiting of money, unless it be used, tho in both cases it is a great misdemeanor and a great evidence to prove the offense committed, if any other circumstances concur to prove it done.

M. 16 Jac. B. R. One counterfeited the draught of a patent to himself and others to compound with alehouse-keepers and usurers touching their offenses, and counterfeited the privy signet to warrant the passing of the other commission so by him drawn, and collected divers sums of money thereby, and for counterfeiting the privy signet he was indicted of high treason upon the statute of 1 *Mar.* It was resolved, 1. That the counterfeiting of the great seal, privy seal, sign manual, or privy signet is at this day high treason. 2. That the adding of the crown in the counterfeit signet, which was not in the true, and the omission of some words in the inscription, which were in the true signet, and the inserting other words, which were not in the true, (which was done purposely, that there might be a difference between the true signet and the counterfeit) alters not the case, but it is high treason, for the fixing of the counterfeit signet, and thereby obtaining the great seal to his feigned patent, and thereby publishing it to be true, and collecting sums of money by it make it treason; the offender had judgment to be drawn, hanged and quartered.(o)

So that it should seem, that tho there might be so great a disparity between the true and counterfeit signet, that the bare affixing of such a seal might not be a counterfeiting within the statute; yet if it were

(o) This case is reported in 2 *Roll. Rep.* 50. by the name of *Robinson's case.*

so like, that it deceived the officers of the great seal, and was used to that purpose, and attained its effect, viz. the affixing of the great seal to the forged commission, it was a sufficient counterfeiting to bring him within this law of 1 Mar.

The like *mutatis mutandis* may be applied to the great or privy seal.

If a man counterfeit the stamp of the great seal, and deliver it to *B.* to use, *B.* being ignorant that it is a counter- [185] feited stamp, but thinking it true, seals a writ or commission, this seems not to be treason in *B.* because he did it not *proditorie*, but it seems to be treason in the deliverer, if he delivered it to that purpose, for he did it *proditorie*, but the other not.

III. I come in the last place to consider the judgment in the case of counterfeiting of the seal, whether it be only to be drawn and hanged, as in the case of counterfeiting money, or to be drawn, hanged, beheaded, &c. as in the case of compassing the king's death, levying of war, or adhering to the king's enemies.

It seems that at the common law this offense was felony or treason at the king's election; if the indictment ran only *felonice* it was only felony, if *proditorie* it was treason. (p)

But altho it were *proditorie* and so applied to treason, it was not a treason of so deep a die, as that of compassing the king's death, adhering to the king's enemies, or levying war, which strikes at the head, and therefore in comparison thereof it was a kind of petit treason.

Claus. 6 Johan. M. 12. dors. "Soias quod dedimus *Adæ de Essex* clerico nostro pro servito suo omnia terras, tenementa & jura, quæ fuerunt *Willielmi de Strubby*, cujus terræ & tenementa sunt eschaeta nostra per feloniam, quam fecit de falsificatione sigilli nostri." *Et nota* the king had the escheat, yet the offense was styled felony.

At the parliament 18 E. 1. Co. P. C. p. 16. Clergy was allowed to a man convict *pro falsificatione sigilli regis, deliberatur ordinario*, (q) but *in tali casu non admittenda est purgatio*; and yet in these greater cases of treason of levying war or [186] compassing the king's death clergy was not allowed at common law. T. 21 E. 3. B. R. Rot. 23. Rex. (r)

(p) Co. P. U. p. 15.

(q) This is confirmed by *Philip Burton's* case, (P. 18 E. 2. B. R. Rot. 25. Rex South') who together with *Richard de Bourne* was indicted *Quod nequiter & seditiose contrafecit sigillum de metallo ad modum magni sigilli regis, de quo quidem sigillo contrafacto diversa brevía quamplurima consignavit*; he pleads *quod clericus est*, the jury find him guilty *de feloniam & seditione prædictis ei impositis*, and he was thereupon delivered to his ordinary, *tanquam clericus convictus*, from hence it appears that at common law clergy was allowed in cases of treason, where it was not immediately against the king's person.

(r) That case was thus, *Peter de Thorpe* son of *John de Thorpe* was indicted, and afterwards outlawed anno 18 E. 3. *pro diversis feloniam & seditionibus*, viz. going to little Yarmouth and Gorleston cum tribus vexillis extensis in modum guerræ, breaking open houses there, feloniously taking away goods there, &c. and also five ships, "Quæ preparatæ erant de victualibus & aliis necessariis eundi cum domino rege in guerra sua, &c. Afterwards coram rege quæsitum est a præfato Patre, si quid pro se habeat vel dicere sciat, quare ad executionem judicii de eo super utlagaria prædicta procedi non debeat, &c. Qui dicit, quod clericus est & membrum sacræ ecclesiæ, &c. Et quæsitum

M. 1. E. 3. Charter de Pardon 13.(f) A man arraigned for counterfeiting the king's seal pleaded a charter of pardon of all felonies, and it was allowed; yet there it is agreed, that the judgment for such an offense is, that he shall be drawn and hanged, but such a pardon will not serve in such a case since the statute of 25 *E. 3.*

Trin. 10 E. 2. Rot. 132. B. R. Bucks. "*Robertus Legat & Johannes Salecok* per ballivos coram rege ducti ad respondendum domino regi de hoc, quod ipsi cum aliis ignotis in pleno mercato villæ de *Olneye*, cum quadam falsa commissione & ficta cum quodam sigillo regis confectæ signata, quam ballivi in curia regis hic porrexerunt, asserentes, illam super eos inveniri die, quo attachiati fuerunt & dicentes, quod virtute illius commissionis prisas fecerunt ad opus domini regis, usque ad summam sexaginta bestiarum, de quibus quatuor bestię inventę fuerunt in eorum possessione & cum eis hic ductę; they both plead not guilty; the jury find *John-Salecok* guilty de falsitatibus & felonis prędictis, judgment given against him pro falsitate sigillı regis & commissione prędictis quod detrahatur & pro furtiva abductione prędictarum bestiarum suspendatur."

Nota, an arraignment of treason without indictment upon [187] the *mainouer(t)* found upon them: *vide P. 21 E. 3. B. R. Rot. 46. Midd' Rex.*

According to the old books above-mentioned, *Fleta, &c. ubi supra, distrahi debet & suspendi*; and so it was practised in the case of 2 *H. 4.* above-mentioned, where the judgment is only *distrahi & suspendi*.

And it may be reasonably argued, that as in the case of counterfeiting the king's coin, which was a treason at common law, tho it be so declared by the statute of 25 *E. 3.* yet the judgment, that was at common law, which was only to be drawn and hanged, is not altered by that statute. *M. 10 Car. B. R. Morgan's case*; (u) so in case of counterfeiting the seal; but at this day the law is generally held, that for counterfeiting of the great or privy seal; or of the privy signet or sign manual, the judgment is to be hanged, beheaded and quartered, as in other high treasons, and so was the judgment in the case of 16 *Jac.* above-mentioned; and it is safest to follow the modern practice in judgments of high treason, tho I think it no error, if the judgment be only *quod distrahatur & suspendatur* according to the antient precedents, because the judgment is still capital, and tho it be less, than the highest judgment in treason, yet it is still included in it.[5]

est sæpius ab eo, si quid aliud velit dicere pro responsione in retardationem iudicii, &c. Qui dicit, ut prius, & nihil aliud respondet, &c. Et inspectis indictamentis prędictis, & etiam recorde & processu utlagar' prędictę manifestę compertum est in eisdem, quod utlagar' prędicta super articulo *seditionis* promulgatur, in quo casu prędictos *Petrus* privilegio clericali gaudere non potest secundum legem & consuetudinem regni, &c. Ideo idem *Petrus* distrahatur & suspendatur, &c."

(s) 1 *E. 3.* 23. b.

(t) See for this kind of arraignment, 7 *H. 4.* 43. b. *S. P. O.* 148. c. 2 *Co. Inst.* 188.

(u) *Cro. Car.* 383.

[5] The Statutes of treason relating to the great seal, privy seal, privy signet, sign manuel, &c. have all been repealed by the 11 *Geo. 4.* & 1 *Will. 4.* c. 66. s. 2. by which

it is enacted, "That if any person shall forge, or counterfeit, or shall utter, knowing the same to be forged, or counterfeited, the great seal of the united kingdom, his majesty's privy seal, any privy signet of his majesty, his majesty's royal sign manuel, any of his majesty's seals appointed by the twenty-fourth article of the union, to be kept, used, and continued in Scotland, the great seal of Ireland, every such offender shall be guilty of high treason, and shall suffer death accordingly; provided always, that nothing contained in an act passed in the seventh year of the reign of King *William the Third*, entitled, 'An act for regulating of trials in cases of treason and misprision of treason,' or in an act passed in the seventh year of the reign of Queen *Anne*, entitled, 'An act for improving the union of the two kingdoms,' shall extend to any indictment, or to any proceedings thereupon, for any of the treasons herein before mentioned."

The 7 Will. 4. & 1 Vict. c. 84. s. 1. after reciting the enactments of the 11 Geo. 4. & 1 Will. 4. c. 66. enacts, "That if any person shall after the commencement of this act, be convicted of any of the offences herein before mentioned, such person shall not suffer death, or have sentence of death awarded against him for the same, but shall be liable at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years nor less than two years."

CHAPTER XVII.[1]

[188]

CONCERNING HIGH TREASON IN COUNTERFEITING THE KING'S COIN,
AND IN THE FIRST PLACE TOUCHING THE HISTORY OF THE COIN[2]
AND COINAGE OF ENGLAND.

THE legitimation of money and the giving it its denominated value is justly reckoned *inter jura majestatis*, and in *England* it is one special part of the king's prerogative.

[1] The law as it is written in the ensuing chapters, which treat of treasons relating to the coin, has undergone very great alterations by a late Act of Parliament. Milder and more suitable punishments have been attached to these offences, and the guilt of treason has in every instance, been taken away from them. They now range under the heads of felony and misdemeanor; which seems to be the proper classification; and the one adopted by the old law writers, in whose treatises they always rank as a species of the *crimen falsi*. See 4 Bl. Com. 88. But there still remains a great deal of curious and useful information untouched by the provisions of this Act. The statute alluded to is the 2 Will. 4. c. 34. which repeals wholly or in part the undermentioned statutes relating to the coin.

(Statutes wholly repealed.) Stat. de Moneta vulgo. 21 Edw. 1. Stat. 4. 5. & 6. 27 Edw. 1. Stat. 1. 9 Edw. 3. Stat. 2. 17 Edw. 3. 25 Edw. 3. Stat. 5. c. 12. & 13. 3 Hen. 5 Stat. 2. c. 6. & 7. 19 Hen. 7. c. 5. 5 & 6 Edw. 6. c. 19. 1 Mar. Stat. 2. c. 6. 1 P. & M. c. 11. 5 Eliz. c. 11. 14 Eliz. c. 3. 18 Eliz. c. 1. 8. & 9. Will. 3. c. 26. 9. & 10. Will. 3. c. 21. 1 Ann. Stat. 1. c. 9. 15 Geo. 2. c. 28. 11 Geo. 3. c. 40. 13 Geo. 3. c. 71. 7 Geo. 4. c. 9.

(Statutes partially repealed.) 18 Edw. 3. Stat. 1. 25 Edw. 3. Stat. 5. c. 2. (the famous statute of treasons: repealed as far as regards the coin) 27 Edw. 3. Stat. 2. c. 14. 6 & 7 Will. 3. c. 17. 7 Ann. c. 24. 7 Ann. c. 25. 37 Geo. 3. c. 126. 56 Geo. 3. c. 68. 3 Geo. 4. c. 114.

It repeals the following Scotch Acts relating to the coin. 6 Parl. Jac. 2. 5 Parl. Jac. 3. 8 Parl. Jac. 3. 7 Parl. Jac. 5. 7 Parl. Jac. 5. 9 Parl. Mary. 1 Parl. Jac. 6. 1 Parl. Will.

And also these Irish Acts. 3 Edw. 4. c. 3. 28 Eliz. c. 6. 8 Ann. 6. 23 & 24 Geo. 3. c. 50. 26 Geo. 3. c. 39.

The principal provisions of the 2 Will. 4. will be found in their appropriate places throughout these pages.

[2] Coin, in French, signifieth a corner, and from thence hath its name, because in ancient times money was square as it is in some countries to this day. 1 Ins. 207.

Before I enter into the particulars concerning money I will give a history or narrative of the various states and conditions and changes of money in the several ages of this kingdom, and then shall descend to some more particular observations, which will be useful in this business.[3]

Money is the common measure of all commerce almost through the world; it consists principally of three parts; 1. The material, whereof it is made. 2. The denomination or extrinsic value. 3. The impression or stamp.

1. The material in *England* is either pure silver, or pure gold, whereof possibly some money was antiently made here in *England*, or else silver or gold mixed with an allay, which was usually and is hitherto a small proportion of copper.

The standard of the money of *England*, that hath for many ages obtained, is that, which is commonly called *Sterling*(a) gold or *Sterling* silver, for tho the denomination of *Sterling* was at first applied to the coin of silver and to that coin, which was the penny.

[189] commonly called *Sterlingus*, yet use hath made it applicable not only to all kind of *English* coin of silver, but also to coin of gold, and this is called the standard of coin.

But before this can be well understood, we must make some digression touching the measures applicable to these materials.

In silver the measure or weights applicable thereunto are principally these:

1. The pound, which being not *averdupois*, but *troy* weight, consists of twelve ounces.

2. The ounce consisting of twenty penny weight.

3. The penny, or *Sterling*, consisting of thirty-two grains of wheat taken out of the middle of the ear.

This is the old *compositio mensurarum* settled in the time of *E. 1.*(b) viz., quodd denarius *Angliæ*, qui denominatur *Sterlingus* rotundus, sine tonsura ponderabit triginta duo grana frumenti medio spicæ, & viginti denarii faciunt unciam, & duodecim unciae faciunt libram, & octo libræ faciunt gallonem, & octo gallones busselum.(c)

And it is to be remembered, that at that time a penny did really weigh the twentieth part of an ounce of silver, and twenty pennies did really weigh an ounce of silver, and two hundred and forty pence

(a) Some imagine this word to come from the town of *Sterling* in *Scotland*, where they pretend the purest money was formerly made; others that it is derived from the *Saxon* word *Steere*, which signifies rule or standard; others that it was taken from some *Flemish* workmen, who in the reign of King *John* were invited over to reduce the money to its proper fineness; the people of that country being generally called *Easterlings*.

(b) An old leiger book of the abbey of *St. Edmundsbury*, says the affair was thus settled in 3 *E. 1.* by *George Rockley* then mayor of *London* and master of the mint; and in the 28 *E. 1.* an indented trial-piece of the goodness of old *Sterling* was lodged in the exchequer, and every pound weight *troy* of such silver was to be shorn at twenty shillings and three pence. See *Tindal's* note on *Rapin's* history, sub fine *Ed. 1.*

(c) Vide statute 31 *E. 1.* 2 *Co. Instit.* 577.

[3] 1 *Bl. Com.* 276. 1 *East, P. C.* 147. *Smith's Wealth of Nations*, Book I. ch. 11.

did really amount to a pound weight troy, and to twenty shillings, which made a pound of silver coin.

And altho at this time the coin is raised, and therefore varies from what it was at that time; yet to this day twenty shillings in silver is called a pound, and the measure of an ounce is by twenty penny weights according to the old proportion; but indeed the grain is changed, (*) for whereas thirty [two] grains of corn then made an ounce, [a penny weight,] yet because the weight of corn is not always uniform, and the number of thirty [two] was not so ready and easy for computation; the penny weight is now [190] divided into twenty-four equal parts, which are commonly in the business of the mint called grains.

But touching the measure of gold, there is some difference in relation to coin from that of silver, for we are told by the *liber ruber scaccarii*, in that large tract concerning money, that the pound of gold consists of twenty-four carets, every caret weighing half an ounce of silver, and every caret consisting of four grains; and consequently every grain of gold would weigh sixty of those grains, which we call grains of silver, viz. the artificial grains, whereof twenty-four made the penny weight. (d)

Now the *Sterling* standard was antiently, as it seems, somewhat different from the standard as it is at this day, and for some hundred of years before; for from the 46th year of *Edward III.* and for some time before until this day, the standard of *Sterling* silver hath been and is this, viz., every pound of *Sterling* silver hath eleven ounces two-penny weight of fine silver, and eighteen penny weight of copper, which makes the allay of *Sterling*; but because there cannot be so exact an observation of the proportion, a half-penny weight of copper over or under is allowed for the remedy, which is the cause that Sir *John Davis* in the case of mixt monies, fol. 24 b. saith, that eighteen shillings and five pence halfpenny *argenti purissimi continentur in quolibet libra, & quælibet libra de Sterling money avoit 18 d. ob. de allay de coper, & nient plus.*

But before that time it appears by the red book in the exchequer, (which was written before 46 *E. 2.* and after 23 *E. 3.*) the standard of *Sterling* silver consisted of eleven ounces four penny weight of fine silver, and sixteen penny weight of copper, so that then the standard was purer; and possibly by what follows it may appear, that in the time of *Henry II.* the standard was purer than that, for then there was allowed only twelve-pence upon the pound of silver *dealbare firmam*, (e) which possibly might be to reduce it to fine silver, but this is obscure; *de hoc postea.*

The standard of *Sterling* gold in the latter end of *E. 3.* (f) [191] was, that a pound of *Sterling* gold consisted of twenty-

(*) There being, as I apprehend, two or three mistakes in this paragraph, I was not willing to vary from the original MS., but have inserted in brackets what I think was intended.

(d) If 1 caret = 4 grains = $\frac{1}{2}$ ounce = 10 penny weight, then $\frac{1}{4}$ caret = 1 grain = $2\frac{1}{2}$ penny weight = 60 grains of silver.

(e) *Mat. Paris*, 747.

(f) See *Tindal's* note on *Rapin's* history, sub fine *Ed. 3.*

three carets, three grains and a half of pure gold, and a half grain of allay of copper, and thus I think it continues to this day; and by this we may understand the statute of 17 *E. 4. cap. 1.* and 4 *H. 7. cap. 2.* by the former it is provided, that no goldsmith sell any gold under the fineness of eighteen carets, nor silver under the allay of *Sterling*; by the latter, that all silver, that shall be fined or parted, be made so fine, that it may bear twelve penny weight of allay in a pound weight, and yet be so good or better than *Sterling*. [4]

And this is the dignity of the coin of *England*, that it hath been generally of the allay of *Sterling*, (except some small interruptions, whereof hereafter) and according to this it was enacted 25 *E. 3. cap. 13.* that the money of gold or silver, which now runneth, shall not be impaired in weight or allay, but as soon as a good way may be found, the same be put into the antient state, as in the *Sterling* made upon the petition of the commons. *Rot. Par. 25 E. 3. n. 32.*

II. As to the second essential of coin it is the denominated or extrinsic value, which is and of right ought to be given by the king, as his unquestionable prerogative, (g) and that is seen in these particulars.

1. In the first institution of any coin within this kingdom he, and he alone sets the weight, the allay, the denominated value of all coin; [5] this is done commonly by indenture between the king and the master of the mint; *de quo postea.*

(g) *Plø. Com. 346.*

[4] By the 9th Sect. of the Act of Congress of April 2, 1792, ch. 16, it is enacted, That there shall be from time to time struck and coined at the mint, coins of gold, silver, and copper of the following denominations, values, and descriptions, viz.: **EAGLES**—each to be of the value of ten dollars or units, and to contain two hundred and forty-seven grains and four-eighths of a grain of pure, or two hundred and seventy grains of standard gold. **HALF EAGLES**—each to be of the value of five dollars, and to contain one hundred and twenty-three grains and six-eighths of a grain of pure, or one hundred and thirty-five grains of standard gold. **QUARTER EAGLES**—each to be of the value of two dollars and a half dollar, and to contain sixty-one grains and seven-eighths of a grain of pure, or sixty-seven grains and four-eighths of a grain of standard gold. **DOLLARS OR UNITS**—each to be of the value of a Spanish milled dollar as the same is now current, and to contain three hundred and seventy-one grains and four-sixteenth parts of a grain of pure, or four hundred and sixteen grains of standard silver. **HALF DOLLARS**—each to be of half the value of the dollar or unit, and to contain one hundred and eighty-five grains and ten-sixteenth parts of a grain of pure, or two hundred and eight grains of standard silver. **QUARTER DOLLARS**—each to be of one-fourth the value of the dollar or unit, and to contain ninety-two grains and thirteen-sixteenth parts of a grain of pure, or one hundred and four grains of standard silver. **DISMES**—each to be of the value of one-tenth of the dollar or unit, and to contain thirty-seven grains and two-sixteenth parts of a grain of pure, or forty-one grains and three-fifth parts of a grain of standard silver. **HALF DISMES**—each to be of the value of one-twentieth of the dollar, and to contain eighteen grains and nine-sixteenth parts of a grain of pure, or twenty grains and four-fifth parts of a grain of standard silver. **CENTS**—each to be of the value of one-hundredth part of a dollar, and to contain eleven penny weights of copper. **HALF CENTS**—each to be of the value of half a cent, and to contain five penny weights and half a penny weight of copper.

[5] The power to coin money, regulate the value thereof, and of foreign coin, is conferred on Congress by the Constitution, Art. 1 Sect. 8. And it is exclusive in Congress, the States being expressly prohibited (Art. 1, Sect. 10.) from coining money; though

And tho by special charter or usage divers prelates and monasteries in *England* had a certain number of stamps for the coinage of money, as the abbot of *St. Edmundsbury*, *Claus. 32 H. 3. m. 15. dors.* the archbishop of *York*, *Claus. 5. E. 3. part. 1. m. 19.* and likewise the archbishop of *Canterbury*, the bishop of *Durham*, the bishop of *Chichester*, &c. *de quibus vide. statute 14 & 15 H. 8. cap. 12.* yet they had only the profit of the coinage, and the residence of some coiners at their cities, but they had not the power of instituting either the allay, the denomination, or the stamp; the stamps were usually sent them by the treasurer and barons of the [192] exchequer by the king's command under his great seal, and the masters or chief officers imployed therein were sworn to the king for the just execution of their places. [6] *Claus. 5. E. 3. part. 1. m. 10. & 19.*

But those mints have been long disused, tho it should seem by the statute of 14 *H. 8. cap. 12.* above-mentioned, that the several statutes made against exchange of money, other than at the king's exchanges, were not intended to prejudice these particular franchises of coinage.

2. He may by his proclamation legitimate foreign coin, [7] and make it current money of this kingdom according to the value imposed by such proclamation; but the counterfeiting of such money was not treason, till the statute of 1 *Mar. cap. 6.* made it so, [8] nor the clipping, washing, impairing thereof was not treason till 5 *Eliz.*

they exercise the authority of establishing a circulation of bank paper as a currency. Congress have enacted a number of laws, which will be referred to, regulating the mint, the domestic and foreign coin, and the offences relating to them.

[6] The Acts establishing and regulating the mint of the *United States*, and for regulating coins, are the following: An Act establishing a mint and regulating the coins of the *United States*, April 2, 1792. *ch. 16.* An Act regulating foreign coins, and for other purposes, February 9, 1793. *ch. 5.* An Act in alteration of the Act establishing a mint and regulating the coins of the *United States*, March 3, 1794. *ch. 4.* An Act supplementary to an Act entitled, "an Act to establish a mint and regulating the coins of the *United States*," March 3, 1795. *ch. 47.* An Act respecting the mint, May 27, 1796. *ch. 33.* An Act respecting the mint, April 24, 1800. *ch. 34.* An Act concerning the mint, March 3, 1801. *ch. 21.* An Act to prolong the continuance of the mint at *Philadelphia*, January 14, 1818. *ch. 4.* An Act further to prolong the continuance of the mint at *Philadelphia*, March 3, 1823. *ch. 42.* An Act to continue the mint at the city of *Philadelphia*, and for other purposes, May 19, 1828. *ch. 67.* An Act concerning the gold coins of the *United States*, and for other purposes, June 28, 1834. *ch. 95.* An Act to establish branches of the mint of the *United States*, March 3, 1835. *ch. 37.* An Act supplementary to an Act entitled, "an Act establishing a mint, and regulating the coins of the *United States*," January 18, 1837. *ch. 3.* An Act to amend an Act entitled, an Act to establish branches of the mint of the *United States*, February 13, 1837. *ch. 14.* An Act amendatory of an Act establishing the branch mint at *Danlonega, Georgia*, and defining the duties of the assayer and coiner, February 27, 1843. *ch. 46.*

[7] Under the confederation, the continental Congress had delegated to them, "the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the States." By this grant there was no power given to regulate the value of foreign coin; a defect which is supplied by the Constitution, Art. 1. Sect. 8. *Story on the Const. 16.*

[8] By the 37 *Geo. 3. c. 126.* counterfeiting foreign gold or silver, is made felony, and punished with transportation for seven years.

cap. 11. and 18 *Eliz. cap.* 1. but all these statutes allow the power of legitimation thereof to the king by proclamation.(h)

3. He may inhance the external denomination of any coin already established by his proclamation, and thus it hath been gradually done almost in all ages, as will appear by what follows in this chapter; this is sometimes called imbasing of coin and sometimes inhapsing it; and it is both, it is an inhansing of coin in respect of the intrinsic value or denomination, but an imbasing in regard of the extrinsic value; as for instance, when in the time of *E.* 4. a noble was raised to a higher rate by twenty pence; *vide* 9. *E.* 4. 49.

4. He may by his prerogative imbase the species or material of the coin, and yet keep it up in the same denominated or extrinsic value as before, namely to mix the species of money with an allay below the standard of *Sterling*; this is the case of mixt monies in Sir John Davis's reports, where the case was this.

April, 43 Eliz. Brett bought wares of one *Gilbert* a merchant in *London*, and became bound to him in 200*l.* conditioned for the payment of one hundred pound *Sterling* current and lawful money of *England* in *September* following at *Dublin* in *Ireland*: 24 *May, 43 Eliz.* the queen sent into *Ireland* certain mixt money from the tower of *London* with the usual stamp and inscription, and declared by her proclamation, that it should be lawful and current money of *Ireland, viz.* a shilling for a shilling, and six-pence for six-pence, and that accordingly it should pass in payment, and none to refuse, and declared that from the 10th of *July* next all other money should be decried and esteemed only as bullion and not current money. Upon the day of payment *Brett* tendered the 100*l.* in this mixt money, and resolved upon great consideration, that this tender was good, the place of payment being in *Ireland*, and the day of payment happening after the proclamation made; that altho this were not in truth *Sterling*, but of a baser allay, nor a money current in *England* by the proclamation, yet the payment being to be made in *Ireland*, it was, as to that purpose, current money of *England*; but if the day had been passed before the proclamation, then he must have answered the value, as it was when payment was to have been made. Sir John Davis's reports, *case de mixt moneys.*(i)

It is true, that the imbasing of money in point of allay hath not been very usually practised in *England*, and it would be a dishonour to the nation, if it should, neither is it safe to be attempted without parliamentary advice; but surely if we respect the right of the thing, it is within the king's power to do it; for tho the statute of 25 *E.* 3, *cap.* 13. above-mentioned be against it, yet the statute doth not absolutely forbid it; and altho by *Poyning's* law 10 *H.* 7.

(h) See also 8 & 9 *W.* 3. *cap.* 25. and 7 *Ann. cap.* 25. whereby it is high treason knowingly to make, mend, buy, sell, or have in possession any mould or press for coining, or to convey such instruments out of the king's mint, or mark on the edges any coin current, or to counterfeit, or colour or gild any coin resembling the current coin of the kingdom. And see 15 *Geo.* 2. ch. 28.

(i) *Davis Rep.* 18.

all the precedent statutes in *England* are of force in *Ireland*, yet that resolution was given as above.

My lord *Coke* in his comment of *Articuli super cartas*, cap. 20. seems to imply, that the alteration of money in weight or allay may not be, without act of parliament, and for that purpose cites the *Mirror of Justices*,^(k) *Ordein fuit, qe nul roy de ce* [194] *reame ne poit changer sa money ne impayre, ne amender, ne autre money faire, qe de ore ou de argent sans assent de tous ses counties*; and the act of 25 *E. 3.* cap. 13. the statute of 9 *H. 5.* sess. 2. cap. 6. that all money of gold and silver shall be as good weight and allay as is now made at the *Tower*: the parliament-roll of 17 *E. 3.* n. 15.^(l) which was an accord in parliament for the present amendment and increase of coin *de fayre une mony des bones Esterlinges en Engleterre du poys & allay del auntient Esterlinges, qe avera son course in Engleterre enter les graunts & commons de la terre*, which should not be exported; and if those of *Flanders* would make money of as good an allay as *Esterlinges*, that it should be current between merchant and merchant here, and and others that would receive it, which was a temporary provision for the increase of money.

All that a man can conclude upon these is, that it is neither safe nor honourable for the king to imbase his coin below *Sterling*: if it be at any time done, it is fit to be done by assent of parliament, but certainly all that it concludes is, that *fieri non debuit*, but *factum valet*, and this appears,[9]

1. By that resolution in the case of mixt monies, which, tho it were but by way of advice and in *Ireland*, is of great weight, especially if we consider the consonancy thereof to the practice in *Ireland*, which tho it hath the same law of 25 *E. 3.* in force there, yet generally their coin current there was of a baser allay than *Sterling*, even before the proclamation of 43 *Eliz.*

2. By the usual inhansing of the coin in point of value and denomination here, which tho it be not absolutely an imbasement of the coin in the species, yet it hath very near the same effect.

3. By the attempts that have been made to restrain the change of coin without consent of parliament. Among those many provisions by the lords ordeiners, 5 *E. 2.* n. 30. that much abridged the king's power, this was one, *pur ceo qe a tous les foys qe le change de mony se fait en royaume, tout le people est grandment grievez in molts des manners, nous ordeinams, qe quant* [195] *mestier serra & le roye voile exchange faire, qil la face par common councell de son baronage & ceo en parlement.*

But these ordinances, and this among the rest was repealed in parliament *E. 2.* and never revived again.

(k) Cap. 1. §. 3.

(l) See Co. P. C. p. 93.

[9] The king's prerogative does not extend to the debasing or enhancing the value of the coin, below or above the sterling value. 1 Bl. Com. 278. 1 East, P. C. 148.

Rpt. Par. 20 E. 3. n. 17. "Item qe les receivers des payments nostre seigneur le roy receuent de people en chescun place auxi bien or come argent al prise assise desicom le people est arte de cel recevoir pur payment, & qe la change de mony de or ne dargent ne se face sans assen de parlement. Rq'. Quant aprimer point de c'article soyt tenus; quant a les changes fair soit l'article monstre a nostre seigneur le roy, & as graunts qe sont perdervers lui, qils ent ordeignent & dient lour volunte."

King *Henry VIII.* imbased the coin of this kingdom in point of allay, and so it continued during the residue of his reign, and during the reigns of *Edward VI.* and queen *Mary*, in so much that the penny had not above a half-penny of intrinsic value; but queen *Elizabeth* among the rest of her excellent methods of government, did by little and little rectify this detestable imbasement of coin: 1. By prohibiting exportation, and melting down of good silver. 2. By reducing the brass money to its intrinsic value. 3. By making a good allowance (to her own loss) of the base money brought into the mint. 4. By stamping of new money of just allay of *Sterling*: *Camd. Eliz. sub anno 1560. p. 48.*

While I wrote this a proclamation hath issued, dated 16 *Aug.* 1672, whereby copper coin of half-pence and farthings near the intrinsic value is proclaimed in these words: "We do by this our royal proclamation declare, publish and authorize the said half-pence and farthings of copper so coined, and to be coined, to be current money, and that the same from and after the 16th of *Aug.* shall pass and be received in all payments, bargains, and exchanges to be made between our subjects, which shall be under the value of six-pence, and not otherwise nor in any other manner;" [10] how far this makes it current money, *videbimus infra.*

And thus far touching the power of denomination, or setting the extrinsic value upon coin; the manner how this is done will be shewn hereafter.

III. The *third* essential in coin is the stamp or impression, for tho it may be possible, as Mr. *Stowe* says, that in antient time money passed in *England* without a stamp or impression, yet I never read any such thing since the conquest, for that, which is frequently called blank money, was not money without impression, but white money or pure silver, or at least *Sterling* silver coined, for otherwise it had not been an apt measure for commerce: the stamps or impressions of current money were heretofore delivered to the master of the mint from the exchequer, but of later times they are delivered by the secretary sometimes with, sometimes without the indenture of coinage: now touching the manner of the legitimation of coin in *England*, it is sometimes by proclamation, but always by indenture between the king and the master of the mint.

[10] This seems to have been the first instance of the introduction of copper coin into the general currency of *England*. See 1 *East. P. C.* 148.

And therefore where Sir *John Davis* in the case *ubi supra*(m) makes these six things as essentials to the legitimation of coin, 1. Weight. 2. Fineness. 3. Impression. 4. Denomination. 5. Authority of the prince. 6. Proclamation. The last is not always necessary to the legitimation of coin, for there is scarce any king's reign, but that there are various stamps or impressions of money, which were never proclaimed; and therefore if upon an indictment of clipping or counterfeiting the king's coin it be questioned, whether it be the king's coin or no upon the evidence, there is not a necessity of proof thereof by a proclamation, but it is a meer question of fact, which must be left upon the jury by circumstances of fact to find, whether it be the king's money; for tho there might be possibly proclamation of some new coins in the beginning of the king's reigns, yet it would be impossible to prove them in the antient coins of *Edward VI.* queen *Mary*, queen *Elizabeth*, &c. but if necessary to be supposed, they may be presumed, *ex diuturnitate temporis*; the most therefore that can be expected is to produce the officers of the mint or their indenture to prove a coin current, if it be not otherwise commonly known. [197]

But proclamation is necessary in these cases following.

1. A proclamation with proclamation-writ under the great seal is necessary to legitimate and make current foreign coin,[11] and without the proclamation it is neither current coin of this kingdom; nor

(m) 19 b.

[11] The Acts relating to foreign coin, are An Act to provide more effectually for the collection of the duties imposed by law on goods, wares, and merchandize, imported into the *United States*, and on the tonnage of vessels, August 4, 1790. ch. 35. sect. 40. An Act relative to the rix dollars of *Denmark*, March 3, 1791. ch. 19. An Act regulating foreign coins, and for other purposes, February 9, 1793. ch. 5. An Act supplementary to an Act regulating foreign coins, and for other purposes, February 1, 1798. ch. 11. An Act to regulate the collection of duties on imports and tonnage, March 2, 1799. ch. 22. sect. 61. An Act to suspend in part the Act entitled, "An Act regulating foreign coins, and for other purposes," April 30, 1802. ch. 38. An Act regulating the currency of foreign coins in the *United States*, April 10, 1806. ch. 22. An Act regulating the currency within the *United States* of the gold coins of *Great Britain*, *France*, *Portugal*, and *Spain*, and crowns of *France* and five franc pieces, April 29, 1816. ch. 139. An Act to continue in force an Act regulating the currency within the *United States* of the gold coins of *Great Britain*, *France*, *Portugal*, and *Spain*, and crowns of *France*, and five franc pieces, March 3, 1819. ch. 96. An Act to continue in force an Act entitled, "An Act regulating the currency within the *United States* of the gold coins of *Great Britain*, *France*, *Portugal*, and *Spain*, and crowns of *France*, and five franc pieces," March 3, 1821. ch. 52. An Act to continue in force an Act entitled, "An Act regulating the currency within the *United States* of the gold coins of *Great Britain*, *France*, *Portugal*, and *Spain*, and the crowns of *France*, and five franc pieces," March 3, 1823. ch. 49. An Act regulating the value of certain foreign silver coins within the *United States*, June 25, 1834. ch. 71. An Act regulating the value of certain foreign gold coins within the *United States*, June 28, 1834. ch. 96. An Act supplementary to an Act entitled, An Act establishing a mint and regulating the coins of the *United States*, January 18, 1837. ch. 3. sect. 8. An Act regulating the currency of foreign gold and silver coins in the *United States*, March 3, 1843. ch. 69. An Act to fix the value of certain foreign monies of account in compensation at the custom house, March 3, 1843. ch. 92. For the rates of estimating foreign coins and currencies, see the Act to regulate the collection of duties on imports and tonnage, 2 March, 1799. sect. 61.

is the counterfeiting, clipping or diminishing thereof treason within the statute of 1 *Mar.* or 5 or 18 *Eliz.* for the words in these statutes (*and by proclamation allowed and suffered to be current here*) refers only to foreign coin, not to the coin of this kingdom; but tho it be not proclaimed, it is misprision of treason to counterfeit[12] it by the statute of 14 *Eliz. cap. 1.*

The reason is especially because by the statute of 17 *R. 2. cap. 1.* no foreign coin of gold or silver are to run in any manner of payment within this realm, but are to be brought as bullion to the mint to be turned into *English* coin.[13]

2. A proclamation under the great seal is necessary to legitimate base coin or mixt below the standard of *Sterling*, and for the dispensing within the statute of 25 *E. 3. cap. 13.* and 4 *H. 5. cap. 6.* and with application to that case the opinion of Sir *John Davis's* report touching the necessity of a proclamation seems to be good in law.

3. A proclamation under the great seal is necessary, when any coin already in being is inhanced to a higher denomination or extrinsic value; as when the twenty shillings piece of gold was raised to twenty-two shillings, because it was once current money under another denomination; thus it was done upon the inhancing of twenty shillings and ten shillings pieces by king *James.*

4. A proclamation is necessary when any money, that is current in usage or payment, is decried; thus it was done in the case of 49 *Eliz.* for the *Sterling* money in *Ireland* before mentioned; and thus it was done by the *Pollards* and *Crocards tempore E. 1. (n) Dy. 82.* and by the several base monies mentioned in *Articuli de moneta*, namely the money with the mitre and with the lyons, which [198] it seems were minted in *England*, besides the other foreign money therein mentioned.(o)

5. Altho in the case of money newly coined by the king's authority in *England* a proclamation is not absolutely necessary to the legitimation thereof or making it current, yet to induce a contempt upon such as refuse to take it in payment such proclamations have not been altogether unusual, and by the red book of the exchequer seems necessary for that purpose; for how can men reasonably know at first, whether this be the king's coin without some such public notification, where long use and custom hath not made the stamp or coin familiarly known to those, that are to receive it: *vide* proclamations for money newly made principally upon this account, *Claus. 18 E. 3. part 1. m. 28 & 12. dors. Claus. 18 E. 3. part 2.*

(n) *Davis* 21. b. See the note in *Rapin's hist. sub fine Ed. 1.*

(o) And thus it was lately done in the case of the broad pieces of twenty-five shillings and twenty-three shillings.

[12] It is a misdemeanor, by the 43 *Geo. 3. c. 139.* to counterfeit foreign coin not current by proclamation, but resembling copper or mixed metal coin of a foreign state.

[13] 1 *Edst.* P. C. 149.

m. 14. dors. Claus. 19 E. 3. part 1. m. 23 & part 2. m. 15. dors. Claus. 20 E. 3. part 2. m. 20. dors. and 25 E. 3. m. 14. dors. But yet the money is the lawful money of *England*, and he that counterfeits it is within the law of 25 *E. 3.* for treason, tho there be no such proclamation: *vide Libr. Rubr. Scaccarii, fol. 259.* “*Impri-
mis oportet ut omnem monetam præcedat constructio allai, viz.
ponderisque & numeri ipsius monetæ distinctè & aptè continens
moderamen, deinde inchoanda est & perficienda ex edicto aut licentiâ
principis speciali, & publicandâ per proclamationem præconis ipsius
principis publicè, ut mos exigit faciendum, & tunc usui apta erit: ita
ut ex tunc non sit impunè a quoquam de populo recusanda. Qui-
cunque autem clam vel apertè vel palam absque licentiâ principis
cujuscunque monetæ contrafactionem attemptasse convictus fuerit,
corporaliter plecti solet.*”

And now I shall give a brief history of the variation of the coin of *England*.

It appears by all the antient monuments, that I have seen, that the use of coin or money was antient and long before the conquest. (p)

It is true that *Gervasius Tilburienſis*, who wrote the black book of the exchequer in the time of *Henry II.* com- [199] monly called *magister & discipulus*, *Lib. I. cap. à quibus & ad quid instituta fuit argenti purgatio*, says, that in the times of king *William I. William II. and Henry I.* the antient farms of the king's demesnes were answered in cattle, corn, and other provisions in specie, because it saved the king the trouble of purveyors, and money was scarce among the people; and yet the reservations of their rents were in money, *viz.* so many pounds *numero*, or so many pounds *blanc*; *de quibus infra.*

And to make an equation between the provisions, that were answered in kind, and the rents that were reserved, there were certain rates or prices agreed upon almost all such provisions, as for wheat for one hundred men *per diem* twelve pence, for a fat ox twelve pence, &c. which it seems were delivered to the sheriff and by him answered to the king in money or kind, as it was agreed.

But those farm rents, that were reserved out of the cities, boroughs, franchises, &c. because they had not provisions in kind were answered in money according to their reservations.

In the time of *Henry I.* this answering of farms by provisions ceased, and the tenants paid their money according to the letter of their reservations; the king was weary of receiving, and the farmers weary of paying their rents in victuals and provisions, but money still was in use as the common instrument of commerce and valuation.

In the troublesome time of king *Stephen* we are told by *Roger Hoveden sub anno 1149.* *Omnes potentes tam episcopi, quam comites & barones suam faciebant monetam*, which occasioned a

(p) That money was coined here in the time of the Saxons is sufficiently plain, but it is very doubtful whether the Britons ever coined any; in *Cæsar's* time they used only iron-rings, or pieces of brass; *Cæsar. Com. de B. G. lib. 5, m. 12.*

great confusion and corruption in money and commerce: (q) *Henry II.* coming to the crown reformed this usurpation and abuse, *notam fecit monetam, quæ sola accepta erat & recepta in regno*; (r) and thus it hath hitherto obtained, only some particular corporations ecclesiastical, as bishops and abbots had special privileges granted to them to have mints, (s) some one stamp, some two, some more, which yet were sent to them from the king's exchequer, and their officers sworn to the king to deal faithfully in their offices.

Yet after this king's time, especially in the beginning of king *John's* time, there was a great uncertainty and disorder both in the weight and allay of coin; for *Claus. 7 Johann, m. 24. Sciatis quod recipimus per manum Petri de Ely, &c. trecentas libras numero, quæ ponderabant quingentas libras 47s. 8d.* and in the same roll, *m. 25. recipimus de Thesaurio per manus Petri de Ely, 1725l. & 11s. 6d. numero, quæ ponderabant 1556l. 17s. 6d.* which holds no proportion with the former.

Henry III. had a troublesome reign, and malefactors abounded, especially in relation to the clipping of money; in his thirty-second year he made new money, and ordained *ne quis denarius, nisi legitimi ponderis & circularis formæ uteretur*, clipt money not to be received but perforated, and divers offenders were hanged. *Mat. Paris sub anno 1248*; (t) but we have not the just standard or weight of his money.

In the time of *Edward I.* we know what the weight and allay of his current money was, namely the allay was *Sterling*, twenty shillings made a pound weight troy, and twenty pence an ounce, so that the pound of *Sterling* silver made two hundred forty *Sterling* pence.

There were other base monies in his time, as namely, those that were decried by the *Articuli de monetâ*, and *Pollards* and *Cro-cards*; what the value of the latter was I know not, but it appears by *Claus. 28 E. 1. m. 6. quod pro qualibet libra pollardorum una marca Sterlingorum solvitur ad Scaccarium*: they were both decried in the 28 *E. 1.* (u) *Vide Dy. 81.* This rate of *Sterling* continued during some time of *Edward II.*

(q) *William of Newbury* writes thus under the reign of king *Stephen*, *Erant in Anglia quodammodo tot reges vel potius tyranni quot domini castellarum, habentes singuli percussuram proprii numismatis.*

(r) See *Wilk. Leg. Henry II. p. 320.* where these words are also added, *abdicata jam procerum illa*; the truth is, this reformation of the money began to be made towards the latter end of *Stephen's* reign, for among the articles of peace between *Stephen* and *Henry* this was one, that the silver coin should be one and the same throughout the kingdom. *Ibid. p. 315. Mat. Paris, p. 139.*

(s) See a charter of king *John* allowing this privilege to *Hubert* archbishop of *Canterbury*. *Wilk. Leg. Johannis, p. 355.*

(t) *p. 747.*

(u) As appears by the proclamation, *Quod Pollardi & Crokardi non currant in regno Angliæ, Claus. 28 E. 1. m. 12. dors.* by which record it also appears, that two *Pollards* and one *Sterling* were much about the same value; for the words are *Licet nuper pro communi utilitate regni nostri de consilio nostro ordinavimus, quod duo Pollardi, vel duo Crokardi currebant in eodem regno pro uno Sterlingo.*

I have not seen any indentures of the mint between the time of *Edward II.* and the 46 *Edward III.* (x) and then by [201.] the indenture of the mint *Claus. 46 E. 3. m. 18.* a pound of gold made forty-five nobles, each noble six shillings and eight pence, and was to consist of twenty-three carets, three grains and an half of fine gold, the rest allay; the coinage to be four shillings for each pound for the master of the mint, and twelve pence for the king; the pound valued at fifteen pounds, and the merchant upon the return to have out of the *Tower* fourteen pounds fifteen shillings.

A pound of silver was to make three hundred pence, and so in that proportion groats, half-pence, and farthings, which was to be of the allay *du viel Esterling*, viz. eleven ounces two-penny weight of fine silver, and eighteen penny weight of allay; eight pence to be allowed for coinage.

The next Indenture I find is 3 *H. 4. p. 2. m. 9. dors.* whereby a farther alteration was made.

The pound of gold made the same quantity of nobles, and was of the same allay as before, only upon every pound was allowed three shillings and six pence to the master, and one shilling and six pence to the king for coinage.

The silver coin of the same fineness, weight and allay; as by the indenture of 46 *E. 3.* the coinage eight pence, whereof seven pence to the master, and one penny to the king upon every pound weight.

Claus. 1 H. 5. m. 35. dors. the allay of gold and silver still the same as before, but some other variance there was.

The pound of gold was now to make fifty nobles, the value of the whole pound to be sixteen pounds thirteen shillings and four pence, the coinage five shillings.

The pound of silver was to make three hundred and sixty pence, the coinage was nine pence to the master, and three- [202] pence to the king; so that now the pound of silver made thirty shillings *Sterling*, which began in *Rot. Parl. 13 H. 4. n. 28.* by ordinance of parliament.

Claus. 9 H. 5. m. 2. dors. the same weight and allay of gold, viz. every pound of gold to make fifty nobles, the coinage to the king three shillings and six pence, to the master eighteen pence.

The like as to silver in all points as by the indenture of 1 *H. 5.* only the master to have nine pence, the king three pence for coinage.

Claus. 1. H. 6. m. 13 & 15. The indenture agrees in all things with that of 9 *H. 5.*

Claus. 4. E. 4. m. 20. The king by proclamation inhanseth the value of coin, so that the noble of gold, which before was six shillings

(x) But among the records in the *Tower* there are several indentures to be found within that time, viz.

Claus. 18 E. 3. p. 2. m. 19. d.

Pat. 18 E. 3. p. 1. m. 27.

Claus. 23 E. 3. p. 1. m. 21. d.

Claus. 25. E. 3. m. 15. d.

Claus. 29. E. 3. m. 6. d.

Claus. 35 E. 3. m. 10. d.

and eight pence, is now raised to eight shillings and four pence, three groats make a shilling, and so do twelve pence, and twenty shillings make a pound.

And afterwards he made new coins according to the standard of gold aforesaid, viz. the noble of gold eight shillings and four pence, and the pound of silver raised to thirty-seven shillings and six pence; and now I shall follow *John Stowe* in his *Survey of London*, p. 47.

H. 7. raised the rate of *Sterling* silver coin to forty pence the ounce.

18 H. 8. the pound of silver coin was raised to forty shillings.

35 H. 8. the coin of gold was raised to forty shillings the ounce, the coin of silver to four shillings the ounce, and coins of base money of allay below *Sterling* were coined, viz. shillings, six-pences, four-pences, two-pences, pennies: these were decried in 5 E. 6. and the shilling reduced to nine-pence, and after to six pence.(y)

30 Octob. 5 E. 6. Silver sterling coin enhanced to five [208] shillings the ounce, and so proportionably; and coins of fine gold, a whole sovereign was thirty shillings, an angel ten shillings, and base money to pass as before.

2 Eliz. The base money was called in and brought to the mint and reduced to *Sterling* and new coined, and the cross given to repair the highways.

16 Novemb. 2 Jac. By proclamation the new coins of gold and silver then made, together with their impressions, inscriptions, weight, and values were proclaimed; and 23 Novemb. 9 Jac. per proclamation the coins of gold are enhanced, viz. thirty shillings to thirty-three shillings, twenty shillings to twenty-two shillings, fifteen shillings to sixteen shillings, ten shillings to eleven shillings, five shillings to five shillings and six-pence.

Upon these variations these things are nevertheless observable, *First*, That the old *Sterling* gold is this, that one pound of *Sterling* gold contains twenty-three carets three grains and a half of fine gold, the rest to make it up twenty-four carets is of allay of copper. *Secondly*, That the old standard of *Sterling* silver is, that every pound weight of *Sterling* silver consist of eleven ounces two penny weight of fine silver, and eighteen penny weight of allay of copper. *Thirdly*, That this rate of *Sterling* gold and silver hath most plainly continued to be the standard of *English* gold and silver coin, at least from the time of *Henry III.* until this day in *England* without any considerable alteration, saving that base money, which was stampd in the time of *Henry VIII.* and then reduced to a lower valuation by *Edward VI.* and after re-established by *Edward VI.* to its former value. *Fourthly*, That, as well in *England* as *Ireland*, there hath been im-basing of the species of money, as appears in these two instances in the time of *Henry VIII.* and *Edward VI.* which are yet the only instances that I find of that nature in *England*. *Fifthly*, That queen *Elizabeth* decried by proclamation all that base money, which was in use in the time of her father and brother, and ever since that pro-

clamation, viz. 2. *Eliz.* the true old *Sterling* standard both of gold and silver hath been the only standard of the *English* current money. *Sixthly*, That altho the standard of *Sterling* hath with great constancy obtained in *England*, yet the denomination or ex- [204] trinsic or imposed value hath varied according to the pleasure of the king both as to gold and silver coin, as appears by what goes before; for in *Edward I*'s time the ounce of *Sterling* silver was twenty pence, the pound twenty shillings or two hundred and forty pence; in *Edward III*'s time the pound of *Sterling* was three hundred pence; in the time of *Henry V.* and so downward to *Edward IV.* three hundred and sixty pence, or, which is all one, thirty shillings; in the time of *Edward IV.* the pound of silver was thirty-seven shillings and sixpence; in 35 *H.* 8. the pound of *Sterling* silver was forty shillings; in 5 *E.* 6, and so down to this day the ounce of silver five shillings or sixty pence, and the pound of *Sterling* silver three pounds or seven hundred and twenty pence, which in *Edward I*'s time was only two hundred and forty pence, which now is thrice as much as then it was. *Seventhly*, That I find rarely any proclamation for the setting of the rate of new coin, but only as before, when the denomination of what is in being is enhanced, or abated, or recalled; so that the indenture of the mint and common reputation is that, which must try what is *English* money. *Eighthly*, That I never find either in the indentures of the mint or any proclamation the stamp, impression, or inscription described, unless in that of king *James*, because the stamps are agreed upon between the king and the master of the mint, and delivered to him by the king, or his warrant either of the great seal, privy seal, signet, or secretary of state.

CHAPTER XVIII.

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CONCERNING THE ADULTERATION OR IMPAIRING OF COIN, AND THE
ANTIENT MEANS USED TO REMEDY IT.

THE decays or impairment of coin is either in weight or allay, the former may happen by some abuse of the moniers or minters; or by the subtilty of clippers, washers and other impairers of coin; the latter, viz. impairment in allay, can only happen either by the dishonesty of the moniers or minters, or by the counterfeiting of coin.

Antiently, all money was paid in number, namely so many pieces made a pound, and this was the common reservation and account of all farms, and the estimating of accounts, *vicecomes A. reddit compotum de 100l. numero*, or in *thesauro 100l. numero*.

But this did not answer all intentions, for the money that was paid in, might be clipt, or otherwise rendered light, or might be counterfeit, or of base allay.

For remedy whereof there was practised these three methods of

rectifications of payments at the exchequer, that the king might not be deceived, and these were successively used in the exchequer, which we may read *Gervas. Tilb. Lib. I. supra quibus*.

1. *Solutio ad scalam*, which it seems was a dish or measure, whereby they measured their money, as well as told it, for that is the proper signification of *scala*: but in process of time this was turned into a measure of money, which was an addition of sixpence for every pound; to avoid the trouble of that probation, whereby an hundred pounds *numero* amounted to an hundred pounds and fifty shillings *ad scalam*; and so we have frequently in the old pipe rolls of *Henry II., Richard I., king John, &c. in the sauro 100l. ad scalam*.

2. *Solutio ad pensum*, which was the answering of every [206] pound of money by weight of a pound weight troy, for in those times the *libra argenti* coin did or was to answer a pound weight troy, and therefore the payer was to make it good of that weight by answering the full weight; this gave the frequent title of the old pipe-rolls, also *in thesauro 100l. ad pensum*.

But altho this *solutio ad scalam* or *ad pensum*, especially both together, did give some help against the defect of coin in weight, as by clipping, washing, or the like, yet it did not help as to adulterate money of baser alloy than the standard: Therefore,

3. There was found out in the time of *Henry II.* a third trial, namely trial by fire or combustion, and if it were of the just alloy it was allowed, if below the alloy the payer was to make it good, and hence he was said *dealbare firmam*; and hence grew quickly a difference between reservations and payments of so much money *numero*, and so much money *blanc*.

A reservation of so much money generally was intended of so much *numero*, as if a pound were reserved, it was in effect but twenty shillings *in pecuniis numeratis*; but if it were expressly said so much money *blanc*, then it was answered in *blanc* money, but yet with this difference, that if a farm were letten and so much rent generally reserved, it should be intended so much *numero*, *in pecuniis numeratis*; but if a franchise or liberty were granted, and so much rent generally reserved without saying *blanc* or *numero*, it was commonly intended *blanc*, unless expressly said *reddendo* so much money *numero*, and therefore in such a case the former was bound *dealbare firmam*, that is, to answer so much as would make his payment to be so much good in fine silver, or very near it at least, *Gervas. Tilb. Lib. II. cap. quid sit, quosdam fundos dari blanc, quosdam numero*.

And therefore upon all the antient accounts in the pipe, made by the sheriff, we shall find some of his accounts of rents to run *numero*, some of them to run *blanc*, viz. *firma comitatús numero, & firma comitatús blanc*, according to the variety of their reser-
[207] tions or the things out of which they are reserved; now what the proportion was, between so much money *blanc*

and so much money *numero* in those antient times, or what this *blanc* money was, is worth the inquiring.

I have formerly thought that *blanc* money was nothing else but *Sterling*, and that *dealbare firmam* was no more, than to reduce money to the true allay of *Sterling*; but upon consideration I think *blanc* money was truly so much fine silver without any allay, and that the true allay of *Sterling* silver or the antient standard was twelve penny weight only of copper to every pound weight of silver; and therefore he, that upon his reservation was to pay one hundred pounds of *blanc* money, was to answer to the king upon every pound of *Sterling* money one shilling to countervail the value of the allay of copper in every pound weight troy of silver.

And hence it is, that the farms of most corporations antiently let with liberties, if one hundred pounds *per annum* were reserved, usually answered one hundred and five pounds, the five pounds being to answer the allay of one of copper in the whole quantity.

21 *H. 3.* in compoto comitatûs *North'ton* summa totalis 102*l.* 3*s.* 7*d.* de quo 4*l.* 9*s.* 4*d.* *blanc*, quæ sunt extensæ ad 4*l.* 13*s.* 9*d.* subtrahuntur ad perficiendum corpus comitatûs & remanet 97*l.* 13*s.* 10*d.* (a) de quibus respondet de proficuo in magno rotulo.

Claus. 19 H. 3. p. 1. m. 2. Sciatus quòd pardonavimus dilectæ & fideli nostræ *A. comitissæ Pembroch* centum triginta & quinque libras *blanc*, quæ extensæ sunt ad 141*l.* 15*s.*

13 *E. 3.* in compoto Bedford & Bucks, Nicholaus Basselew 18*l.* 4*s.* 4*d.* *numero pro* 17*l.* 7*s.* *blanc.*

That of 19 *H. 3.* exactly answers twelve pence *per* pound, which amounts to six pounds fifteen shillings, and added to one hundred thirty-five pounds make just one hundred forty-one pounds fifteen shillings.

And the other estimate is very near the same account, bating the difficulty of small fractions, four pounds nine shillings and four pence, with the adding of twelve pence for every pound [208] to make it *Sterling*, amounts to about four shillings and six pence, which added to four pounds nine shillings and four pence make four pounds thirteen shillings and ten pence; so the allay of *Sterling* at that time seems to be twelve pence of copper to every pound of silver.

The sum therefore is, 1. That *blanc ferme* or *blanc* money was the estimate of money in pure silver without allay, and accordingly it was to be answered, *viz.* one hundred pounds *blanc* was to answer one hundred and five pounds *numero*. 2. That a *ferme* or sum of money *numero* was so much *Sterling* money according to the standard of those times. 3. That the standard of *Sterling* money in those times was finer than it hath been since the time of *Edward I.* namely *Sterling* was then eleven ounces eight penny weight finer silver, and twelve penny weight of allay. 4. That when at the exchequer they burnt the money to make assay of it, in case twenty shillings

(a) This should be 97*l.* 9*s.* 10*d.*

numero were reserved, it sufficed if it held the allay of *Sterling*, viz. eleven ounces, eight penny weight of pure silver, and twelve penny weight of allay; but if it were reserved *blanc*, then the good *Sterling* was brought to the test, yet it went for less than *Sterling* by twelve penny weight in every pound, and therefore they were to add five pounds in the hundred to make it up *blanc*. 5. But when this probation grew troublesome, and *Sterling* money was well established, then they, that were to pay one hundred pounds *blanc*, paid one hundred and five pounds *Sterling*, as the common estimate of *blanc* money: it seems that in king *John*'s time the standard of *Sterling* money was far lower and worse, than at any time before or after, especially towards the latter end of his reign.

The borough of *Wich* was antiently from the conquest till 17 *Johann*. held at the yearly rent of eighty pounds *per annum blanc*, which was answered by the sheriff in the times of *Henry II.* and *Richard I.*

7 *Johann*. the king granted the borough of *Wich* to the town at the farm rent of one hundred pounds *Sterling*: in the pipe-
] 209] roll of 24 *H. 3. homines de Wico reddunt compotum de 100l. numero, pro 80l. blanc*, which imports these sumas to be equal, and afterwards 43 *H. 3. homines de Wico reddunt compotum de 80l. blanc, quæ sunt extensæ ad 84l.* and in 17 *E. 3.* this eighty-four pounds was raised to eighty-nine pounds five shillings *numero* upon the extent, which *ferme* of eighty-nine pounds five shillings they have ever since answered; whereby it appears the standard of *Sterling* was but low in king *John*'s time, for eighty pounds *blanc* was in his charter estimated at one hundred pounds *Sterling*: again it was high in 43 *H. 3. viz.* after the rate of twelve penny weight of allay in a pound of fine silver; for there, eighty-four pounds *Sterling* is rated to be eighty pounds *blanc*; and in *Edward III.* the standard was lower, than twelve penny weight of allay, viz. above twenty-four penny-weight of allay and more in a pound weight of fine silver; but afterwards raised to eighteen penny weight of allay towards the latter end of his reign, which hath hitherto continued as the true standard of *Sterling* silver.

These curiosities, tho they be not much in use at this day, yet they are fit to be known for understanding the old rolls.[1]

[1] By the 2 *Will. 3. c. 34. sects. 4. & 5.* it is felony, with transportation or imprisonment, to colour, file, alter, or impair the gold or silver coin. See *Rosc. on Coin.* 19.

By the Act of 21 *April, 1806, ch. 49. sect. 3.* if any person shall fraudulently and for gain's sake, by any art, way, or means whatsoever, impair, diminish, falsify, scale, or lighten the gold or silver coins, which have been, or which shall hereafter be coined at the mint of the *United States*; or any foreign gold or silver coins, which are by law made current, or are in actual use and circulation as money within the *United States*, every person so offending shall be deemed guilty of a high misdemeanor, and shall be imprisoned not exceeding two years, and fined not exceeding two thousand dollars. 2 *Stats. at Large.* 405.

By the Act of 3 *March, 1825, ch. 65, sect. 24.* if any of the gold or silver coins which shall be struck or coined at the mint of the *United States*, shall be debased or made worse, as to the proportion of fine gold or fine silver therein contained, or shall be of less weight or value than the same ought to be, pursuant to the several acts relative thereto,

through the default or with the connivance of any of the officers or persons who shall be employed at the said mint, for the purpose of profit or gain, or otherwise, with a fraudulent intent, and if any of the said officers or persons shall embezzle any of the metals which shall, at any time, be committed to their charge for the purpose of being coined, or any of the coins which shall be struck or coined at the said mint, every such officer, or person who shall commit any, or either of the said offences, shall be deemed guilty of felony, and shall be sentenced to imprisonment and hard labour for a term not less than one year, nor more than ten years, and shall be fined in a sum not exceeding ten thousand dollars.

By sect. 26. nothing in this act contained shall be construed to deprive the courts of the individual States, of jurisdiction, under the laws of the several States, over offences made punishable by this act. 4 *id.* 122.

CHAPTER XIX.

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CONCERNING THE COUNTERFEITING OF THE KING'S COIN WHAT IT IS, WHAT THE PENALTY THEREOF ANTIENLY, AND WHAT AT THIS DAY.

HAVING taken this compass I now descend to the offense itself, wherein I shall consider, 1. What is the coin or money of the king. 2. What a counterfeiting thereof. 3. What the punishment before this statute. 4. What the punishment since this statute.

I. What shall be said the king's money.

The money of a foreign kingdom is not the king's money within this act, and therefore at common law the counterfeiting thereof was only punishable as a cheat; and now by the statute of 14 *Eliz. cap. 3.* it is made misprision of treason to counterfeit any foreign coin of gold or silver, tho not made current here by proclamation.[1]

The money of a foreign kingdom made current by proclamation, tho it be now, as to all civil respects, the proper money of this kingdom, yet, as to the crime of treason, it was not the king's money within this act.

And therefore a special statute was made, *viz.* 1 *Mar. cap. 6.* that if any person falsely forge or counterfeit any such kind of coin of gold or silver as is not the proper coin of this realm, and is or shall be current within this realm by the consent of the queen, her heirs or successors, then such offense shall be judged high treason [2]

This consent cannot be but under the great seal, *viz.* by proclamation and a writ under the great seal annexed thereunto, or some other sufficient notification under the great seal; and it must be of money of gold or silver, which I take to be a denomination *ex majore parte*, if it be such a foreign coin as is, for the most part, of gold or silver.

But even the counterfeiting in copper or brass gilt, or in tin or alchymy, if the exemplar itself be of gold or silver, is [211] within this act of 1 *Mar. cap. 6.*

If the coin of *Ireland*[3] doth not substantially differ in the signa-

[1] Misdemeanor, by the 43 *Geo. 3. c. 139.* in the case of copper or mixed metal coin.

[2] Felony and transportation for seven years, by the 37 *Geo. 3. c. 126.*

[3] As to the counterfeiting of the coin of *Ireland*, see 1 *East, P. C. 150.*

ture or impression from the coin of *England*, the counterfeiting of that money here in *England* seems to be a counterfeiting of the king's coin here in *England*; but if the stamp or impression bear no such resemblance, as is easily discernable, then it is considerable, whether it be a counterfeiting of the king's coin here, for *Ireland* is a distinct kingdom from *England*, tho part of the dominions of the crown of *England*.

Yet it seems that it is treason within the act of 25 *E. 3.* 1. Because the words of the statute are *sa monoye*, and not specially the money of *England*; and money coined by the king's authority in *Ireland* is *sa monoye*, tho it be not the current money of *England*.

2. Because by the express words of the statute of 25 *Eliz.* the clipping of coin of this realm, or *any the dominions thereof*, is enacted to be treason; it is not to be supposed that the parliament would make the *clipping* of *Irish* coin treason, unless the *counterfeiting* thereof were treason; and with this the resolution of the case of mixt monies in Sir *John Davys's* reports agrees, viz. that the imbased coin stampd for *Ireland* is lawful money for *England* within the condition of a bond for payment of money in *Ireland*. [4]

What shall we say concerning the farthings and halfpence of copper newly minted in *England*, and proclaimed as before to be current money, is the counterfeiting thereof treason.

It is true, in antient proclamations for farthing-tokens it was not usual to be, that it should be current money, but only that it should be used as tokens, and the punishment of counterfeiters was either in the star-chamber, or by information or indictment, and fine and imprisonment in the king's bench.

And yet it seems to me, that this proclamation makes it not the king's money within this act of 25 *E. 3.* 1. Because it is so made only to a special purpose, namely in receipts and payments under sixpence, and not otherwise. 2. Because here is no dispen-

[212] sation or *non obstante* of the statute of 25 *E. 3.* Again, when by the statute of 25 *E. 3. cap. 13.* it is enacted, that the money of gold or silver which now runneth shall not be impaired in weight or allay; we can hardly think it ever intended that the copper money should be that money, which should be intended within the act made at the same parliament touching treason; but *quære tamen*. [5]

[4] By the act of 3 *March*, 1825. *ch. 65. sect. 21.* it is enacted, That if any person or persons shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or willingly aid or assist in falsely making, forging, or counterfeiting any coin in the resemblance or similitude of any copper coin which has been or hereafter may be coined at the mint of the *United States*, or shall pass, utter, publish, or sell, or attempt to pass, utter, publish, or sell, or bring into the *United States* from any foreign place, with intent to pass, utter, publish, or sell as true, any such false, forged, or counterfeited coin with intent to defraud any body politic or corporate, or any other person or persons whatsoever; every person so offending shall be deemed guilty of felony, and shall on conviction thereof, be punished by fine not exceeding one thousand dollars, and by imprisonment and confinement to hard labour, not exceeding three years. 4 *Stats. at Large*. 121.

[5] By the 2 *Will. 4. c. 34. s. 12.* it is made felony, with transportation or imprison-

If money be decried and varies signally from the stamp and impression in the coin that is commonly allowed, this is not money within this act, for it hath lost its denomination and legitimation by the king's proclamation.(a)

The money of an usurper bearing his stamp and effigies and inscription, is the king's money in the time of the succeeding rightful king, till it be recalled by proclamation. If, upon the evidence against any counterfeiter of the king's coin, tho it be but of a late coinage or impression, it comes in question whether the coin that is counterfeited were the coin of this kingdom, it is not necessary to produce a proclamation to prove its legitimation for these reasons; 1. Because where there were proclamations of coin they are for the most part lost: if we should be put to prove a proclamation for the coins of queen *Mary*, queen *Elizabeth*, where should we find them? 2. Because in most kings times there are variations of the impressions without any proclamation, or so much as a new indenture between the king and the master of the mint. 3. Because there are very few proclamations, except that before-mentioned in king *James's* time, that express any more than the weight and allay, but the impression or effigies is rarely, if at all, expressed, and so such proclamation would import little to ascertain the effigies or stamps; and for the same reason the indenture of the mint is not absolutely necessary, tho in some cases it may be useful. 4. Because especially in antient coins *ex diuturnitate temporis omnia præsumuntur rite acta*, if proclamation or indenture be necessary, it shall be presumed in length of time, as a licence of appropriation shall be presumed by long continuance, tho not shewn.

The question therefore, whether the coin that is counterfeited be the coin of this kingdom, is a question of fact, [213] which upon evidence of common usage, reputation, &c. may be found to be *English* coin, tho no proclamation of it extant.

But it may be of some use in case of newness of coin to produce the indentures, or the officers of the mint, or the stamps here used for the coin, and the like evidence of fact.

But as to foreign coin legitimated here, it seems necessary to shew the proclamation, together with the proclamation-writ, or a remembrance thereof; and this is expressly required by the statutes of 5 & 18 *Eliz.* for impairing or clipping foreign coin.

(a) For this reason when the broad pieces were cried down, and the officers of the revenue charged to take them in payment for one year after, it was thought necessary by a special act of parliament 6 *Geo. II. cap. 26.* to make the counterfeiting of them during that year treason.

ment at the discretion of the Court, to counterfeit, or knowingly to make or mend, buy or sell, or have in possession any instrument for counterfeiting, or to buy, sell, receive, or put off any counterfeit, at a lower value than its denomination imports, of the current copper coin. And to tender, utter, or put off any counterfeit current copper coin knowing the same to be counterfeit, or to be possessed of three or more pieces of counterfeit current copper coin, knowing the same to be counterfeit, and with intent to utter or put off the same, are misdemeanors, and punishable with imprisonment.

II. I come to the *second* consideration, what is a counterfeiting within this law.

And before I come to particulars it must be remembered, that the misfeasances concerning coin refer to two sorts of persons; *first*, to such as are authorized either by their office, or by charter, or by custom to coin money; *monetarii*, moneyers, minters; or *secondly*, those who do counterfeit, or take upon them the stamping of coin without such authority, counterfeiters, clippers, washers, &c.

Touching the former of these 3 *H. 7. 10.(b)* Si ipse, qui facit monetam in *Angliâ* autoritate regiâ infra turrinam *London* vel alibi in *Anglia* vel *Calicia*, illam facit minus in pondere per dimidium ordinationis antiqui ponderis, &c. vel falso metallo, est proditio, & tamen ipsi, qui illam monetam utterant ligeis domini regis infra *Angliam* non sunt proditores nec proditio, sed misprisio.

But it is not every mistake in weight or allay, that chargeth the moneyers with so high a crime as treason, for the master is chargeable by his indentures to a fine and ransom for some mistakes of this nature; but it must be a wilful gross proditorious doing it, for the indictment runs *proditoriè*, and so it must be proved, for it is difficult for the best artist to make every piece of the precise [214] weight.

Touching others that either counterfeit or imbase the coin.

First, there must be an actual counterfeiting, for a compassing, conspiracy or attempt to counterfeit is not treason within this statute without an actual counterfeiting.

But if many conspire to counterfeit, or counsel or abet it, and one of them doth the fact upon that counselling or conspiracy, it is treason in all, and they may be all indicted for counterfeiting generally within this statute, for in such case in treason all are principals.[6]

(b) pl. 3.

[6] But since the late Act of Parliament, only the party who actually counterfeits would be the principal felon, and the others accessories before the fact. *Archb. C. P.* 470.

"While I declare that this doctrine contradicts every idea I had ever entertained on the subject of indictments, (since it admits that one case may be stated, and a very different case may be proved,) I will acknowledge that it is countenanced by the authorities adduced in its support. To counsel or advise a treasonable assemblage, and to be one of that assemblage, are certainly distinct acts, and therefore ought not to be charged as the same act. The great objection to this mode of proceeding is, that the proof essentially varies from the charge in the character and essence of the offence, and in the testimony by which the accused is to defend himself. These dicta of Lord *Hale*, therefore, seem to be repugnant to the declarations we find every where that an overt act must be laid, and must be proved. No case is cited by *Hale* in support of them, and I am strongly inclined to the opinion, that had the public received his corrected, instead of his original manuscript, they would, if not expunged, have been restrained in their application to cases of a particular description. Laid down generally, and applied universally to all cases of treason, they are repugnant to the principles for which *Hale* contends, for which all the elementary writers contend, and from which courts have in no case, either directly reported or referred to in the books, ever departed. These principles are, that the indictment must give notice of the offence; that the accused is only bound to answer the particular charge which the indictment contains, and that the overt

How far a receiver is a principal, *videbimus infra Co. Pla. Cor.* 138. *Dyer* 296.

If *A.* counterfeits, and by agreement before that counterfeiting *B.* is to take off and vent the counterfeit money, *B.* is an aider and abetter to such counterfeiting, and consequently a principal traitor within this law; but if *B.* knowing that *A.* hath counterfeited money, put off this false money for him after the fact, without any such agreement precedent to the counterfeiting, he seems to be all one with a receiver of him, because he maintains him. [7]

If *A.* counterfeit money, and *B.* knowing the money to be counterfeit vent the same for his own benefit, *B.* is neither guilty of treason nor misprision of treason, but it is only a cheat and misdemeanor in him punishable by fine and imprisonment.

But if *B.* know that *A.* counterfeited it, and doth neither receive, maintain, or abet him, but conceals his knowledge, this is misprision of treason; and with this difference the book of 3 *H.* 7. above-cited is to be understood, and so it was ruled upon debate at the sessions at *Newgate Car. 2. ex libro Bridgman. (c)*

A. fashions stamps for the counterfeiting of money, but he is discovered and apprehended before he hath actually counterfeited it; this is no treason within this statute, *(d)* for tho he hath counterfeited the stamps, yet he hath not counterfeited the money of *England.* [8]

A. counterfeits the king's money, but never vents it; this is a counterfeiting, and treason within this statute, and so it [215] hath been ruled *Co. P. C. p. 16.* [9]

A. counterfeits the coin of this kingdom or any foreign coin of silver or gold of any foreign kingdom, and this counterfeiting is in another metal, as tin, lead, alchymy, copper gilt or silvered over, yet the former is treason within the statute of 25 *E.* 3. and the latter within the statute of 1 *Mar.* If there be a lawful coin of this kingdom, and *A.* doth counterfeit it in a considerable measure, but yet with some small variation in the inscription, effigies, or arms, to the intent thereby to evade the statute, yet this is a counterfeiting of the

(c) *Aug. 16 Car. 2. in the case of Richard Oliver, Kel. 33.*

(d) 1 *Rich. 3. 1.* but it is treason by the statutes of 8 & 9 *W. 3. cap. 25.* and 7 *Annt. cap. 25.*

act laid, is that particular charge." Per *Marshall, C. J., 2 Burr's Tr. 432.* See *post. 228. 1 East, P. C. 127.*

[7] The offender would now be an accessory after the fact, and as such, by *sect. 18 of the 2 Will. 4.* subject to imprisonment for two years; though the proper course would be to proceed against such an offender for the substantive offence of uttering. *Rosc. on Coin, 6.*

[8] By *Sect. 10. of 2 Will. 4. c. 34,* making, mending, or having possession of any coining tools, is felony, with transportation. See the cases in *Arch. C. P. 481.*

Having tools for coining in possession, with intent to use them, held to be a misdemeanor at common law. *1 East. P. C. 172.*

[9] It was no offence at common law, to have possession of counterfeit coin with intent to utter it. *R. v. Stewart. Russ & Ry. 288. R. v. Heath. id. 184.* but to procure it with that intent was a misdemeanor. *R. v. Fuller. id. 308.*

king's money, and that intent doth unquestionably appear, if he vent it as true: [10] *vide supra de privato signetto. 16 Juc. (f)*

The clipping, washing, or impairing, &c. of foreign coin made current by proclamation most certainly was not treason by the statute of 25 E. 3. but was made treason *de novo* by the statute of 5 & 18 Eliz.

But whether the clipping, washing, or impairing the proper coin of this realm for lucre or gain were treasons within this statute of 25 E. 3. or not, is a question that deserves consideration, which, tho it be now settled by those statutes to be treason, yet it is of moment to be known; if it were and continues treason by the act of 25 E. 3. then the judgment is only to be drawn and hanged; if it be a new made treason, then by my lord *Coke's* opinion the judgment must be to be hanged, beheaded, and quartered, as in treason for compassing the king's death. *Co. P. C. p. 17.*

I will therefore give the history of this business of washing, clipping, &c. *ab origine*, from the time of the statute of 25 E. 3. for the history of former times at common law will be given in the next section.

It appears by the record of *M. 31. E. 3. coram rege rot. 18, 55. Bucks*, cited by *Co. P. C. p. 17.* within six years after the statute of 25 E. 3. that for counterfeiting and resection of the king's [216] coin *the abbot of Mussenden* was adjudged to be drawn and hanged, but not quartered.

By the statute of 3 H. 5. cap. 6. clipping, washing, and filing of the money of the land is declared to be treason, and the offenders to be traitors, and shall incur the pain of treason; this was made to settle the doubt, and not purely as a new law.

The petition, upon which this act was made, is more full than the act, as it is printed, *Rot. Parl. 3 H. 5. part 2. n. 40.* "Item pryont les commons, qe come devant ces heures grand doubt & awerestee ad este, le quelle le tonsure, loture, filinge, & autre fauxisme de vostre monoy duissent estre adjudge treason ou nient, a cause qe null mention ent est fait en le declaration des articles de treason faits en le parlement de vostre tresnoble besaiel lan de son raigne 25. Plese a vostre royal majestee de ordeiner, declarer, & determiner en cest present parlement par authority dicol, qe ceux, qe tondent, loient, filent, ou aucun autre fauxisme facent de vostre mony, soient adjudges traytors, & encurgent le pain de treason, si bien come ceux

(f) *Robinson's case, 2 Rol. Rep. 50.*

[10] In a prosecution for passing counterfeit money, the jury should be satisfied that the resemblance of the forged to the genuine piece is such as might deceive a person using ordinary caution. *U. S. v. Morrow. 4 W. C. C. R. 733.* In *R. v. Harris et al. 1 Leach. 165.* it was held that the coin counterfeited did not bear a sufficient resemblance to the real coin to make the offence complete. But the 3d sect. of the Act of 2 Will. 4. c. 34. declares that the offence shall be deemed complete, although the coin made or counterfeited be not in a fit state to be uttered, or the counterfeiting of it has not been finished or complete. See *R. v. Wilson. 1 Leach. 285. R. v. Welch id. 293. R. v. Varley. 2 W. Bl. 682. 1 East, P. C. 64.*

qe apportent faux money en *Engleterre* sachant la estre faux; & qe cest declaration si bien soy extende al tiels tonsure, loture, & fau-isme faits avant ces heures come a faire en temps avener. Re. Quant a le loture, tonsure & fileigne soit il declare pur treason."

Nota; A retrospect desired, which was not usual, unless the law had held it treason before.

By the statute of 4 *H. 7. cap. 18.* counterfeiting or forging of foreign coin current here is enacted to be treason, which before was neither felony nor treason.

By the statute of 1 *E. 6. cap. 12.* it is enacted, that there be no other treason nor petty treason, but what was ordained by the statute of 25 *E. 3.* or by that act; and after certain new treasons enacted there is a *proviso*, that this act extends not to repeal any act of parliament concerning the counterfeiting, forging, clipping, washing or filing any coin of this realm, or any coin of other realms made current here, or the bringing into the realm any counterfeit coin.

This proviso was absolutely necessary in relation to the treason in counterfeiting foreign coin contrary to the statute [217] of 4 *H. 7. cap. 18.* because a new treason, but whether necessary in relation to clipping or impairing the coin of *England* declared to be treason by the statute of 3 *H. 5.* may be doubtful upon what herein after follows, but certainly was very fit and convenient to avoid the question.

By the statute of 1 *Mar. cap. 1.* it is enacted, that no offense being by act of parliament or statute made treason, petit treason, or misprision of treason, by words, writing, or cyphering, deeds, or otherwise howsoever, shall be adjudged to be high treason, petit treason, or misprision of treason, but only such as be declared and expressed to be treason, petit treason, or misprision of treason in or by the act of parliament of the twenty-fifth year of king *Edward III.* concerning treason, nor any pains, penalty or forfeiture to ensue upon any offender in treason, petit treason, or misprision of treason, than such as are ordained by that statute; and all offenses made felony or *præmunire* since 1 *H. 8.* not being felony or within the statutes of *præmunire* before, and all articles, &c. concerning the same are repealed.

And yet it appears by the statute of 1 & 2 *Ph. & M. cap. 11.* that then, notwithstanding the statute of 1 *Mar. cap. 1.* they did take the impairing as well as forging or counterfeiting the king's coin to remain treason; for, by that statute of 1 & 2 *P. & M. cap. 11.* that makes the importation of foreign counterfeit coin to be high treason, it is provided, that any that shall be accused of the offenses contained in the same statute, or any other offense concerning the impairing, counterfeiting or forging of any coin current within this kingdom, shall be indicted, arraigned, tried, convicted and attaint by such like evidence, and in such manner and form as hath been used in *England* at any time before the first year of the reign of king *Edward VI.*

So that it seems they took impairing of any coin current to be a

treason in force, but on the other side it may be said, so they took also the forging of any foreign coin current to be treason, when as yet the statute of 4 *H. 7.* concerning forging of foreign coin made current stood repealed by 1 *E. 6.* but it is plain that no such [218] consequence could be made, for by the statute of 1 *Mar. sess. 2. cap. 6* forging of foreign coin made current here is enacted to be treason; so that as to the point of foreign coin made current here, tho the statute of 4 *H. 7. cap. 18.* stood repealed, yet 1 *Mar. cap. 6.* stood in force at the time of the making of the statute of 1 & 2 *P. & M. cap. 11.*

Then ensues the statute of 5 *Eliz. cap. 11.* which reciting in express words, that the statute of 3 *H. 5.* concerning clipping, &c. is repealed by 1 *Mar. cap. 1.* and the mischief that happens thereby, enacts, "That if, after the first day of *May* next, clipping, washing, rounding, or filing for wicked lucre or gain's sake any of the proper monies or coins of this realm or the dominions thereof, or the monies or coins of any other realm allowed and suffered to be current within this realm, or the dominions thereof, or that hereafter at any time shall be lawful monies or coins of this realm or of the dominions thereof, or of any other realm; and by proclamation allowed and suffered to be current here by the queen, her heirs or successors, shall be taken, deemed, and adjudged by virtue of this act to be treason, and the offenders, their counsellors, consenters and aiders shall from and after the first day of *May* be deemed traitors, and suffer pain of death and forfeit their goods, and forfeit all their lands during their lives only.

"That all, that by charter have lands or goods of traitors within their liberties; shall have these: a *proviso* that this act make no corruption of blood or loss of dower."

And the act of 18 *Eliz. cap. 1.* declaring that the falsifying, impairing, diminishing, scaling; or lightning of money was not within the act of 5 *Eliz.* which ought to be taken strictly according to the words thereof, and the like offenses not by any equity to receive the like punishments or pains, enacts those offenses to be treason almost *in totidem verbis* with that of 5 *Eliz.* with the like *proviso*; and note this clause in both statutes, *and the offenders being lawfully thereof convict or attainted according to the due order and course of the laws of this realm shall suffer the pains of death.*

These acts do, in effect, declare, that this was not treason [219] within the statute of 25 *E. 3.* and that the statute of 1 *Mar. cap. 1.* repealed that declaration that was made in 3 *H. 5.* and gives the reason, because the law being penal ought to be taken and expounded strictly according to the words, and the like offenses not by any equity to receive the like punishment, and therefore lightning or scaling were not within the act of 5 *Eliz.* and neither within the act of 25 *E. 3.* against counterfeiting the coin.

And yet it is observable, that those very judges, which were present at the making of the statute of 5 *Eliz.* yet upon a solemn consideration in *Wright's case*, T. 6 *Eliz. Dyer 230.* did agree, that

the judgment in treason *pro tonsurâ monetæ Angliæ* is no other but to be drawn and hanged, and accordingly judgment was given in that case; and upon search of the precedents at *Newgate* I find, that altho some judgments in case of clipping of money are *to be drawn, hanged, beheaded and quartered*; yet the greater number both of former and latter times have been only *to be drawn and hanged*(g) according to the judgment in 6 *Eliz.*

And therefore my lord *Coke*, *Pl. Cor. p. 17.* tho he agree, that the judgment for counterfeiting the coin of *England* is only to be hanged and drawn, as it was before the statute of 25 *E. 3.* seems nevertheless to be mistaken, when in the same page he saith, that if any be attainted for diminishing the king's money upon the statutes made in the time of queen *Mary* or Queen *Elizabeth*, because it is high treason newly made, the offender shall have judgment as in the case of high treason, *viz.* to be drawn, hanged, beheaded, dismembred, quartered, &c. for the greater number and better precedents run only to be drawn and hanged; and so it was lately ruled upon great consideration in a case in the king's bench,(h) tho perchance it is not error, whether the one judgment or other be given.

Upon the whole matter therefore it seems to me, 1. That altho it should be admitted, that clipping of the coin of [220] *England* continued treason notwithstanding the statute of 1 *Mar.* that yet it is, at this day, treason merely by the statute of 5 *Eliz.* and therefore every indictment, at this day, for clipping or impairing, &c. must pursue the words of the statutes of 5 & 18 *Eliz.* and conclude *contra formam statuti*; and this, not only in the case of clipping of foreign coin, which certainly was no treason after 1 *Mar.* and before 5 *Eliz.* but also in relation to the coin of *England*; and the reason is, 1. Because this statute hath added a qualification to these treasons of clipping or lightning, *viz.* it must be *for lucre's sake*, which must be expressly laid in the indictment, but need not have been so laid by the statute of 3 *H. 5.* for tho, perchance, it was intended, yet it was not expressed in that statute, neither needed it then to have been in the indictment. 2. Because in express words the statutes of 5 & 18 *Eliz.* say, that it shall be treason by virtue of this statute, which is not a bare recital as in the beginning of the statute, that the statute of 3 *H. 5.* was repealed; but it is also an express enacting clause, which is in effect exclusive of any other law to make it treason, but this of 5 or 18 *Eliz.* for these words are in both the statutes. 3. Because it extremely alters the consequences of a judgment in treason, for here was no loss of dower, no loss of land but during life, no corruption of blood, so that these statutes did perfectly intend a total new establishment and qualification of this treason.

2. That altho this be a new law, yet inasmuch as neither at common law, nor after the statute of 25 *E. 3.* the treasons or offenses

(g) *Morgan's case*, *Cro. Car.* 383.

(h) The case of *Bellew and Norman*, 1 *Ven.* 254. 2 *Lev.* 98. *Raym.* 234.

concerning money had any greater judgment than such as is given in case of petit treason, namely for the man to be drawn and hanged, the woman to be burnt, no higher or other judgment is to be given upon the statutes of the 5th or 18th *Eliz.* and hence it is, that in the statute of 25 *E. 3.* though it rank counterfeiting money among high treasons, yet it alters not the judgment that was at common law; nay tho it be most certain, that the statute of 25 *E. 3.* as to some points of bringing in foreign money be introductive of a new law, yet inasmuch as it concerns money, wherein the highest judgment [221] at the time of 25 *E. 3.* was only that of petit treason, it doth not enhance the judgment higher; and accordingly it was resolved upon great advice and consideration of precedents *Car. 2. Banco Regis* in the case(i) for clipping *English* coin.

3. That upon any trial of counterfeiting, clipping, washing, &c. the coin of *England* or foreign coin made current, there is no necessity either upon the trial or the indictment of two witnesses, required in other cases by the statutes of 1 *E. 6. cap. 12.* and 5 *E. 6. cap. 11.*

For as to the counterfeiting of money, or so much as was treason for impairing money, by 1 & 2 *P. & M. cap. 11.* it is expressly provided, that no other evidence shall be requisite either upon the indictment or trial than was before the statute of 1 *E. 6.* and as to clipping and washing, the very statutes of 5 and 18 *Eliz.* in express terms require only a conviction and attainder *according to the order and course of the law*; and therefore tho the statute of 5 *E. 6. cap. 11.* enact, that two witnesses or lawful accusers shall be required upon proceeding for any treason, that now be or hereafter shall be, yet that act is thus far derogated by those two acts, that require only an indictment, a conviction and attainder according to the order and course of the law generally; for tho it be held, that the statute of 1 & 2 *P. & M. cap. 10.* that enacts, that all trials of treason shall be according to the course of the common law, doth not take away the necessity of two witnesses upon the indictment, because that is a distinct thing from the trial. 14 *Eliz.* lord *Lumley's case*, *Dy. 99. Co. P. C. p. 25.* yet the words (*conviction and attainder after the order and course of the law*) mentioned in the statutes of 5 & 18 *Eliz.* include the indictment as well as the trial, and therefore even without the aid of the statute of 1 & 2 *P. & M. cap. 11.* restores the whole proceeding according to the order of the common law in case of clipping or washing, as the statute of 1 & 2 *Ph. & Mar.* doth in express words in case of counterfeiting.

And note, upon the statutes of 5 & 18 *Eliz.* tho *Irish* [222] coin be not current in *England*, when of a baser alloy, yet it is the king's coin, and clipping or washing in *England* the coin of *Ireland* is treason by those acts, for the words are *the coin of this realm, or dominions thereof*, which extends to *Ireland*.

4. The *fourth* thing observable upon these statutes is, that the act of 1 *Mar. cap. 1.* reducing all treasons to the standard of 25 *E. 3.*

(i) This I take to be the forecited case of *Bellew and Normdn*, 1 *Ven. 254.*

doth not only repeal treasons, that were newly enacted *de novo*, but such acts concerning treason as were only declarative, as this of 3 H. 5. among others.[11]

[11] The Constitution (Art. 1. Sect. 8. c. 6.) authorizes Congress to provide for the punishment of counterfeiting the securities and current coin; in pursuance of which, the Acts of 21 April, 1806, ch. 49, and 3 March, 1825, ch. 65, were passed. By the 20 sect. of the latter, it is enacted, That if any person or persons shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or willingly aid or assist in falsely making, forging, or counterfeiting any coin, in the resemblance or similitude of the gold or silver coin which has been, or hereafter may be, coined at the mint of the *United States*; or in the resemblance or similitude of any foreign gold or silver coin which by law now is, or hereafter may be made current in the *United States*; or shall pass, utter, publish, or sell, or attempt to pass, utter, publish, or sell, or bring into the *United States* from any foreign place with intent to pass, utter, publish, or sell as true, any such false, forged, or counterfeited coin, knowing the same to be false, forged, or counterfeited, with intent to defraud any body politic or corporate, or any other person or persons whatsoever; any person so offending shall be deemed guilty of felony; and shall, on conviction thereof, be punished by fine, not exceeding five thousand dollars, and by imprisonment and confinement to hard labour, not exceeding ten years, according to the aggravation of the offence.

Sect. 26. That nothing in this Act contained shall be construed to deprive the courts of the individual States of jurisdiction, under the laws of the several States, over offences made punishable by this Act.

The State courts having, by permission of this Act, concurrent jurisdiction of these offences, their legislatures have severally passed laws on the subject. But they have hitherto generally fallen under the cognizance of the federal courts.

It has been held, that a person who takes base pieces of coin which are brought to him ready made, having the impression and appearance of real coin, though of different colour, and brightens them so as to give them the resemblance of real coin, and render them fit for circulation, is guilty of counterfeiting. He completes the offence, and subjects thereby, to the penalties of the law, not only himself, but all who acted a part, or were present assisting in the transaction. *Rasnick v. Commonwealth*, 2 Virg. Cas. 356.

Under the *Connecticut* statute, aiding in the act of counterfeiting, is within both the letter and reason of the statute, as much as assisting in making the implements. *State v. Stearns, Kerby*, 52.

An indictment does not lie for forging a *Spanish* head pistareen, as it is not a coin of *Spain* made current by law in the *United States*. *U. S. v. Gardiner*, 10 Peters, 618.

In an indictment for uttering counterfeit coins, it is sufficient to describe them as "made and counterfeited" to the likeness and similitude of the good, true, and correct money and silver coins currently passing in the State, and commonly called *Spanish* dollars. *Fight v. State*, 7 Ham. (Part 1) 180.

Proof that the defendant had implements for coining in his own house, does not go to establish the fact of the defendant's knowledge that the dollar, for passing which he was indicted, was counterfeit. *State v. Odel*, Const. Rep. 758.

On an indictment for passing a counterfeit dollar, proof of the admission of the defendant, that he had made and passed other counterfeit dollars, is inadmissible. *Id.*

Having a crucible in possession is not having a tool or instrument for counterfeiting within sect. 31. of the *Vermont* Act against high crimes and misdemeanors. Allegation in the indictment that the coins intended to be counterfeited were "current silver coins of this State and of the *United States*," does not satisfy the words of the Act, "which shall be made current by the laws of this, or the *United States*," and are bad on demurrer. *State v. Bowman*, 6 Verm. 594.

On an information for passing a counterfeit coin, knowing it to be counterfeit, the prosecutor offered evidence of the prisoner's having in his possession at the same time, an engraved paper, having the appearance of a bank note, but not purporting to be signed or countersigned, for the purpose of showing the knowledge charged in the declaration. It was held inadmissible. *Stalker v. State*, 9 Cowen, 341.

In an indictment for passing a counterfeit coin, the possession of instruments for coining may be given in evidence to prove the guilty *scienter* of the defendant. *State v. Antonio*, Const. Rep. 776.

Under the Act of *Massachusetts* of 1804, c. 121. sect. 6. against having in possession

IV. The *fourth* thing that I propounded to consider, is the history of the punishment of counterfeiters, &c. of coin before the statute of 25. E. 3. and how it hath stood since.

In this kingdom and indeed in all the kingdoms the counterfeiting of the king's money hath been in all ages *crimen læsæ majestatis*, (k) tho in many of the old books (l) it comes under the general title of *crimen falsi*.

But the punishment in its kind and degree hath among us very much varied both in relation to the *monetarii* or moneyers, that were intrusted with the making of coin, and others, that took upon them to counterfeit the king's coin: among the laws of king *Athelstan*, l. 19. set down by *Brompton*, p. 843. Una moneta sit in toto regni imperio, & nullus monetet extra portum, si monetarius reus fuerit, amputetur ei manus, & ponatur supra monetæ fabricam, accord *Hoveden* sub anno 1127. & *M. Paris* sub anno 1125. (m)

In the time of *Henry I.* it is written by *Simon Dunelmensis*, p. 214: Monetarii totius *Angliæ* principales deprehensi adulterinos, scilicet non puros ex argento, fecisse denarios, jussu regis simul

[223] *Wintonæ* congregati omnes unâ die amputatis dextris evirantur; Et ibidem p. 231. Qui falsos denarios fecerit, oculos et inferiores partes corporis perdet; and *Knighton*, p. 2377. H. 1. statuit, ut fures suspenderentur, falsarii oculos & genitalia amitterent, & ut denarii & oboli essent rotundi. (n)

Knighton, p. 2463. "Edwardus primus tenuit parliamentum apud *London*, fecit mutari monetam regni, quæ illo tempore fuit viliter retonsa & abbreviata, unde populus regni graviter conquerebatur, & rex veritatem inquirens, & comperiens trecentos & plures de illo delicto & feloniam publicè convictos, quorum quidam fuerunt suspensi, quidam distracti & suspensi secundum delicti quantitatem et qualitatem, & ordinavit, quòd deinde *Sterlingus* & quadrans deinceps essent rotundi:" so that clipping was then held treason, or at least felony.

After the statute of 25. E. 3. the punishment hath been constantly

(k) By the old *Roman* law, Qui nummos aureos, argenteos adulteraverit, laverit, confaverit, raserit, corruerit, vitiaverit, vultuve principum signatam monetam, præter adulterinam, reprobaverit, honestior in insulam deportandus, humilior aut in metallum damnandus, aut in crucem tollendus; and whatever degree he was of, ejus bona fisco vindicantur: see *Jul. Pauli* sententias receptas, Lib. V. tit. 12. §. 12. and Lib. V. tit. 25. §. 1. Afterwards by a law of *Constantine*, Cudendæ pecuniæ obnoxii majestatis crimen committunt, & quicunque solidorum adulter poterit reperiri, flammæ exustionibus mancipetur, Lib. IX. Cod. tit. 24. l. 2. See also *Wilkin's Leges Anglo. Sax.* p. 59, in notis.

(l) *Bracton*, Lib. III. de corona, cap. 3. §. 1. *Glanvil.* Lib. XIV. cap. 7, *Flet.* Lib. I. cap. 22.

(m) *Leges Ethelstani*, l. 14. *Wilk. Leg. Anglo. Sax.* p. 59. See also *Leges Edgari*, l. 8. *Constitutiones Ethelredi in fine.* *Leges Cnuti*, l. 8.

(n) *Wilk. Leg. Hen. I.* p. 304. sub anno 1108. p. 308. sub anno 1125.

ten similar pieces of counterfeit gold or silver coin, it is sufficient if the offender has in his possession ten pieces of either kind of coin, though not all of the same denomination. *Brown v. Commonw.* 8 Mass. 59. 71,

to be drawn and hanged, because that was the proper judgment of it, before the making of the statute.[12]

And altho the course hath been in treasons concerning the king's person not to allow the privilege of clergy, yet before 25 E. 3. cap. 4. *pro clero* it had been thought and practised in antient time to allow the privilege of clergy upon an indictment for counterfeiting money.(o)

But after that statute clergy was not allowable in the case of counterfeiting money, 19 H. 6. 47 b. *Stamf. Pla. Cor.* 114 b. yet whereas in cases of treason regularly he that stands mute shall be thereby convicted 15 E. 4. 33 a. *Stamf. Pla. Cor.* 150 a. because not within the statute of *Westmin.* 1. cap. 12.(p) yet we have some historical instances, that upon indictment of counterfeiting coin the prisoner standing mute was put to *pain fort & dure*. *Knighton tempore R. 2. sub anno 1339.* before *Belknap, Skipwith,* and others *apud Lincoln septem falsarii monetæ convicti, [224] qui simul tracti fuerunt & suspensi, & quidam vicarius de Wintringham obmutescens adjudicatus est ad pœnam mutorum;* but at this day the law is taken otherwise, and that standing mute amounts to a conviction of the crime.[13]

And in short at this day in all cases of treason for counterfeiting the coin of this kingdom, or of any the dominions thereof, or of foreign coin made current by proclamation, or for washing, clipping, sealing, impairing, or diminishing the same, the most of these are

(o) For clergy was antiently denied only in such treasons, as were immediately against the king's person, and therefore *Co. P. C. p. 16.* clergy was allowed in the case of counterfeiting the great seal. See also the case of *Burdon*, (*P. 18. E. 2. B. R. Rot. 25. Rex. South'ton*) who was admitted to his clergy on being convicted of felony and sedition in counterfeiting the great seal; but in *Thorpe's* case, (*T. 21 E. 3. Rot. 23. Rex.*) who was convicted of sedition in levying war, it was adjudged, that he could not be admitted to his clergy: *nota la diversite*; but the 26 H. 8. cap. 13. takes away clergy in all cases of treason: *vide antea in notis, p. 185 & 186.*

(p) 2 *Co. Inst.* 177.

[12] The punishments under the Stat. 2 W. 4. c. 34. are various: transportation, imprisonment, and fine. When imprisonment, the 19 Sect. leaves it to the discretion of the court to sentence the prisoner to hard labour, or solitary confinement. But the 7 W. 4. & 1 Vict. c. 9. s. 5. restrain such solitary confinement to a period not exceeding one month at a time, or three months in the space of one year. See Sects. 20 & 21 of the Act of Congress of 3 March, 1825, ch. 65, and the 3 Sect. of the Act of 21 April, 1806, ch. 49.

[13] Before the 7. & 8. Geo. 4. c. 28. s. 2, standing mute in cases of high treason amounted to a conviction; but by that statute, if any person being arraigned, &c., for treason, &c., shall stand mute of malice, or will not answer directly to the indictment, it shall be lawful for the court, if it shall think fit, to order a plea of not guilty to be entered, and the plea so entered shall have the same effect as if the party himself had pleaded it.

By the 30th Sect. of the Act of Congress of 30th April, 1790, it is enacted, That if any person or persons be indicted of treason against the United States, and shall stand mute or refuse to plead, &c., the court shall, notwithstanding, proceed to the trial of the person or persons so standing mute, &c., as if he or they had pleaded not guilty, and render judgment thereon accordingly.

As to the case of a person deaf and dumb, see *R. v. Pritchard*, 1 C. & P. 303. *Com. v. Hill*, 14 Mass. 297.

made treason by new acts of parliament, as 1 *Mar. cap. 6.* 5 *Eliz. cap. 11.* 18 *Eliz. cap. 1.* yet the judgment is only for a man to be drawn and hanged, for a woman to be burned, and so (as I said) it was solemnly resolved.

And the reason is, because the most of these be new treasons made by act of parliament, yet they are all in their matter concerning money, wherein the judgment at common law was, as in case of petit treason; and that judgment was not altered by 25 *E. 3.* in case of counterfeiting, which is the highest offense concerning money, and therefore is not to be exceeded by the intent of those statutes, which brought lesser offenses concerning money, as clipping, into the same rank of offense with counterfeiting, for they are all offenses *in pari materia*, and so shall have a parity of judgment.

See the Stat. 12 Geo. 3. ch. 20. concerning standing mute and refusing to plead.
4 Blacks. Com. ch. vi. p. 89.

[225]

CHAPTER XX.

CONCERNING TREASON IN BRINGING IN FALSE MONEY.

THE next point of treason is, if any man bring in false money into this realm counterfeit to the money of *England*, as the money called *Lishborough*, or other like to the said money of *England*, knowing the money to be false, to merchandize or make payment in deceit of our lord the king and of his people.[1]

Toucing this point of treason these things are observable.

I. That the money in this case must be imported from a foreign nation, for here, it is not the counterfeiting, that is the treason, but the importing: and yet it seems by the general words of the statute of 35 *H. 8. cap. 2.* the counterfeiting itself, tho out of the kingdom, may be tried in the king's bench, or before special commissioners, as well as any other treason.

But at common law the counterfeiting beyond the sea seems not to have been such a treason as could be tried here, as treason in adhering to the king's enemies might have been, and therefore the importing was made treason by this act.[2]

Altho *Ireland* be within the statute of 35 *H. 8. cap. 2.* for trial of treason in compassing the king's death or levying of war, as is before observed, and therefore as to that purpose out of the realm of *England*, yet it hath been held upon the obscure book of 3 *H. 7. 10.*

[1] By the 6. sect. of the 2 W. 4. c. 34. it is felony, punishable with transportation or imprisonment, at the discretion of the court, to import into the *United Kingdom* from beyond seas any counterfeit coin resembling any of the king's gold or silver coin, knowing the same to be counterfeit. It would seem to be no offence within this Sect. to import from the king's dominions beyond the seas, (1 *Hawk. c. 17. s. 87.* 1 *East, P. C. 175.*) because the counterfeiting there is punishable by the laws of *England*. *Arch. C. P. 477.*

[2] See 1 *East, P. C. 175.*

that an importation of counterfeit coin from thence into *England* is not treason here within that statute, principally because the counterfeiting itself is punishable by the statute of 25 *E.* 3. which is of force in *Ireland. Co. P. C. p.* 18. And the like reason holds for the *Isle of Man*. Before this statute there was some [226] difficulty what this crime should be.

In the time of king *Edward I.* there were three great inconveniences touching coin imported from foreign parts, sometimes they imported true coin of *England*, but such as was clipped, sometimes they imported counterfeit coin like the coin of *England*, but of a base alloy; and most times they imported foreign coin, which yet passed between merchants, and filled the kingdom with bad money to the detriment of trade and the king's coinage. [3]

And to remedy these inconveniences were those three ordinances made, called *Statutum de moneta magnum, de moneta parvum, & Articuli de moneta*; by which, searches were ordained of all coin imported, that if any clipt money or any foreign money, other than of *England, Ireland, or Scotland*, were taken, it should be pierced and redelivered to the owner, if it were false it should be detained, and the bodies of such as had false or clipt money to be attached, (a) and if suspicious, detained till he produce his warrant; that money be received by weight; and by the second, *viz. Statutum de moneta parvum*, that if any merchant brought in clipt or counterfeit money, for the first offense he should lose the money, for the second he should lose his money and goods, and for the third *de corporibus suis & de omnibus bonis & catallis suis nobis totaliter incurratur*; that if they were not merchants, they should pierce the clipt and counterfeit money and send it to the exchange, otherwise in whose hands soever such money should be found, it should be forfeited to the king; and by *articuli de moneta* the several faulty coins, foreign and others, that had obtained in the kingdom by common use are described and decried.

By the statute of 9 *E.* 3. *cap.* 2. *Item*, "That no false money or counterfeit *Sterling* be brought into this realm or elsewhere within our power upon forfeiture of such money."

By an act or rather an advice, *Rot. Parl.* 17 *E.* 3. *n.* 15. *que nul soit si hardy de porter fausse & malveis monnoie en* [227] *roialme sur peyn de forfeiture de vie & membre.*

Rot. Parl. 20 *E.* 3. *n.* 15. A complaint of importation of false money, especially the false money called *Lusheburnes*, praying de punir ceux, que sont trovez culpablez d'apport, ou de le resceit de eux sachant le fauxisme, par judgment come faux monyers.

Ro'. Quant a cest point de ceux, que apportent la faux mony deins le realme, & que le usent per voy de merchander ent sachiant, le roy voet, quils eient judgment de vie & de membre, come faux monyers,

(a) See an ordinance to this purpose in the reign of king *John Wilk. Leg. Anglo-Sax.* p. 359.

[3] See the Act of Congress of 3 March, 1825, ch. 65. sect. 20, ante, p. 222.

solonc les leys & customes de realme; but this was never drawn up into an act: yet *Rot. Parl.* 21 *E. 3. n. 19.* the commons desire the penalty may stand according as was ordained in the last parliament, and that it extend as well to the time past as to come, & *qe nul chartres de pardon soient grant de dit fauzime & treason*: they were answered, that the justices should be assigned to enquire of the time past and to come after this act, and to do right, and that pardons be not granted *cy legerment*.

By which it appears, that it was never settled to be treason till 20 *E. 3.* and even from that time there was but a faint proceeding upon that offense.

But this statute of 25 *E. 3.* was that, which made the final settlement in this point.

But this makes only the apporters themselves, their aiders, abettors, and assistants, traitors, not those, that receive it at the second hand; and this stands with reason and is consonant to the statute of *moneta* before cited, which rendered the merchants offense punishable at the third time with death, but subjected others only to loss of the money, if not pierced and carried to the exchange.

II. That it be counterfeit after the similitude of the money of *England*, otherwise it is not treason: the bringing in of money counterfeit after the similitude of foreign coin made current here by proclamation is not treason within this act; but by the statute of 1 & 2 *Ph. & Mar. cap. 11.* it is enacted, "That if any person after *Jan. 20* next shall bring from the parts beyond the sea into this [228] realm or into any of the dominions of the same any false and counterfeit coin of money being current within this realm as aforesaid, *viz.* by the sufferance and consent of the king and queen,) (*which extends to the successors*) knowing the same coin or money to be false and counterfeit, to the intent to utter or make payment of the same, within this realm, or any of the dominions of the same, by merchandizing or otherwise, that every such offender, their counsellors, procurers, aiders, and abettors shall be deemed traitors, and forfeit as in case of high treason."

And by the statute of 14 *Eliz. cap. 3.* forging of foreign coin not current by proclamation, as well without the realm as within, is made misprision of treason; but that act extends only to the counterfeiting, whether within the realm or without, but not to the bare importing; the instance that is here given is of *Lushboroughs*, which were a base counterfeit coin after the similitude of *English* coin.

Other monies both before and after this statute there were, some counterfeit, some clipt, some of baser metal, some foreign, which had their several courses and periods in this realm: *Pollards* and *Cro-kards*, that obtained some time in *Edward I.* but were after decried by proclamation 24 *E. 1. vide Dy. 81.* Other several base coins in the same king's time mentioned in the ordinance of *Articuli de moneta*, *black money*, which had been formerly current here, recalled by the statute of 9 *E. 3. de moneta, cap. 4.* *Suskins*, *Dodkins*, and *Gally* half-pence, recalled by the statute of 11 *H. 4. cap. 5.* 3 *H. 5.*

cap. 1. *Scotch* money recalled by the statute of 3 *H. 5. cap. 1.* *Blankes* recalled by the statute of 2 *H. 6. cap. 9.* and several penalties, some general, some of felony applied to them; but these were for the most part out of this statute, and obtained here by connivance, till recalled.[4]

III. The next qualification of this offense is, that the bringer in, must know it.[5]

IV. The next qualification is, that he must bring it to merchandize or make payment thereof in deceit of the king and his people.

Counterfeiting of the king's coin without uttering of it is treason; clipping, washing, &c. by the statutes of 5 and 18 [229] *Eliz.* is treason, but it must be for gain or profit, and here the importing is not treason, unless it be to merchandize or utter it.

And hereupon my lord *Coke(a)* concludes, that he must merchandize therewith, or make payment thereof; it is a favourable exposition, but the statute is not, that if he import and merchandize, but *pur merchandizer & payment faire*, if it were to that intent, the statute makes it treason.

And by the statute of 1 & 2 *Ph. & Mar. cap. 11.* touching importation of coin counterfeit of foreign money, it must be to the intent to utter and make payment of the same; and tho the best trial of an intention is by the act intended when it is done, yet the intent in this case may be tried and found by circumstances of fact, by words, letters, and a thousand evidences besides the bare doing of the fact.

As in case of those many acts, that prohibit lading of wool, gold, silver, &c. with an intent to transport the same, whereby some are made felony, &c. the intent shall be tried in those cases (being joined with an act) by circumstances, that evidence the intent of that action, for the bare intentions cannot receive any trial, yet intentions joined with an overt-act, as here, importation, may be tried and discovered by circumstances.

So that it seems the very importing of counterfeit money *pur merchandizer, &c.* to the intent to merchandize or make payment therewith, tho no such merchandize or payment be actually made, is treason by this statute, if the party importing know it to be such, and that as well his intent as his knowledge lies in averment and proof.

And thus far concerning treasons relating to money.

(a) *Co. P. C. p. 18.*

[4] By the 37 *Geo. 3. c. 126. s. 3.* to bring into the realm any counterfeit coin resembling any gold or silver coin of any foreign country, to pass as such foreign coin, knowing the same to be counterfeit, to the intent to utter the same in any of the king's dominions, is made felony, with transportation. By the 4 *sect.* tendering in payment such coin is made, for the first offence, imprisonment for six months—second offence, two years—third offence, felony without benefit of clergy. To have in custody a greater number than five pieces of counterfeit foreign coin, makes the party liable to a penalty of five pounds, by the 6 *sect.*

[5] 1 *East, P. C. 175. Rosc. on Coin. 24. Archb. C. P. 477.*

CHAPTER XXI.

CONCERNING HIGH TREASON IN KILLING THE CHANCELLOR, ETC.

I COME shortly to treat of the last kind of high treason declared by this act.

Si home tuast chancellor, treasurer, ou justice nostre seigneur le roy del un banck ou del autre, justice in eyre, ou de assises, & tous autres justices assignes de oyer & terminer, esteant en leur place fesant leur office,

I. This statute extends only to the actual killing of some of these officers, and therefore a conspiring to kill any of these without actual killing of any of them is not treason; but if any conspire to do the act, and one of the conspirators actually do it, this seems to be treason in them all, that are abettors or counsellors to do the act, as is before instanced in levying of war, and therefore there is a particular act made 3 H. 7. cap. 14. that make the conspiring the death of a privy counsellor to be felony. (a)

If a man only strike or wound one of these officers, tho in the execution of his office, this is a great misprision, for which in some cases the offender shall lose his hand, (b) as was once done in the case of my lord chief justice *Richardson* sitting as justice of oyer and terminer, but it is not treason within this act.

II. This statute extends to no other officers but those [231] above-named, and therefore not to the lord steward, constable, marshal, admiral, or lord of parliament, tho in the exercise of their offices; it may be murder, but not treason. Co. P. C. p. 18.

A justice of peace, tho there be in the end of his commission of the peace, *nec non ad diversa felonias, malefacta audiend' & terminand'* is not a justice of oyer and terminer within this act, for the justices of oyer and terminer are intended such, as have their commission *ad audiend' & terminand' &c.* as the principal designation of their office; and thus it is in divers statutes also, that speak generally of justices of oyer and terminer. (c)

But a justice of peace may be also a justice of oyer and terminer by another commission, as many times they are, and then they are

(a) But this act extends only to such offenders, as are the king's sworn servants, whose names are entered in the cheque-roll of the king's household, and who is under the state of a lord; and according to lord Coke's opinion the conspiracy must be plotted to be done within the king's household. Co. P. C. p. 39. by this statute the offender was not deprived of the benefit of the clergy; but by 9 Ann. cap. 16, on occasion of *Robert Harley*, Esq. (afterwards earl of Oxford) being stabbed by *Anthony Guiscard*, who was then under examination before a committee of privy council, it was enacted, "That whoever should unlawfully attempt to kill, or should unlawfully assault, strike or wound a privy counsellor in the execution of his office, shall suffer death as a felon without benefit of clergy."

(b) 3 Co Inst. 140.

(c) 9 Co. 118. b. Cro. Eliz. 87, 697.

within this statute, when they are sitting by virtue of that commission.

The lord keeper, when there is a lord chancellor also, as there may be both at the same time, seems not to be within this law; but if there be no lord chancellor, then the lord keeper is within this act, for by the statute of 5 *Eliz. cap. 18.* their office is declared to be the same to all intents and purposes, as if the lord keeper were lord chancellor.

But the commissioners of the custody of the seal^(d) or for the treasury are not lord chancellor or lord treasurer within this act, and therefore at such times as the treasury hath been in commission those commissioners have not the same power as the lord treasurer, as in cases of writs of error by the statute of 31 *E. 3 cap. 12.*^(e) in the exchequer before the lord chancellor and treasurer, and so for the setting of the prices of wines by the statute of 7 *E. 6.*^(f) neither do they sit as lord treasurer in the exchequer-chamber, as judges of equity.

It extends not to the chancellor and under treasurer of the exchequer, nor to the chancellor of the county palatine of [232] *Lancaster*, nor to the lord privy seal, for these are special officers and of a lower rank, than the lord chancellor or treasurer.

III. The *third* qualification of this treason is, that it must be *este- ants en lour places, fesant lour offices*; wherever the seal is open, whether in the court of chancery or in the chancellor's house, the chancellor or keeper there sealing writs is *seants en son place, fesant son office*.

And the same law seems to be, if he be hearing of causes in his chamber, for tho antiently the hearing of causes upon *English* bills was rare, yet use hath sufficiently obtained to give it the style of *sesant son office*.

Quære, touching the lord treasurer's dispatching business in his house, whether this be *seant in son place*, but sitting in the court of exchequer, or exchequer-chamber, or in the star-chamber, when it stood, had been *seant in son place*, &c.

The place for the justices of the several courts are the courts themselves, where they usually or by adjournment sit for the dispatch of the business of their courts.

And so much shall suffice for this treason also.

1 Hawk. P. C. 41. 4 Black. Com. c. vi. p. 84.

(d) But it should seem, that now they are within the act, since by 1 *W. & M. sess. 1. cap. 21.* their office is declared to be the same, and they to have the same jurisdiction and privileges, as lord chancellor.

(e) See also 31 *Eliz. cap. 1.*

(f) This power is given by 37. *H. 8. cap. 23.* which statute was revived by the 5 & 6 *Ed. 6. cap. 17.* but there is nothing of it in the 7 *E. 6.*

CHAPTER XXII.

CONCERNING PRINCIPALS AND ACCESSARIES IN TREASON.

BEFORE I leave the discourse concerning high treason it is necessary to consider, whether or how all are principals in high treason.

In cases of felony there are two sorts of principals, viz. principals in the first degree, that do the fact, be it in murder or any other felony, and principals in the second degree, that are present aiding and abetting the felony.

And regularly in felony there are two sorts of accessaries, 1. Accessaries before the fact, which are not present, but yet counselling, commanding, or abetting the felony, but in manslaughter no such accessaries can be before: and 2. Accessaries after, such as knowing a felony to be done by such a man do yet receive or maintain him, unless it be a wife receiving her husband; (a) of this hereafter in its due place.

Now in treason thus far it is agreed of all hands, 1. That there are no accessaries *à parte ante*, but all such as counsel, conspire, aid, or abet the committing of any treason, whether present or absent, are all principals. 2. It is likewise agreed of all hands, that in all treasons, except that which concerns counterfeiting the great or privy seal, or money, whosoever knowingly receives, maintains, or comforts a traitor, is a principal in high treason. *Co. P. C.* 16, 138, and so it is there cited to be resolved in the case of *Abington*, who received *Garnet*, that was one of the conspirators in the powder treason; that which hath occasioned the doubt hath been the resolution in *Conyer's* case, *Dy.* 296. who was indicted, that *proditorie receptasset, &c.* *Fairfax, sciens ipsum diversas pecias monetæ ad similitudinem monetæ Angliæ vocat shillings de falso metallo fabricasse*; upon this he and others were discharged, because it was misprision of treason only, and not treason; but this opinion is contradicted by my lord *Coke, Pla. Cor. p.* 138. and yet it is said by the same author, *Paschæ 9 Jac. 12 Rep.* 81. the receiver of a counterfeiter of the seal or money is no traitor.

We will see therefore in what cases an act *ex post facto* will be, treason in relation to the aid of him, that committeth this or any other treason.

A man is imprisoned for treason, the goaler voluntarily suffers him to escape, this is treason in the goaler. *Stamf. Pl. Co.* 32.

If a person be arrested for treason, he that rescues him is guilty of treason. [1]

(a) *Vide supra, p.* 47.

[1] By the 23 Sect. of the Act of April 30, 1790, it is enacted, That if any person or persons shall by force set at liberty or rescue any person who shall be found guilty of treason, murder, or any other capital crime, or rescue any person convicted of any of

And so if a man be imprisoned for treason, and another prisoner or any other person breaks the prison, and lets out the party imprisoned for treason, this is treason in the party that breaks the prison. 1 H. 6. 5 *Stamf. Pl. Cor.* 32. nay, if a stranger breaks the prison and lets out one there imprisoned for treason; this is held treason, tho he that breaks the prison knew not that any there was imprisoned for treason; so resolved by ten judges, *P. 16. Car. Croke* 583. *Bensted's* case; but my lord *Coke* holds that he must be knowing it. *Co. Mag. Cart. super statutum de frangentibus prisonam.* (b) [2]

Rot. Parl. 2 H. 6. n. 18. in schedula. Mortimer was committed to the Tower of London for suspicion of treason; and 23 Feb. 2 H. 6. was indicted, *quod per covinam, confederationem & assensum* Wilhelmi King, &c. *pro diversis denariorum summis eidem Wilhelmo King per præfatum Johannem Mortimer promissis, idem Johannes turrim prædict' falso & proditoriè fregit:* the indictment was removed into parliament, and John Mortimer likewise brought into the parliament: the commons desired the duke of Gloucester (then commissioned to hold the parliament) that the indictment might be affirmed, and that John Mortimer *de prædictis prodicionibus & felonis convincatur:* thereupon the duke and lords at the request of the commons affirm the indictment by act of parliament, & quod prædictus Johannes Mortimer de prodicionibus & [235] felonis prædictis convincatur, & quod trahatur per medium civitatis, & super furcas de Tyburne suspendatur, & ad terram præjiciatur, & caput ejus amputetur, & interiora sua comburantur, & corpus ejus in quatuor partes dividatur, & caput ejus ponatur super portam pontis London, &c. & quod bona & cātalla, terras & tenementa sua, tam in dominico, quàm in reversione, domino regi forisfaciat.

So that it seems, tho the statute of 25 E. 3. speaks not of these offenses, yet they are in a manner incidents, and virtually included within the original offense, and therefore these cases of voluntary

(b) 2 Ce. Inst. 590.

the said crimes, going to execution or during execution, every person so offending and being thereof convicted, shall suffer death. And if any person shall by force set at liberty or rescue any person who before conviction shall stand committed for any of the capital offences aforesaid; or if any person or persons shall by force set at liberty or rescue any person committed for, or convicted of any other offence against the United States, every person so offending shall, on conviction, be fined not exceeding five hundred dollars, and imprisoned not exceeding one year.

[2] It is true it was resolved in *Benstead's* case, cited here by the learned author, (Sir M. Hale,) and at p. 141, but I think not with entire approbation of the rule, that the party breaking prison would have been guilty of treason though he had not known that traitors were there. I am by no means satisfied with this opinion. For the single authority upon which this point is said by *Hale* to have been so ruled doth by no means warrant it. The book expressly stateth it, that the party did know that traitors were there. And *Brooke*, who abridgeth the case, is express to the same purpose, "*sciant que traitors fuerent en coo.*" And *Coke*, citing the same case, layeth a great stress on this circumstance, that the party knew that traitors were there, and conducted them out of prison. *Foot.* 344.

permission to escape, rescue, breach of prison, translate the original offense upon him, that commits it by the common law; and these would be treasons as well in the case of counterfeiting of coin, as other treasons.

But herein these things are observable, 1. This judgment in *Mortimer's* case is not at all now in force, nor binding, for the statute of 1 *Mariæ* repeals not only enacted treasons, but declared treasons, that were not within 25 *E. 3.* and 2. That therefore at this day, if one be committed for suspicion of treason, and another break goal to let him out, yet unless the party imprisoned were really a traitor, this is no treason at this day. 3. But if he were really a traitor, then breaking of the prison to enlarge him is treason, and a treason of a greater guilt, than a knowing receiver, and then it is treason by virtue of the common law, for it is a kind of incident; the like of a receiver of a traitor, or a goaler that suffers him voluntarily to escape, those are incident treasons by the common law, and virtually included in the statute of 25 *E. 3.* as well as a receiver of a traitor knowingly.

The differences therefore seem to be these, which state and reconcile the whole matter.

First as for new treasons. If an act of parliament enact a new treason, and that the offender, his counsellors, abettors, and aiders thereunto shall suffer as traitors, this doth not make receivers or comforters after the fact guilty of treason, for *expressum facit cessare tacitum*; such a clause we shall find in the statute 23 *Eliz.* [236] *cap. 2.* for a new felony (c) 5 *Eliz. cap. 1.* in a case of a *præmunire*. (d)

If an offense be made treason in the offender, his procurers, counsellors, abettors, consenters, (without the word *thereunto*) yet it seems to me for the same reason it doth not make the knowing receivers traitors, unless the words *receivers* or *comforters* be also inserted: for the former words import an offense preceding or concomitant to the act of treason, but the latter words *receivers* and *comforters* are after the offense, and so of another nature: and this difference appears expressly by the statute of 13 *Eliz. cap. 2.* where *abettors, procurers, and counsellors* are made guilty of high treason; but *receivers* and *comforters* (e) after the fact are only within the statute of *præmunire*; the like in 27 *Eliz. cap. 2.* where the coming of a priest, &c. is *treason*, but his receiver, aider, or comforter is *felony*: so 5 & 6 *E. 6. cap. 11.* and 1 *Eliz. cap. 5. the offenders, their counsellors, abettors and procurers, and all and every their aiders and comforters knowing the same* extend to knowing receivers.

The word (*aid*) is of somewhat a more doubtful extent, yet we shall find in those statutes and some others the word *aid* to be applied to an aiding after the offense, and not in it or to it; but it seems to

(c) The words of this statute are, *aiders, procurers, and abettors.*

(d) The words of this statute are more extensive, *viz. abettors, procurers, counsellors, aiders, assistants, and comforters.*

(e) The words in this place of the statute are, *aiders, comforters, or maintainers.*

me, that when it is joined only with those that import a consent to the offense, (as *procurers, counsellors, aiders, abettors, or counsellors, consenters and aiders*) as in the statute of 5 *Eliz. cap. 11.* for clipping, 18 *Eliz. cap. 1.* for impairing 1 *Mar. sess. 2 cap. 6.* for counterfeiting foreign coin, it must be construed of those that are *aiders* in the offense, and not bare receivers of the person.

But in all new treasons, those that rescue him from prison, or suffer him voluntarily to escape being lawfully committed to his custody, tho these are not expressly contained in that new act of treason, yet they are traitors by a necessary construction of law upon the act itself; but if the act, be general, making a man a traitor for such an act without mentioning in what degree his aiders, [237] or abettors, comforters, or receivers shall be, it seems probable, that the receiver, knowing it, is thereby virtually made also a traitor; this, I say, seems probable, but most certainly procurers, consenters, and aiders to the fact are thereby traitors, tho not specially so enacted; this is agreed in *Conyer's case, Dy. 296. Co. P. C. 16 & 138.*

Secondly, As touching treasons within the act of 25 E. 3.

The procuring, counselling, consenting, or abetting such treasons, tho not specially expressed in that statute, is treason within that statute. *Co. P. C. cap. 64. p. 138.* and so is the receiving of a traitor, or a gaoler's voluntary permitting him to escape, if he were in truth a traitor.

In case of the knowingly receiving of a person guilty of counterfeiting of coin, or of the great seal, there is diversity of opinion, *M. 12 & 13 Eliz. Dy. 296.* and my lord *Coke* himself in his 12 *Rep. p. 81. 9 Jac.* says, that it is not treason, and yet *Pla. Cor. cap. 64. p. 138.* he holds it treason, tho this latter opinion is the more probable, the former is more merciful.

But in all other treasons against the king within the statute of 25 *E. 3.* the receiver of a traitor knowingly makes the receiver a traitor; this was *Abington's case* for receiving *Garret* guilty of the powder treason, *Co. P. C. p. 138.*

Only this difference is to be observed, he, that being committed for treason breaks prison, may be indicted for breaking of prison, before he be convict of the principal offense, for which he was committed, but not of treason, but it will be only felony by the statute *de frangentibus prisonam*, for this statute *de frangentibus prisonam* makes it not treason; and if it did, yet the statute of 25 *E. 3.* makes it no treason; because not within the same statute, and consequently 1 *Mar. cap. 1.* exempts it from being treason; but he, that rescueth a person imprisoned for treason, or suffers him voluntarily to escape, shall not be arraigned for that offense, till the principal offender be convict of that offense: for if he be acquitted of the principal offense, the gaoler, that suffered the escape, and he that made the rescue shall be discharged; and the like in felony. *Coke Mag. [238] Car. super stat. de frangentibus prisonam, p. 592.* and the reason is, because tho rescuing a person charged with treason, or suf-

fering him wilfully to escape be a great misdemeanor, yet it is not treason, unless in truth and reality he were a traitor, for a man may be arrested or imprisoned under a charge of treason, and yet be no traitor.

And tho the receiver of a traitor, knowing it, be a principal traitor, and shall not be said an accessory, yet thus much he partakes of an accessory, 1. That his indictment must be special of the receipt, and not generally, that he did the thing, which may be otherwise in case of one, that is a procurer, counsellor, or consenter; [3] thus it was done in *Conyer's* case, *Dy.* 296. 2. That if he be indicted by a several indictment, he shall not be tried till the principal be convicted, (f) upon the reason of the goaler and rescuer before given, for the principal may be acquitted, and then he is discharged of the crime of receipt of him. 3. If he be indicted specially of the receipt in the same indictment with the principal offender, as he may be, yet the jury must first be charged to inquire of the principal offender; and if they find him guilty, then to inquire of the receipt, and if the principal be not guilty, then to acquit both; and accordingly it was ruled in *Arden's* case. (g) [4]

For tho, in law, they be both principals in treason, and possibly process of utlary may go against him, that receives, at the same time as against him, that did the fact; and tho the principal appear, process may go on against the other (otherwise in the case of an accessory in felony, *Stamf. Pla. Cor.* 47.) yet in truth he is thus far an accessory, that he cannot be guilty, if the principal be innocent.

(f) See *postea* Book II. cap. 28. And therefore the conviction of lady *Alice Lisle*, 1 *Jac.* 11. was contrary both to law and reason, for that *Hicks* the principal (for harbouring whom she was convicted of treason) was not at that time convicted, nor indeed was there any proof that she at that time knew he had been in the rebellion. *State Tr.* Vol. IV. p. 105.

(g) 1 *And. n.* 154. p. 109.

[3] The words "may be otherwise" do not clearly convey the idea that it is universally otherwise. In all cases of a receiver the indictment must be special on the receipt, and not general. The words "may be otherwise in case of a procurer, &c." signify that it may be otherwise in all treasons, or that it may be otherwise in some treasons. If it may be otherwise in some treasons, without contradicting the doctrines of *Hale* himself as well as of other writers, but cannot be otherwise in all treasons without such contradiction, the fair construction is, that *Hale* used these words in their restricted sense; that he used them in reference to treasons in which a general indictment would lie, not to treasons where a general indictment would not lie, but an overt act of the treason must be charged. Per *Marshall, C. J.* 2 *Burr's Tr.* 434.

[4] The conviction of some person, who has committed the treason, must precede the trial of him who advised or procured it. 2 *Burr's Tr.* 461.

But in all acts of approbation, incitement, advice, or procuring, in case of treason in compassing the king's death, the party may be tried before the person who acted upon such incitement; because the bare advising or encouraging such acts, is in itself an overt-act of compassing; and it is immaterial whether the attempt was ever made or not. But in the other treasons in the 25 *Edw.* 3. if one advise another to commit them, or furnish him means for that purpose, and the fact is committed, the adviser will be a principal traitor; for such advice would have made him an accessory before the fact in felony; but if the act were not committed, the adviser could not be a traitor. In these cases the treason is of a derivative nature and depends upon the guilt of the agent, the proof of which can only be legally ascertained by his conviction. *Fost.* 346. 342. 1 *East, Pl.* 100. 4 *Bl. Com.* 35.

How far *Mortimer's* case agrees with law at this day, *videbimus infra, & vide supra.*

That, which will not make an accessory to felony after the fact, will not make a man principal in treason; therefore [239] sending of a letter for his deliverance, or speaking a good word for him, &c. will not be treason. *Stumpf. Pl. Cor.* 41. b. how far charitable relief will do it, *vide infra super statutum* 13 *Eliz. cap.* 1.[5]

[5] The principle that the same acts which make a man an accessory in felony, make him a principal in treason applies, it is presumed, in respect to treason in the state of *Virginia*; but whether it does in respect to treason against the *United States* is doubtful; because the acts in which treason against the *United States* shall consist are precisely defined by the federal constitution in terms which seem to exclude all accessorial treasons; and because, too, the common law, of which this doctrine is a part, is not the law of the *United States*, though it has been severally adopted by all of them except one: *Davis's Virg. Cr. Law*, 38. But it was laid down by Judge *Chase*, in *Fries' Trial*, 199. that in treason all the *participes criminis* are principals; that there are no accessories in this crime. All persons who are present, and countenancing and are ready to afford assistance, if necessary, to those who actually commit any treasonable act, are also principals. If a number of persons assemble and set out upon a common design, as to resist and prevent by force, the execution of any law, and some of them commit acts of force and violence with intent to oppose the execution of any law, and others are present to aid and assist if necessary, they are all principals. If any man joins and acts with an assembly of people, his intent is always to be considered and adjudged to be the same as theirs; and the law in this case, judgeth of the intent by the fact. If a number of persons combine or conspire to effect a certain purpose, as to oppose by force, the execution of a law, any act of violence done by any one of them, in pursuance of such combination and with intent to effect such object, is in consideration of law, the act of all who are present when such act of violence is committed. If persons collect together to act for one and the same common end, any act done by any one of them, with intent to effectuate such common end, is a fact that may be given in evidence against all of them. It appears to the court, says Chief Justice *Marshall*, (2 *Burr's Tr.* 405.) that those who perform a part in the prosecution of the war may correctly be said to levy war and to commit treason under the constitution. It will be observed that this opinion does not extend to the case of a person who performs no act in the prosecution of the war—who counsels and advises it—or who, being engaged in the conspiracy, fails to perform his part. Whether such persons may be implicated by the doctrine, that whatever would make a man an accessory in felony makes him a principal in treason, or are excluded, because that doctrine is inapplicable to the *United States*, the constitution having declared that treason shall consist only in levying war, and having made the proof of overt acts necessary to conviction, is a question of vast importance, which it would be proper for the Supreme Court to take a fit occasion to decide; but which an inferior tribunal would not willingly determine unless the case before them would require it. This doctrine remains still in uncertainty, having never come up before the Supreme Court of the *United States*. See 4 *Tucker's Bl. Com. Appdx.* 41. 1 *East, P. C.* 93. 4 *Bl. Com.* 34. 323. *Post.* 341. *Hawk. c.* 17. c. 39.

CHAPTER XXIII.

CONCERNING FORFEITURES BY TREASON.

HAVING gone thro the several treasons declared by this statute, I shall now proceed to what follows in this statute, which is, 1. Touching forfeitures of high treason.[1] 2. Touching declaring of treason by parliament, and under this head shall consider those several declarations and new enacted treasons since the statute of 25 E. 3. and how they stand at this day.

The forfeitures for treason are either goods or lands.

As to goods: the king's prerogative as to goods forfeit for treason is the same as to forfeitures for felony, only there seems to be some difference in relation to grants thereof. 22 Ass. 49. The king grants to the master of St. Leonard's *Omnia bona & catalla tenentium suorum fugitivorum, and felonum qualitercunque damnatorum*. A tenant of the master's was convict and attaind for killing of the king's messenger, which at that time was held high treason; it was ruled, that the master shall not have the goods of this person by force of this general grant.

As to lands this statute of 25 E. 3. goes farther, Et soit a entendus, qe les cases suisnosmes doit estre adjudge treason, qe se extend a nostre seigneur le roy & sa royal majesty, & de tiel manners de treasons le forfeiture des eschetes appertenant a nostre seigneur le roy, ci bien de terres & tenements tenus des autres, come de lui mesme.

I shall here examine, 1. Of what lands the king shall have [240] the eschete upon attainder of treason, and 2. In what manner or degree he shall have those eschetes. 3. Where a subject in point of privilege or franchise shall have these royal eschetes.

1. As to the first of these, what lands are forfeit to the king by attainder of treason, my lord Coke, *Pl. Cor. p. 19.* gives a full account of them, which I shall repeat with some additional observations: 1. At common law the lands entailed were forfeited for treason, because it was a fee-simple conditional; but by the statute *W. 2. de donis conditionalibus* the forfeiture of lands entailed, even in case of treason, was taken away, and the general words of this statute of 25 E. 3. doth not repeal the statute of *Westm. 2.*

But some later statutes have given to the king the forfeiture for treason of lands entailed: the statute of 21 R. 2. cap. 3. did give the forfeiture of lands entailed to the king for the treasons therein mentioned; but that statute with the whole parliament of 21 R. 2. was repealed by the statute of 1 H. 4. cap. 3.

[1] The Constitution (Art. 3. Sect. 3.) declares that no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted. By the 24 Sect. of the Act. of 30 April, 1790, it is enacted, That no conviction or judgment, &c. shall work corruption of blood, or any forfeiture of estate.

By the statute of 26 *H. 8. cap. 13. in fine* lands entailed are forfeited by attainder of treason, *viz.* "All such lands, tenements, and hereditaments, which any such offender shall have of any estate of inheritance in use or possession, by any right, title, or means, within any of the king's dominions at the time of any such treason committed, or at any time after, saving to all persons, other than the offenders, their heirs and successors, and such persons as claim to any of their uses, all such right, title, interest, possession, &c. as they might have had if this act had not been made."

And by the statute of 33 *H. 8. cap. 20.(a)* "That if any person be attaint of high treason by the course of the common law such attainder shall be of as good force, as if it had been by parliament; and the king, his heirs and successors, shall have as much benefit by such attainder, as well of uses, rights, entries, conditions, as possessions, reversions, remainders and all other things, and shall be deemed in the actual and real possession of the lands, [241] tenements, hereditaments, uses, goods, chattles, and all other things of the offender, which his highness ought to have, if the attainder had been by authority of parliament, without any office or inquisition to be found for the same, saving to all persons, (other than the offenders and their heirs and assigns; and other persons claiming by, from or under them or to their uses after the treason committed) all such right, title, use, possession, entry, reversion, remainder, interest, condition, fees, offices, rents, annuities, commons, leases, and all other commodities, and hereditaments whatsoever, which they should, might, or ought to have, if this act had not been made."

And the statute of 5 & 6 *Ed. 6. cap. 11.* is to the same effect.

These statutes as to the forfeiture of lands entailed remain in force, and are not repealed by the statute of 1 *Mar.* and so it hath been often ruled, and particularly by all the judges in the lord *Sheffield's* case 21 *Jac de quo postea.*

And the reason is, because the statute of 1 *Mar. cap. 1.* enacting, that no treason shall be, but what was enacted by 25 *E. 3.* and that no pains of death, penalties or forfeitures shall ensue for doing any treason; other than be in the statute of 25 *E. 3.* these words *other than be mentioned in the statute of 25 E. 3.* refer to treasons, not to forfeitures or penalties; and therefore tho by the statutes of 26 and 33 *H. 8.* new penalties, *viz.* forfeitures of lands intailed, are introduced, this forfeiture is not repealed, but only new treasons not mentioned in 25 *E. 3.* so that at this day, if tenant in tail be attaint of treason, the estate-tail is forfeited, and yet this attainder works no corruption of blood as in relation to the heir in tail: *vide* the lord *Lumley's* case cited in *Dowry's* case, 3 *Co. Rep.* 10. *b.* Grandfather tenant in tail, father, and son, the father is attaint of treason and dies, the grandfather dies, the land shall descend to the grandchild, for the father could forfeit nothing; for he had nothing to forfeit;

(a) See the cause of making this act, 3. *Co. Rep.* 10. *b.*

and the statute of 26 *H. 8.* that gives the forfeiture of tenant in tail, yet corrupts not the blood by the attainder of the father.

And therefore it is agreed in the principal case, that if [242] after 26 *H. 8.* and before 33 *H. 8.* which vests all in the king without office, if tenant in tail had been attainted of treason, and died in that interval, the land would have descended to his son till office found; but otherwise in case of tenant in fee-simple attainted and dying before office, the freehold is cast upon the king without office, because none could take it else.

2. The king at common law and by virtue of this statute was entitled to a right of entry, where the party was in merely by disseisin or abatement, but not to a right of entry, where the possessor was in by title; but at this day by virtue of the statute of 33 *H. 8.* above-mentioned the king is entitled to a right of entry in both cases, and that without office, but then there must be an inquisition or seizure to bring the king into the actual possession; and if he grant it over before such seizure, the grant must be special, not of the land simply, but of the right to the land, otherwise neither land nor the right of entry passeth; it is so adjudged in *Dowty's case*, 3 *Co. Rep.* 10. *b.*

3. If a person committing treason hath at the time of the treason committed a bare right of action touching any lands, or a right to reverse a judgment given against him by writ of error, or a right to bring a formedon, or writ of entry, but hath no right of entry without such recovery in such action; this right neither at common law nor by the statute of 33 *H. 8.* is given to the king by the attainder of treason, 3 *Co. Rep.* 3. *a.* marquis of *Winchester's case*, 3 *Co. Rep.* 10. *b.* *Dowty's case* so adjudged; but yet there have been two great cases resolved, that tread hard upon the heels of this judgment.

H. 15 Eliz. Pl. Com. 552. *b.* *Walsingham's case*: *Wyat* tenant in tail of the gift of king *Henry VII.* the reversion in the crown, made a feoffment in fee, and then was attaint of treason, and died leaving issue, tho the feoffor, against his own feoffment, could not claim any right at the time of the treason; yet it was adjudged, 1. That there remained in him such a right of the entail, as was forfeited to the king. 2. And that the king was in as of [243] his reversion, and should not be subject to leases duly made by *Wyat* before his attainder.

21. *Jac. in Camera Scaccarii Stone and Newman's case*, it was adjudged in *B. R.* and affirmed in *Camera Scaccarii* by the greater number of justices. *Bigott* tenant in tail general makes a feoffment to the use of himself and his heirs; and before the statute of 26 or 27 *H. 8.* commits treason, and is attaint of treason, and dies leaving issue inheritable to the entail, then a special statute is made 31 *H. 8.* whereby he was to forfeit all estates and rights; yet it was adjudged, 1. That against his own feoffment the tenant in tail could have no right, and therefore if the case had stood barely so, the right of the entail could not have been forfeited by the attainder.

2. But when an estate returns to him, that is forfeited by the attainder, the king shall hold this estate discharged of the right of the old entail, and that right shall never revive to the issue. 3. That the retrospect of the king's title by the attainder shall over-reach and avoid the remitter, which was wrought in the issue before the king's actual seisin by the attainder or office thereupon.

But it is to be noted, that if the king makes a gift in tail, saving the reversion to himself, the attainder of treason of such tenant in tail shall not bar his issue, because the statute of 34 *H. 8. cap. 20.* enacts, "That the heir in tail in such case shall have the lands, any recovery, or any other thing or things hereafter to be had, done, or suffered by or against such tenant in tail to the contrary notwithstanding;" which act coming after 26 *H. 8.* and 33 *H. 8.* that gave the forfeiture of lands entailed, is a repeal of those statutes as to this case, and a restitution of the statute *de donis conditionalibus* in this special case: and therefore, where in *Plowden's Commentaries* (*Walsingham's case*) *Wyat*, who was tenant in tail of the gift of the crown, the reversion in the crown, was attainted of treason 1 *Mar.* he had not forfeited his land by virtue of the statutes of 26 or 33 *H. 8.* if there had been no more in the case; but in that case he lost it, because by special act of 1 & 2 *Ph. & Mar.* that attainder was confirmed, and farther it was enacted, "That he should forfeit all the lands, tenements, and hereditaments, whereof he [244] or any to his use was seized the day of the treason committed, saving the right of all persons other than the person attainted and his heirs, and all claiming under them after the treason committed;" and this act coming after 34 *H. 8. cap. 20.* repealed that act as to this case, as the act of 34 *H. 8.* repealed the acts of 26 and 33 *H. 8.* as to entails of the gift of the crown, where the reversion continues in the crown.

But since all these statutes it is enacted by the statute of 5 & 6 *Ed. 6. cap. 11.* "That every offender being lawfully convict of any manner of high treason according to the course and custom of the common law shall lose and forfeit to the king's highness, his heirs and successors, all such lands, tenements, and hereditaments, which any such offender or offenders shall have of any estate of inheritance, in his own right, in use, or possession, within this realm of *England*, or elsewhere within the king's dominions at the time of such treason committed, or at any time after:" this act coming after 34 *H. 8.* makes lands of the gift of the king in tail subject to forfeiture for treasons, as well as other lands entail. 16 *Eliz. Dy. 332. b.*

4. At common law the king was not entitled to a condition, that was in the party attainted; but now by the express words of the statute of 33 *H. 8.* the king is in some cases entitled to a condition of re-entry belonging to the party attainted, *viz.* not to the land itself but to the benefit of that condition, which might reduce the land into the possession of the party attainted, if he had not been attainted, and now to the benefit of the king: but herein this difference is to be observed.

1. If the condition be such, as that the substance of the performance thereof is not bound up strictly to the person attaint, then such a condition is given to the crown, and he may perform it, as the party himself might have done in case the condition hath a continuance.

7 Co. Rep. 11. b. *Englefield's case*: Sir Francis Englefield conveyed his lands to the use of himself for life, the remainder [245] to his nephew and the heirs male of his body, &c. with a proviso, that in as much as he might turn prodigal, and therefore for a bridle to him, if Sir Francis by himself, or any other during his life, should deliver or offer to his nephew a ring of gold to the intent to make void the uses, then the uses should cease—Sir Francis is attaint of treason; it was ruled, that the queen in the lifetime of Sir Francis may by commission, &c. tender the ring and make void the uses, for it was not personally annexed to him, but might be performed by the queen.

This case was judged M. 33 & 34 Eliz. but it was not thought safe to rely upon this judgment; but 35 Eliz. cap. 5. there was a special act of parliament reciting the attainder and the conveyance with the proviso: "And it is declared and enacted, that the attainder be confirmed, and that the queen was lawfully entitled to take benefit and advantage of that proviso in the same form, as Sir Francis Englefield might have done, and that the said proviso or condition was well performed by the queen's commission:" But suppose Sir Francis had died before the queen had made the tender, then the condition which was only limited to him during his life, had been determined, and the queen could not have tendered, for the attainder could not lengthen the condition longer than the first limitation; but on the other side, if the condition be appropriated and applied to the person of the party attaint, then such condition is not given to the crown.

The duke of Norfolk's case 11 Eliz. (b) cited in *Englefield's case* to be adjudged and then agreed by the court: the duke conveyed land to uses, provided that if he shall be minded to revoke, and shall signify his mind in writing under his proper hand and seal subscribed by three witnesses, that then the uses should be revoked; it was ruled, that this condition was not given to the crown by his attainder.

2. Car. 1. B. R. Sir William Shelly, (c) made a feoffment to the use of himself for life, the remainder to his first, second, third, [246] and other sons in tail, provided, that if Sir William Shelly at any time during his life give or deliver, or lawfully tender to the feoffees or any of them, their heirs or assigns, a gold ring, or a pair of gloves of the price of twelve-pence *ipso Wilhelmo tunc declarante & expressante*, that the tender was to the intent to avoid the deed, that then it should be void, and the feoffees should stand

(b) 7 Co. 13. a.

(c) See this case by the name of Warner and Hardwin in Latch 25, 69, 102. W. Jones 134.

seised to the use of Sir *William* and his heirs; and it was adjudged in the common pleas, that this condition was so personal, that it was not given to the king, but upon a writ of error in *B. R.* the court was divided; *Whitlock* and *Jones*, that it was given, *Croke* and *Doderidge*, that it was not given to the king, & *sic stetit*.

In the case of *Wheeler* and *Smith*,^(d) *Simon Mayne* being possessed of the rectory of *Haddenham* for sixty years, in 1643, assigned it over to trustees in trust for himself for life, and afterwards to divers other trusts for payment of debts and other things, provided nevertheless and upon condition, that if the said *Simon Mayne* shall, at the time of his decease have issue of his body, that then and from thenceforth the trustees shall stand possessed for such person and persons, and such estate and estates, as *Simon Mayne* by his last will and testament shall limit and appoint, and for want of such limitation and appointment, in trust for such after-born child; provided also, that if the said *Simon Mayne* shall hereafter during his life be minded to make void these present indentures, or any use or trust therein, or to limit new uses; and the same his mind shall declare or signify *under his hand and seal* in the presence of two witnesses, then the uses shall cease, and then the trustees shall stand possessed to such uses, as he by such deed or writing, or by his last will and testament in writing shall limit and appoint. *Simon Mayne* was guilty of the execrable murder of the king, had issue a son, was attainted, and died without making any such will or revocation or declaration; and by act of parliament all the estates, which he had or any in trust for him, and all rights, conditions, &c. were vested in the crown, who granted this rectory to the duke of *York*; and by him the same was granted to Sir *William Smyth*:

it was adjudged in the common pleas, and upon a writ of [247] error affirmed in the king's bench, *P. 23 Car. 2.* that Sir *William Smyth* had no title to this rectory: 1. That this was a personal condition and not given to the king, *under his hand* and *under his proper hand*, being all one in sense and appropriate to his person. 2. That, if it were given, yet the same expiring by the death of *Mayne* could not be performed after his death by the king. 3. Admitting it might, yet nothing but the condition was in the king, and not the rectory itself, till the condition performed. 4. That consequently the rectory passed not to the duke of *York*, because the condition was not performed. 5. Neither the performance of the condition nor the benefit thereof passed to the duke by the general grant of the rectory, but it must have been specially granted, or otherwise nothing passed. 6. That here was no estate in trust for *Simon Mayne* longer than during his life, because the whole residue of the trust was out of him, and was not reducible back to him, but by a strict performance of the condition or power, which was strictly tied to the person of *Simon Mayne*, and determined by his death; and therefore not given to the crown; but if it had been given to the crown, and might by the crown be transferred to the patentee, yet it seems the patentee

(d) See this case reported 2 *Keb.* 564, 608, 6763, 772. 1 *Med.* 16, 38.

could not transfer or assign that condition over to another; but this last question was not moved, as I remember, for the resolution of the former points made an end of the case.

5. At common law the king by attainder of treason was not entitled to uses or trusts belonging to the party attaint: thus it is recited to be the law by the statute of 27 *H. 8. cap. 10.* and was one of the reasons of the making of that statute for transferring of uses into possession; and hence it was, that in some general acts touching treason, as that of 21 *R. 2. cap. 3.* and in most particular acts of attainder, that were made after that time, there was special provision made, that the parties attaint should forfeit all the lands, whereof they or any other to their use were seized, and in most of those acts provision was also made to save from forfeiture such lands, whereof the persons attaint were seized to the use of any other, as [248] may be seen in the acts of attainder: *vide Rot. Parl. 1 E. 4. n. 18. 3 E. 4. n. 28. &c.*[2]

And yet, altho the statute of 27 *H. 8. cap. 10.* had executed uses into possession, so that after that statute all uses were drowned in the land, yet there have succeeded certain equitable interests called trusts, which differ not in substance from uses; nay, by the very statute of 27 *H. 8. cap. 10.* they come under the same name, *viz. uses or trusts.*

And by the statute of 33 *H. 8. cap. 20.* there is a special clause, that the person attainted shall forfeit all uses, &c. and the saving is to all persons other than the person attainted, and his heirs, and all persons claiming to the use of them or any of them.

And what other uses there could be at the making of the statute of 33 *H. 8.* but only trusts, such as are now in practice and retained in chancery, I know not, and yet such hath been the opinion of men, or rather their necessity in respect of frequent emergencies in estates and their dispositions thereof, that these trusts since the statute have not only been kept from being executed by the statute of 27 *H. 8.* but have been held and used quite as other things different from uses, and from all those burdens, with which uses were incumbered by several acts of parliament made before 27 *H. 8.*

And therefore *H. 55. Eliz. Croke, n. 2. B. R. Ridler and Punter, (e)* such a trust not within the statute of 3 *H. 7. cap. 4.* or any other statute of that nature.

M. 16 Jac. B. R. Croke, n. 23. (f) the king made a lease for years to Sir John Duncombe of the provision of wines for the king, but in trust for the earl of Somerset, who was afterwards attainted of felony; by the opinion of all the judges the king shall have this trust, and so if a person outlawed have a bond made to another in trust for him, it shall be executed by an information in the exchequer chamber or chancery; but it was agreed by them all, and so

(e) *Cro Eliz.* 291.

(f) *Cro. Jac.* 512. *Hob.* 214.

[2] By the 4 & 5 *Will. 4. c. 23. s. 3.* no lands or chattels vested in any trustee shall be forfeit to the king by the attainder of such trustee.

resolved in *Abington's* case, that a trust, if a freehold, was not forfeited by attainder of treason.

But how this resolution in *Abington's* case can stand [249] with the statute of 33 H. 8. I see not, for certainly the uses there mentioned could then be no other than trusts, and therefore the equity or the trust itself in cases of attainder of treason seems forfeited by the statute of 33 H. 8. upon an attainder of *cesty ge trust* of an inheritance, tho possibly the land itself be not in the king.

But indeed, where the king or a common person is entitled to an eschete by an attainder of felony, there, by the attainder of *cesty ge trust in fee-simple* the land nor trust doth not come to the king or lord by eschete, for the eschete is only *ob defectum tenentis*, and in this case the king or lord hath his tenant, as before, namely the feoffee in trust, who is to be attendant for the services to the king or lord, and by the attainder of felony of the feoffee, the lord shall have his eschete of the lands discharged of the trust; [3] and besides, an attainder of felony is not within the statute of 33 H. 8. cap. 20. and so it was resolved by all the court in the exchequer, M. 21. Car. 2. wherein the case was thus. (A)

10 Martii 1 Car. a long lease of the manor of *Bony Tracy* came to Sir *Ralph Freeman*.

4 Car. 1. The fee-simple thereof was conveyed to Sir *George Sands* and his heirs in trust for Sir *Ralph Freeman*.

July 1633, Sir *George* having issue two sons, *Freeman Sands* and *George Sands*, Sir *Ralph Freeman* devised part of the manor to *Freeman Sands* and his heirs, and other part thereof to *George* the son and his heirs, and devised all the rest of the manor to *Freeman Sands* and *George* his brother, and all such other sons as Sir *George* should have by *Jane* his wife, and their heirs, and made Sir *George Sands* and *Ralph Freeman* executors, and appointed them to convey the term according to these trusts.

Ralph Freeman the executor refused, Sir *George* took administration alone to him and his wife *cum testamento annexo*.

1635. *Freeman Sands* died without issue, *George* being his brother and heir.

Afterwards Sir *George* by *Jane* his wife had issue another *Freeman Sands*, but no conveyance was executed of the [250] term or inheritance.

1655. *Freeman Sands* murdered his brother *George*, who dying without issue all that right or trust, that was in *George* the brother, descended and survived to *Freeman*.

7 Aug. 1655. *Freeman* the son was attainted of felony.

22 Nov. 1655. Sir *George* takes administration to his son *George*.

The land being held of the king, as of the manor of *East-Green-*

(A) 1 Sid. 403.

[3] Copyhold estates, in treason, are forfeited to the lord of the manor, not to the crown. *Com. Dig. "Copyhold,"* (M.) 1. But see 2 *Husk. c.* 119. s. 7.

which, the king's attorney preferred an information against Sir George Sands in the exchequer-chamber to have a conveyance both of the term and inheritance to be executed by Sir George Sands unto the king, being the lord of whom the land was held; but it was *und voce* resolved, 1. That as to the inheritance, tho there were a trust for George the son, and that trust descended unto Freeman the murderer, as his brother and heir, and was in him at the time of the death of his brother and at his attainder, as to the greatest part of the lands, and as to the residue of the lands the trust was originally for Freeman Sands, yet in as much as Sir George Sands continued seized of the fee-simple, and so was tenant to the king, tho subject to a trust; yet the trust escheted not to the crown, but Sir George held it discharged of the trust. 2. That the term for years was not extinguished in law by the accession thereof to Sir George, as executor or administrator, tho Sir George had the fee-simple, because it was *en autre droit*, that he had the term. 3. That if the term for years had been a term in gross in trust for the party attaint, then by the attainder of felony the king had been entitled thereunto, not in point of eschete, but by his prerogative; having *bona & catalla felonum*. 4. But this term being to attend the inheritance the trust thereof was not like the trust of a chattle in gross, but was to wait upon the inheritance (and otherwise it had been impossible for the greatest part to have descended from George Sands to his brother Freeman Sands, unless it waited upon the trust of the inheritance) therefore the inheritance remaining in Sir George now discharged of the trust by the attainder of Freeman Sands the trust of the term shall also remain in him, for it is a kind of incident or appurtenant to the inheritance.

And in this case the case of Sir Walter Raleigh was cited, which was Mich. 7 Jac. in Camera Scaccarii. Sir Walter Raleigh being possessed of a long term for years of the manor of Sherburn, intending to obtain the inheritance assigned this term to his son an infant upon pretense for a trust for his son, but really in trust for himself.

Sir Walter Raleigh then purchased the inheritance and made a settlement upon his son, but the same was defective, whereby the fee-simple remained in Sir Walter.

1 Jac. Sir Walter was attainted of treason, and afterwards the king granted all the goods and chattels real and personal of Sir Walter to Shelbury and Smith in trust for Sir Walter's wife and children.

Sir Walter Raleigh was executed, and upon an information in the exchequer, M. 7 Jac. it is declared and decreed, that the lease was in trust for Sir Walter, and therefore forfeited by his attainder, as well as if it had continued in him, and that it should be cancelled, and not incumber the reversion in fee-simple.

So that according to this resolution this trust for Sir Walter was not a chattle, for then it had passed to Shelbury and Smith; but it was a kind of appurtenant to the inheritance, and together with it was forfeited by the attainder, the conveyance of the inheritance

being defective, and accordingly at this day it is held by those that derived under the patent of king *James*.

6. At common law the king by attainder of treason was not entitled to any chattles, that the party had *en autre droit*, as executor, or administrator, or in right of a corporation aggregate.

But the husband possessed of a term in right of his wife forfeits it by attainder of treason, felony, or out-lawry; but as to lands of inheritance, if the husband be seized in right of his wife, and is attainted of treason, the king hath the freehold during the coverture; and so if tenant for life be attainted of treason, the king hath the freehold during the life of the party attainted; and [252] so he had before the statute of 26 *H. 8.* by the attainder of tenant in tail.

Touching forfeitures for treason by a corporation sole, or aggregate, somewhat is observable.

At common law and still to this day in the case of a corporation aggregate, as dean and chapter, mayor and commonalty, where the possessions are in common in the aggregate corporation, nothing was or is forfeited by the attainder of the head of the corporation, as the dean, mayor, &c.

At common law a sole corporation, as an abbot, bishop, dean, prebendary, parson, vicar, by attainder of treason forfeited to the king the profits of their abbey, bishoprick, prebend, during their incumbency; but their successors were not bound by that forfeiture, for tho the profits as they arose belonged to their persons, yet the inheritance was in right of their church, and so not forfeited.

But by the general words of the statutes of 26 and 33 *H. 8.* and by the exclusive saving of the rights of others, *other than the successors of the persons attaint*, these sole corporations forfeited the inheritance, and their successors were bound by such attainder; for it is apparent that *H. 8.* had not only in prospect the dissolution of monasteries, but had a resolution to curb the clergy, who were too obsequious to the pope and his power.

And therefore there were several attainders of abbots of high treason, whereupon the king seized their possessions, as dissolved thereby, as appears by the statutes of 27 *H. 8. cap. 28.* and 31 *H. 8. cap. 13.* touching monasteries, tho the king rested not barely upon such attainders; but by the statutes of 27 and 31 *H. 8.* their possessions are settled in the crown by those acts, and with this agrees the book of *Dy. 289.*

And therefore we may observe in the statute of 1 *Mar. sess. 2. cap. 16.* for the attainder of the archbishop of *Canterbury* a cautious proviso was added, that it should not prejudice his successors touching the possessions of his see; this was to avoid the question, that otherwise might have arisen upon the general words of the forfeitures thereby enacted.

But now by the act of 5 & 6 *Ed. 6. cap. 11.* this matter seems to be settled, for whereas by the statute of 26 *H. 8.* [253] *cap. 12.* a person attaint of treason is to forfeit all the lands

which he had by any right, title or means, saving the right of others, other than the heirs and successors of the person attaint, which confiscated the inheritance of sole corporations attaint, of treason, the statute of 5 & 6 E. 6. cap. 11. enacts specially, that persons attaint of treason shall forfeit the lands, which they have of any state of inheritance in their own right, and saves the right of all persons, other than the persons attaint, and *their heirs*, which restores and preserves the right of *successors*, as it was at common law.

7. By the common law all hereditaments, whether lying in tenure or not, as rents, advowsons, commons, corodies certain, are forfeited to the king by attainder of treason; but such inheritances, as lie purely in privity, appropriate to the person, are not forfeited neither at common law, nor by any special statute, as a foundership, or corody uncertain.

8. At the common law by attainder of felony or treason of the husband the wife lost her dower: by the statute of 1 E. 6. cap. 12. no attainder of treason or felony excludes her dower; but by the statute of 5 & 6 E. 6. c. 11. the husband attaint of treason the wife shall lose her dower; and so it stands at this day, except in treasons enacted by particular statutes, where dower is saved to the wife, notwithstanding the attainder of her husband of treason, as upon the statute of 5 Eliz. cap. 14. for clipping money, 18 Eliz. cap. 1. for impairing money, 5 Eliz. cap. 1. refusing the oath of supremacy the second time, and some others.

And thus far concerning the things forfeited by attainder of treason, now,

II. I shall consider in what kind or degree the king hath these forfeitures of lands.

1. Altho these be called royal eschetes, yet the king is not *in*, purely, as by an eschete, for he hath those forfeitures *in jure coronæ* of whomsoever the lands be immediately held; yea, tho they are held immediately of the king, he hath them not in point of eschete, but *jure coronæ* or *prerogative regalis*.

47 E. 3. 21 b. A manor is held of the king as of his [254] honor of D. and the manor eschetes for the felony of the tenant, it is now parcel of the honor, and therefore by the book if the king grant it out again generally, it shall be held of the honor, but if it eschete for treason, it is no parcel of the honor, and if it be granted out generally it shall be held *in capite*, 6 E. 3. 82. a. accordant adjudge: vide the case of *Saffron Walden*, *More's Rep. n. 301.(i)* & *ibidem n. 405.* the case of the borough of *Southwark*.(k)

2. Where land comes to the crown by attainder of treason all mesne tenures of common persons are extinct; but if the king grants it out, he is *de jure* to revive the former tenure, for which a petition of right lies. 46. E. 3. 19.(l)

3. If tenant in tail of the gift of the king, the reversion in the

(i) Mo. 159.

(k) Mo. 257.

(l) I take it, this should be H. 46 E. 3. Petition 19.

king, makes a lease for years, and then is attainted of treason, the king shall avoid that lease, for the king is in of his reversion, tho the tenant in tail have issue living: this hard case is so adjudged in Commentaries *Austin's case*(*m*) in *fine*, and yet if such tenant in tail had, after such lease, bargained and sold, or levied a fine to the king, he should be bound by such lease as long as there is issue. *H. 22 Jac. B. R. Croker and Kelsey*.(*n*) 1 *Rep. Alton Woods case*.(*o*)

III. The *third* thing I propounded was the consideration of the eschetes in case of treason to such as have royal franchises, or counties palatine, as *Durham*, &c.

I. At common law divers lords had by special grant or in right of their counties palatine royal eschetes of the lands held within their franchises of persons attaint of treason against the king.

Such was the royal franchise of the manor of *Wreck* in *John Darcy's case*, 6 *E. 3.* 31. *b.*

It appears in the parliament-roll 9 *E. 2. m. 8.* that the bishop of *Durham* claimed among divers franchises between the waters of *Tyne* and *Tese*, and *Norhamshire* and *Bedlingtonshire* in the county of *Northumberland*, the forfeitures of war, namely the lands of those who held lands within that precinct, who adhered [255] to the enemies of the king.

And after many debates in parliament 2 *E. 3.* that liberty was allowed him by the judgment of the king and his council in parliament.

Claus. 1 E. 3. part 1. m. 10. and p. 2. m. 20. the precedents of the allowance of that liberty being produced, *viz.* that *Anthony* bishop of *Durham* had the forfeiture of *Castrum Bernardi* by the forfeiture of *John de Baliol*, the manors of *Hert* and *Hertness* by the forfeiture of *Robert Bruce*, the manor of *Gretham*, that was *Peter of Montfort's*; and, upon the consideration of the several pleadings in those cases, concordatum est per nos & totum concilium nostrum in ultimo parlamento, quod episcopus habeat suam libertatem de hujusmodi forisfacturis juxta tenorem & effectum cartæ proavi nostri, ideo vobis mandamus, (*viz.* the *custos* of these lands) quod de terris & tenementis infra libertatem episcopatus prædicti, & in prædictis locis de *Norhamshire* & *Bedlingtonshire*, in manu nostrâ & in custodia nostrâ per forisfacturam guerræ existentibus manum nostram amoventes vos ulterius de eisdem non intromittatis, and the like particularly after *Claus. 1 E. 3. part 2. m. 20.* an *amoveas manus* for all the lands of *Guido de Bello Campo Comes Warwick*, *qui de rege tenuit in capite infra libertatem episcopatus Dunelmensis*, and likewise for the manors of *Gainsford*, *Hert*, and *Hertness* in the hands of *Roger de Clifford* seised for the forfeiture of war of *John de Baliol* and *Robert Bruce*; only the patentees not to be put out without an answer.

So that it is apparent, that at common law the bishop of *Durham*

(*m*) *Plowd.* 560. *a.*

(*n*) *Cro. Jac.* 688. 1 *R. A.* 843,

(*o*) 1 *Co.* 40. *b.*

had the royal forfeitures of war (which was treason) for such lands as were within his liberty, tho they were formerly held of the king immediately *in capite*, if they lay within the precinct of his county palatine; and tho by the statute of 7 *E. 6.* the said bishoprick was dissolved, yet by the statute of 1 *Mar. Parl. 2. cap. 3.* that act is repealed and the bishoprick with its franchises revived.

2. Yet farther, tho this act of 25 *E. 3.* declares, that all such forfeitures belong to the king, yet this act did not derogate from the franchise of the bishop of *Durham* or others, that had that [256] royal liberty of forfeitures for treason, because it was in effect but a declaration of the common law, or at least an ascertaining of it without prejudice to those, that had these franchises of royal forfeitures, either by charter, or by reason of their county palatine by prescription; and this is agreed by all the judges in the case of the bishop of *Durham* *P. 12. Eliz. Dy. 288.* and accordingly *Rot. Parl. 1. E. 4. n. 20. & sequentibus*, where by act of parliament a great many noblemen, that were of the party of *H. 6.* were upon the coming of *E. 4.* to the crown attainted and their lands forfeited to the king; and such as were within the county palatine of *Lancaster* annexed to the duchy of *Lancaster*, and the rest lodged in the crown; yet there is a special provision and exception of the lands within the bishoprick of *Durham*, viz. between the waters of *Tyne* and *Tese*, and in the places called *Norhamshire* and *Bedlingtonshire* within the county of *Northumberland*, in which liberty and place the bishop of *Durham* and his predecessors of time, whereof there is no memory, have had royal right and forfeiture of war in the right of the cathedral church of *St. Cuthbert* of *Durham*, as by concord in parliament in the time of the progenitors of our lord the king *Edward IV.* it hath been assented.

3. Altho by the statute of 26 *H. 8.* and 33 *H. 8.* before-mentioned it is enacted, that the king shall have the forfeiture of all lands, &c. of the persons attainted of treason; yet in as much as in those acts there is a saving of the rights of others, the forfeitures for all treasons, that were within the statute 25 *E. 3.* and consequently were treasons at common law, by tenant in fee-simple, are saved to the bishop of *Durham*, and those that have such royal franchises of forfeiture of treasons; for these stand as they did before, by the opinion of five judges against four. *P. 12. Eliz. Dy. 289.* in the bishop of *Durham's* case.

4. But as to the forfeiture for new treasons enacted by any of those statutes the lords of franchises shall not have their franchise; this was agreed by all: but those new treasons that were enacted in the time of *H. 8.* or before, are all repealed by the statute of 1 *Mar. cap. 1.*

[257] 5. But as to treasons, that stood by the statute of 25 *E. 3.* and therefore not repealed by 1 *Mar. cap. 1.* yet as to the forfeitures of tenants in tail, or of lands in the right of churches or monasteries, the person that hath *jura regalia* shall not have them, because the king before the act of 26 *H. 8.* was not entitled to the

forfeitures of those estates; and the statute of 26 *H. 8.* stands unrepealed as to the forfeitures for treasons within the statute of 25 *E. 3.* these are the points resolved in that case of 12 *Eliz.*

And therefore it is observable, that in the statutes of 5 *Eliz. c. 11.* whereby clipping is made treason, tho the forfeiture of lands is only during the offender's life, and no corruption of blood, nor loss of dower, yet there are special proviso's, that all persons, which have any lawful grant to hold and enjoy the forfeitures of lands, tenements, goods, or chattels of offenders, and men attaint of high treason within any manor, lordship, town, parish, hundred, or other precinct within the realm of *England* and *Wales* shall and may at all times have like liberty to take, seize, and enjoy all such forfeitures of lands, tenements, goods, and chattels, as shall come or grow within their liberties by force of the attainder of any person upon any offense made treason by this act, as they might have done by virtue of any grant to them heretofore made.

I do not find the like clause to my remembrance in any other acts of new treason either in that of 1 *Mar. sess. 2. cap. 6.* for counterfeiting the privy signet or sign manual, or in that of 1 & 2 *Ph. & Mar. cap. 11.* for importing foreign counterfeit coin made current by proclamation, or in that of 18 *Eliz. cap. 1.* concerning washing of coin, nor in any of these temporary acts made for the safeguard of the queen's person, &c. so that upon the reason of the resolution of 12 *Eliz.* the patentees of goods or lands of traitors by patents granted before those acts, and particularly the bishop of *Durham*, whose claim is by prescription, cannot have the goods or lands of persons attainted for those new treasons: *vide* 13 *Eliz. cap. 16.* a special provision in the act of attainder of the earl of *Westmoreland* and others for the rebellion in the *North*, that the queen shall have and hold against the bishop of *Durham* and his suc- [258] cessors the lands, tenements, goods and chattels of the persons attainted within the county palatine and franchise of the said bishop.

Nay, I cannot see how the bishop of *Durham* can either by his antient charters or prescription claim the goods or lands of persons attaint for bringing in counterfeit coin contrary to the statute of 25 *E. 3.* for it seems that *that* was not treason at common law, as may reasonably appear by what has been before said touching that subject. [3]

See a learned treatise, intituled, *Considerations on the Law of Forfeitures for High Treason*; (supposed to be) written by the Hen. *Chs. Yorke*, sometime Attorney General to King George III. and afterwards Lord High Chancellor of Great Britain, *per totum. Wilson.*

[3] The clause in the 7 *Ann. c. 21.* and that in the 17 *Geo. 2. c. 39.* limiting the periods when forfeiture for treason should be abolished, are repealed by the 39 *Geo. 3. c. 93.* So that forfeiture remains in *England* as at common law, in the cases of treason and murder; in other crimes, no attainder, by the 54 *Geo. 3. c. 145.* shall extend to the disinheriting of any heir.

See *Consider. on the Law of Forfeitures*, by *Yorke*. 2 *Hawk. c. 119.* 4 *Bl. Com. 381.* 3 *Burn's Just. (edit. of 1845.) 106.*

CHAPTER XXIV.

CONCERNING DECLARING OF TREASONS BY PARLIAMENT, AND THOSE TREASONS THAT WERE ENACTED OR DECLARED BY PARLIAMENT BETWEEN THE 25 OF E. 3. AND THE 1 MAR.

ALTHO the order of the statute leads us to consider of *petit treason* in the next place, yet because I intend to absolve the whole discourse of high treason and misprision of treason, before I descend to crimes of an inferior nature, I shall proceed to a full consideration of the whole matter specially relating to high treason, and so far as the same is not common to other capital offenses: the statute therefore proceeds, "And because many other like cases of treason may happen in time to come, which a man cannot think nor declare at this present time, it is accorded, that if any other case supposed treason, which is not above specified, doth happen before any justice, the justice shall tarry without going to judgment of the treason, till the cause be shewed and declared before the king and his parliament, [259] whether it ought to be judged treason or other felony; and if *per case* any man of this realm ride armed covertly or secretly with men of arms against any other to slay him or rob him, or take him or detain him, till he hath made fine or ransom to have his deliverance, it is not the mind of the king or his council, that in such case it shall be judged treason, but shall be judged felony or trespass according to the law of the land of old time used, and according as the case requireth, &c."

This clause consists of two parts, the former, how treasons not specially declared by this statute shall for the future be settled. 2. It declareth, that a particular offense therein mentioned, that was in truth formerly held to be treason, shall not for the future be taken to be so.

As to *the former* of these clauses touching the declaring of treasons not declared by this act, I shall pursue the history thereof at large in what follows, only at present I shall subjoin these few observations.

1. The great wisdom and care of the parliament to keep judges within the bounds and express limits of this act, and not to suffer them to run out upon their own opinions into constructive treasons, tho in cases, that seem to have a parity of reason (*like cases of treason*) but reserves them to the decision of parliament: this is a great security, as well as direction, to judges, and a great safeguard even to this sacred act itself.

And therefore, as before I observed in the chapter of levying of war, this clause of the statute leaves a weighty *memento* for judges to be careful, that they be not over hasty in letting in constructive or interpretative treasons, not within the letter of the law, at least in

such new cases, as have not been formerly expressly resolved and settled by more than one precedent.

2. That the authoritative decision of these *casus omitti* is reserved to the king and his parliament, viz. the king and both his houses of parliament, and the most regular and ordinary way is to do it by a bill declaratively; and therefore altho we meet with some declarations by the lords house alone in some particular [260] cases, as in that of the earl of *Northumberland*, anno 5 H. 4. and that of *Talbot* 17 R. 2. tho they be decisions and judgments of great weight, yet they are not authoritative declarations to serve this act of 25 E. 3. but it must be by the king and both houses of parliament.

As to the latter of these, it has been formerly discussed in the second chapter.

This, at common law, was held treason, and the particular reason of the adding thereof in this place was, in effect, to reverse the judgment given in *B. R. P.* 21 E. 3. *Rot.* 23. in Sir *John Gorbegge's* case; (a) and touching this whole matter of riding armed, &c. vide *quæ dicta sunt supra cap.* 14. p. 135. & seq.

Only the printed statute varies from the parliament-roll of 25 E. 3. p. 2. n. 17. for whereas it is printed in the late statutes (*covertly or secretly*) the parliament roll is *chivach arme discovert ou secretment*, and accordingly the old written manuscript statutes are written thus, *chivach arme discovert ou en privy en le realm* &c., which misprinting possibly hath made some mistakes in judgments given of high treason, as if to ride privily and covertly upon such a private attempt were not treason; but to ride discovert, openly, were treason, when in truth neither in one case or the other it is treason, neither at this day nor at common law, if it be only upon a particular or private quarrel, as in the case of 20 E. 1. between the earls of *Gloucester* and *Hereford*; (b) and this of *Gerbegge*, tho it were *more guerrino & vexillis explicatis*.

But now to resume what is before promised, viz. touching the first matter, namely treasons not declared by the statute of 25 E. 3. we shall find, that between *that* statute and 1 Mar. there were treasons enacted or declared of these kinds:

1. Such as were simply declarative treasons, or so many expositions of the statute of 25 E. 3.

2. There were new treasons, that were simply enacted, and not declared only that were perpetual in their institution, but repealed by the statute of 1 Maria.

3. There were new treasons, that seem only temporary or fitted to the reigns of those kings, in whose time they were [261] made.

4. There were some treasons, that were perpetual, but more explicate declarations or rather expositions of the statute of 25 E. 3. which yet stand repealed by the statute of 1 Mar.

(a) Vide *antes* p. 80 & 183.

(b) *Supra* p. 135. *Ryl. plac. parl.* p. 77.

And here I must advise the reader to take notice of these cautions.

1. Because the hereafter mentioned statutes are many, and consisting of divers clauses, that he rely not barely upon the abstracts thereof here given, because possibly there may be mistakes or omissions in those abstracts, but peruse the statutes themselves in the books at large.

2. That tho generally it be a fair topical argument, that when offenses are made treasons by new and temporary acts, they were not treasons within the statute of 25 *E. 3.* for if they were, they needed not to have been enacted to be treason by new statutes, as introductive of new laws in such cases; yet that doth not hold universally true, for some things are enacted to be treason by new, yea and temporary laws, which yet were treason by the statute of 25 *E. 3.* as will appear in the sequel.

And therefore the statutes of 1 & 2 *Ph. & M. cap. 3.* 1 *E. 6. cap. 12.* 23 *Eliz. cap. 2.* making several offenses felony have this wary clause, *the same not being treason within the statute of 25 E. 3.*

And hence it was, that whereas by the statute of 13 *Eliz. cap. 1.* compassing the queen's death and declaring the same by writing or printing is enacted to be treason during the queen's life, but the delinquent is by that statute to be charged therewith within six months, and *Throckmorton* was generally indicted for compassing the queen's death, and the overt-act was by making a writing declaring convenient landing places for the *Spanish* forces, and the naming of divers popish gentlemen in writing, who would be assistant to that design, and communicating it to the *Spanish* ambassador, and *Throckmorton* excepted to the proceeding, because not within six

months according to the statute of 13 *Eliz.* that exception [262] was overruled, because it was a charge of treason and an overt-act within the statute of 25 *E. 3.* which hath no such restriction, and thereupon he was convict and executed. *Camd. Annals sub anno 1584. p. 298.* and the like was done upon the like exception in the case of the earl of *Arundel*; quod vide *Camd. Annals sub anno 1589. p. 426.*

3. But where an act of parliament made for the safety of the king or queen's person or government enacts any offense to be felony only, or a misdemeanor only punishable by fine and imprisonment, without that wary clause above-mentioned, it is a great evidence and presumption, that the same was not treason before, and a judgment of parliament in point, for it can never be thought, that the parliament would in such cases abate the extent of 25 *E. 3.* or make that less than treason, which was treason by that act.

I shall as near as I can pursue the order above-mentioned, but some intermixtures there will necessarily be of the many particular treasons enacted by some statutes, some of which were within the statute of 25 *E. 3.* and I shall follow those in every succeeding king's reign.

In the time of king *Edward III.* I find no declarations of treason after the statute of 25 *E. 3.*

Only I find somewhat like it in the attainder of *Thorp* chief justice of the king's bench for bribery(c) and other offenses, who was thereupon sentenced to death, before special commissioners(d) assigned *ad judicandum secundum voluntatem regis*, in respect of the oath he had made to the king and broken, whereby he had bound himself to that forfeiture, *si ale encountre son serement*: it is true he had judgment, but there was no execution; this judgment and the whole proceeding is entered in patent-roll of 24 *E. 3. part 3. m. 8. dors.* and was afterwards removed into the lords house in the parliament held *in octabis purificationis 25 E. 3.* which was a year before the parliament held *Wednesday* in the feast of *St. Hillary 25 E. 3.* wherein the declaration of treason was made; and in that parliament of *octabis purificationis, n. 10.* the judgment [263] was affirmed good, *de puis qe se obligea mesme par son serement a tiel pennance, sil fait al encountre, & connusseit, quil avoit receive douns coudre son dit serement*: but with this caution for the future to prevent such an arbitrary course of proceeding, & sur ceo y fuit accord par les grants de mesme le parlement, qe si nul tiel case aueigne desore an evant de nul tiel, que nostre seigneur le roy prigne devers lui des grants, qe lui plerra, & par lour bone avyse face outre ce qe plesse a sa royal seignory;(e) but this comes not to our purpose concerning treason.

As to the time of *R. 2.* it was a fruitful time for declaring and enhancing of treason in parliament. *Rot. Parl. 3 R. 2. n. 18. pars 1.* the case of *Jean Imperiall(f)* who was sent as agent from the duke and commonalty of *Genoa*, and coming hither by the king's safe-conduct was murdered: the inquisition before the coroner was brought into parliament, and in pursuance of this clause of 25 *E. 3.* it was declared by the king, lords, and commons, to be treason.

This declaration being by the king and both houses of parliament was a good declaration pursuant to the act of 25 *E. 3.* but is not of force at this day, 1. Because it was but a particular case, and extended not to any other case, as a binding law but only as a great authority. 2. Because it being not within the express provision of the statute of 25 *E. 3.* it stands wholly repealed as treason by the statutes of 1 *E. 6.* and 1 *Mariae*.

Rot. Parl. 1 R. 2. n. 38. the judgment against *Gomeney*s and *Weston* for betraying the king's castles in *France* mentioned before *cap. 15. p. 168.* where *Weston* had judgment to be drawn and hanged; this judgment was given by the lords at the petition of the commons in parliament, but makes not much in the point of declaration of treason, because, 1. If done, as is supposed, by treachery and bribery,

(c) He was justice of assize in com' *Lincoln*, and took bribes of several to stay an exigent upon an indictment for felony, that should have issued against them.

(d) The earls of *Arundel*, *Warwick*, &c.

(e) There is likewise a proviso added, that this should not be drawn into precedent; *sed solummodo versus eos, qui prædictum sacramentum fecerunt & fregerunt, & habent leges Angliæ regales ac custodiendum.*

(f) *Co. P. C. p. 8. vide supra p. 83.*

it was an adherence to the king's enemies. 2. Being a declaration or judgment only by the lords, and not formally by the king, lords and commons, it is not such a declaration of treason, as the [264] act of 25 *E. 3.* requires in cases of treason not thereby declared.

Rot. Parl. 11 R. 2. pars 2. per totum, the great appeal in parliament by the duke of Gloucester and others against the archbishop of York, duke of Ireland, Tresilian, Uske, Blake, Holt, and others containing divers articles, which surely were not treason within the statute of 25 *E. 3.* yet had judgment of high treason given against them by the lords in parliament.(g)

Upon the impeachment of the commons against Simon Burle, Beauchamp, and others, many of them had likewise judgment of high treason given against them by the lords in parliament. (*)

Altho the king did in some kind outwardly agree to these judgments, and the commons were active in it, and *Rot. Parl. 11 R. 2. pars 1. n. 50.* public thanks were given to the king by the lords and commons in full parliament, *de ceo, qil lour avoit fait cy plein justice*, yet this was no declaration of parliament of treason pursuant to the statute of 25 *E. 3.* because the king and commons did not consent *per modum legis declarativæ*, for the judgment was only the lords. 2. Because it was but a particular judgment in a particular case, which was not conclusive, when the like cases came before judges.

This parliament of 11 *R. 2.* was repealed by the parliament of 21 *R. 2.* and that of 21 *R. 2.* also repealed, and the parliament of 11 *R. 2.* enacted to be holden according to the purport and effect of the same by the statutes of 1 *H. 4. cap. 3 & 4.* but this did not alter the statute of 11 *R. 2.* and make those judgments, which were given by the lords in 11 *R. 2.* of any other value than they were and consequently amounted not to any declaration by parliament, that these which the lords adjudged treasons in 11 *R. 2.* were or ought to be so held; and if any such construction might be made upon the confirmation of 1 *H. 4. cap. 4.* yet the same was repealed by the statute of 1 *H. 4. cap. 10.* in the same parliament; and if not, yet certainly 1 *E. 6.* and 1 *Mar.* have wholly taken away the force of those declarations, as shall be shewed.

Rot. Parl. 17 R. 2 n. 20. Talbot's case, in conspiring the [265] destruction of the dukes of Aquitain and Gloucester the king's uncles, and other great men, *Et sur ce firent divers gent's lever armies & arrayes a faire guerre en assembles & congregations in tres grand & horrible nombre*: this was declared treason by the lords in parliament, and a proclamation issued to render himself, or otherwise to be attainted of treason: how far this was treason or not within the statute of 25 *E. 3.* hath been before considered, but certainly, if it were no treason declared by the particular purviews of 25 *E. 3.* it is no such authoritative declaration of treason in parliament, as this act requires in treasons not declared; and if it were

(g) See *State Tr. Vol. I. p. 1.*

(*) *Ibid. p. 15.*

such an authoritative declaration, it binds not now as such, because all treasons are reduced to those expressed in the statute of 25 *E. 3.* by the statutes of 1 *H. 4. cap. 10.* 1 *E. 6. cap. 12.* 1 *Mar. cap. 1.* and treasons declared, as well as new treasons enacted, are by these statutes set aside, farther than the very declaration of 25 *E. 3.* extends.

Rot. Parl. 21 R. 2. quod vide inter statuta 21 R. 2. cap. 2, 3, 4; 12. some new statutes of treason were enacted, others were declared; by *cap. 2.* it is enacted, that the procurers of any new commission like that, (for the obtaining of which the archbishop of *Canterbury*, &c. were in that parliament attainted) being convict in parliament should be guilty of high treason: again, *cap. 3.* If any be convict in parliament of the compassing of the king's death, or to depose him, or to render up his homage to him, or of raising war against the king; and *cap. 4.* The procurers or counsellors to repeal the judgments given in that parliament, if convict in parliament, are guilty of high treason: other treasons were declared, as namely those nine rank answers to the king's questions, which are all recited and affirmed, and adjudged good and sufficient by the 12th chapter of that parliament; other points were judged, as namely, that the procuring of the commission for regulating the miscarriages in government *anno 7 R. 2.* and the execution thereof by the archbishop of *Canterbury* and others was high treason.

And tho it is true, that some of the points enacted to be treason by the 3d chapter were in truth treasons by the [266] statute of 25 *E. 3.* if here were an overt-act, namely compassing the death or deposing the king, or levying war, yet these statutes and these declarations by the parliament of 21 *R. 2.* are wholly set aside; and the statute of 25 *E. 3.* governs the whole matter of high treason, notwithstanding any of the extensions, enactings, or declarations of the parliament of 21 *R. 2.* or any of the judges therein-mentioned, *viz. Belknap, Tresilian, Holt, Fulthorp, Burgly, Thirlinge, Bikhill, and Clapton,* for the parliament of 21 *R. 2.* is wholly repealed by 1. *H. 4. cap. 3. & 4.* and the parliament of 11 *R. 2.* wherein *Belknap* and *Tresilian* were judged traitors for delivering those extravagant opinions^(h) is revived and affirmed; and also by the statutes of 1 *E. 6.* and 1 *Mar.* the treasons enacted or newly declared by the parliaments of 11 & 21 *R. 2.* are repealed.

And tho those opinions of the judges *Tresilian, Thirlinge* and the rest had the countenance of the parliament of 21 *R. 2.* yet they had the discountenance of the parliament of 11 *R. 2.* and 1 *H. 4.* which repealed the parliament of 21 *R. 2.* and stand at this day unrepealed in their full strength, excepting only such treasons as were newly made, or newly declared by those parliaments: tho the statutes of 1 *E. 6.* and 1 *Mar.* have taken away those treasons, which either the statute of 11 *R. 2.* or 1 *H. 4.* had introduced more than were in the statute of 25 *E. 3.* yet it hath not taken away the

(h) *Co. P. C. p. 22.*

efficacy of the parliaments of 11 *R.* 2. and 3 *H.* 4. as to their declarations, that the extrajudicial opinions of those judges were false and erroneous; but in that respect the parliaments of 1 *H.* 4. and 11 *R.* 2. are of force, as to the damning of those extravagant and unwarrantable opinions and declarations.

I come now to the time of *Henry IV.* wherein I find little: *in anno primo* in parliament *inter Placita Coronæ*, *John Hall* was convict before the lords in parliament of the murder of the duke of *Gloucester*, and judgment given by the lords *per assent du roy*, that altho it were only murder, yet the offender should have the judgment of high treason, *viz.* to be drawn, hanged, embowelled, [267] his bowels burnt, his head cut off, and quartered, and his head sent to *Calice*, where the murder was committed, which was executed by the marshal accordingly: this was no declaration of treason, but a transcendent punishment of the murder of so eminent a person.

1 *H.* 4. *cap.* 10. "It is accorded, that in no time to come any treason be judged otherwise than it was ordained by the statute of king *Edward III.*" This at once swept away all the extravagant treasons introduced in the time of *R.* 2. either in over much favour of popularity, or over much flattery to prerogative, for they were of both sorts.

Rot. Parl. 5 *H.* 4. *n.* 12. There is a declaration of an acquittal of the earl of *Northumberland* from treason; *quod vide antea cap.* 14. *p.* 136. but I find no declaration nor act of new treason, in the time of *H.* 4. he was as good as his promise by the act of 1 *H.* 4. *cap.* 10. for he contented himself with the declaration made by 25 *E.* 3.

In the time of *H.* 5.

By the statute of 2 *H.* 5. *cap.* 6. "It is ordained and declared that manslaughter, robbery, spoiling, breaking of truce, and safe-conduits, and voluntary receipt, abetment, procurement, concealing, hiring, sustaining, and maintaining of such persons to be done in time to come by any of the king's subjects within *England, Ireland,* or *Wales*, or upon the main sea shall be judged and determined treason done against the king's crown and dignity; and the conservator of the truce to have power by the king's commission and by the commission of the admiral to inquire thereof:" But this statute as to treason is particularly repealed by the statute of 20 *H.* 6. *cap.* 11. but whether the general statutes of 1 *E.* 6. *cap.* 12. 1 *Mar.* *cap.* 1. had repealed it as to treasons done upon the sea may be a question, because it hath been ruled, that those statutes extend not as to trials of treason done upon the sea by the statute of 28 *H.* 8. *cap.* 15. *de quo infra.*

The statute of 3 *H.* 5. *cap.* 6 & 7. it is true, is a declarative law, that clipping, washing and filing the king's coin is treason within the statute of 25 *E.* 3. and judges of assise and justices of [268] peace have cognisance thereof; but even this declarative

law is repealed by the statute of 1 *Mar.* as it is declared in the statute of 5. *Eliz. de quo antea.*

As to the judgment of treason given in Sir *John Oldcastle's* case *Rot. Parl. 5 H. 5. par. 1. n. 11.* tho the judgment be given in parliament, yet it is barely upon the account of compassing the king's death, and of levying of war, which was expressly within the statute of 25. *E. 3.* as appears before, *cap. 14. p. 142.*

Touching the times of *H. 6.*

Rot. Parl. 2. H. 6. n. 18. It appears, that *John Mortimer* was committed for suspicion of treason against *H. 5.* and 23 *Feb. 2 H. 6.* brake prison, and escaped, for which he was indicted 25 *Feb. 2 H. 6.* at *Guildhall, London,* before commissioners of *oyer and terminer* setting forth the matter, and that *prisonam prædictam falso & voluntariè fregit;* the record by the king's command was sent into parliament, and by the king's commissioner *ad tenendum parliamentum,* and the lords at the request of the commons, it was affirmed a good indictment; and *Mortimer* had judgment to be drawn, hanged, and quartered, and his lands and goods forfeited to the king by the judgment of the lieutenant, lords, and commons, by an act made then for that purpose.

This it is true was an authoritative declaration of treason in this particular case pursuant to the clause of the statute of 25 *E. 3.*

But it rested not here, for in the same parliament, *n. 60.* a general statute passed, "Que si ascun person soit indite, appelle ou prise par suspicion de grand treason and pur cest cause soit commise & detenus in prison & escape voluntierement hors du dit prison, que tiel escape soit adjudge and declare treason, si tiel person ent soit duement atteint selon la ley de terre. Et eient les seigneurs de fee en tiel cas les eschetes and forfeitures de terres & tenements de eux tenus par tiel persons issint atteints, come de ceux, que sont atteints de petit treason; Et teigne cest estatute lieu & effect del 20 'our de *Octobre* darrein passe tanque al prochein parliament.

"Ro'. Soit fait, come est desyre par la petition."

This parliament began 20 *Oct. 2. H. 6.*

[269]

The things observable hereupon are these, 1. That to rescue a person, that is a traitor, out of prison was treason at common law, and so continues at this day within the statute of 25 *E. 3. 2 Co. Instit. p. 589. and 1 H. 6. 5. b. 2.* But if a man committed for treason breaks prison and escapes, this is not treason at common law. 3. Tho it be felony by the statute *de frangentibus prisonam,* yet it is not made treason by that statute. 4. But if it were treason by that statute, yet it is corrected and made not treason by the statute of 25 *E. 3. and 1 H. 4.* and therefore in this case it was made treason merely by the judgment of parliament, and statute of 2 *H. 6.* was but temporary and expired by the next parliament. 5. That the judgment itself in *Mortimer's* case, tho an authoritative declaration, was not at all binding in other cases for two reasons, 1. Because it is checked and controled as to any such effect by the general act of parliament of 2 *H. 6.* which was to continue only to the next parlia-

ment; and 2. Because it was but a particular judgment of parliament in that particular case, to which it was particularly applied.

But howsoever, that question is now put out of question by the general act of 1 *Mar. cap. 1.* which enervates the force of this judgment and declaration; for 1 *Mar.* repeals declarative laws of treasons as well as enacting laws, and leaves the judges to judge strictly according to the statute of 25 *E. 3.* as if no such judgment had been given in parliament. 2 *Co. Instit. p. 589.* and therefore it seems strange to me, that the judges took any notice of 2 *H. 6.* in *Bensted's* case to ground any opinion on. (i)

And therefore, altho in the late act of attainder of the earl of *Stratford*, there was a proviso added, that it should not be construed, that the treasons therein charged should be a rule for judges to proceed

by, in other cases, it seems a cautious but needless proviso, [7 0] because it was a particular judgment, that did not *egredi personam*, and no general declarative law to serve the statute of 25 *E. 3.* For there may be collateral reasons not only in policy, but in justice sometimes for a parliament to vary the punishment of crimes, in substance the same, when differenced by circumstances, in several persons.

8 *H. 6. cap. 6.* Burning of houses maliciously or wickedly to extort sums of money from those, whom the malefactors spare, is made high treason with a retrospect to the first year of the king's reign, saving to the lords their liberties, as in case of felony.

Two things are observable upon this act, 1. That had it not been specially provided against, the lords had lost their eschetes by making it treason. 2. That this act, tho perpetual in its constitution, yet was repealed by 1 *Mar. cap. 1.* and after that repeal it remained felony, as it was before, and so continues to this day.

Rot. Parl. 11 H. 6. n. 43. A petition that *John Carpenter*, who had committed a barbarous murder upon his wife, for which he was outlawed and in prison in the king's bench, might for example's sake by authority of parliament be judged a traitor, and that the judges might give judgment against him to be drawn and hanged, saving to the lords their eschetes. Ro'. Pur ceo, quil semble encountre le liberty de seint esglis le roy se avisera.

20 *H. 6. cap. 3.* The coming of people out of *Wales* or the marches of the same into the counties adjacent, and taking and driving away cattle, and their abettors and receivers knowing thereof, is made treason against the king, saying to the lords marchers, of whom the offenders, receivers, or abettors held their lands, the forfeiture thereof and of their goods and chattles, when attainted; this act was to continue for six years: *nota*, the lords had lost their eschetes and for-

(i) *Cro. Car. 583. Jones 455.* It was the case in 1 *H. 6. 5. b.* and not the statute of 2 *H. 6.* on which the judges grounded their opinion, altho as that opinion is exprest in *Cro. Car. 583.* and *Kel. 77. viz.* that the breaking of a prison, wherein traitors be, is high treason, tho the parties did not know, that there were traitors there, is not warranted by that case, which is of one, who brake prison, knowing certain persons to be prisoners in the said prison for treason.

feiture of the offenders goods, if it had not been specially provided for, because made treason and a new treason, which was not before, for the lords marchers had not only forfeiture of goods of felons, but royal eschetes and forfeiture of traitors goods for the most part; but that franchise, which was by prescription, could [271] not extend to new treasons.

I find nothing more relating to this matter in the time of *Henry VI.*

The impeachment of the duke of *Suffolk* by the commons for treasons and misdemeanors contained many articles of high treason within the statute of 25 *E. 3.* namely, *adhering to the king's enemies*; but the whole matter being at last left to the king, he was declared by the king clear of the treasons, and for the rest the king by a kind of composition ordered him to be banished for five years. *Rot. Parl. 28 H. 6 n. 18, 19, 20, &c.*

As to the reigns of *Edward IV.* and *Richard III.* tho in those great revolutions, that happened in the latter end of *Henry VI.* the beginning of *Edward IV.* the time of *Richard III.* there are many acts of attainder of treason of particular persons, that adhered to either party then contending for the crown, according as the success of war fell to one side or the other, as namely *Rot. Parl. 38 H. 6. n. 1.—36, &c.* many of the duke of *York's* party were attainted of treason by act of parliament. *Rot. Parl. 1 E. 4. n. 6.—15, &c.* the numerous companies of the party of *Henry VI.* were attainted by parliament; the like was done in the short regress of *H. 6. 11 E. 4.* in a parliament held in that short resumption of the crown by *Henry VI.* Again, the like was done in the parliament of 12 *E. 4.* upon the regress and re-expulsion of *Henry VI.* Again, *Rot. Parl. 1 R. 3.* divers persons of great quality, that opposed the pretensions of *Richard III.* were attainted by act of parliament; and the like was again done in the parliament of 1 *H. 7.* against the assistants of *Richard III.* Every new revolution occasioned the attainder by parliament of the most considerable of the adverse party; yet in all this time I find no general declaration or general enacting of new treasons by parliament.

I come to the time of *Henry VII.*

In this time I find but one new treason, namely the statute of 4 *H. 7. cap. 18.* whereby the counterfeiting of foreign coin made current in this realm is made high treason.

But this act was repealed by the statute of 1 *E. 6. cap. 12.* and 1 *Mar. cap. 1.* and another act made to the same purpose in 1 *Mar. sess. 2, cap. 6.* [272]

This wise prince duly considering the various revolutions, that had formerly happened in this kingdom touching the crown especially to the houses of *York* and *Lancaster*, and that every success of any party presently subjected all that opposed the conqueror, to the penalties of treason; and weighing that, altho by his marriage with the heir of the house of *York*, he had reasonably well secured his possession of the crown, yet otherwise his title, as in his own right, was

not without some difficulties; he therefore made a law, not to enact treason, but to give some security against it, *viz.* 11 *H. 7. cap. 1.* "That all persons, that attend upon the king and sovereign lord of this land for the time being in his person, and do him true and faithful service of alligance in the same, or be in other places by his commandment in the wars within this land or without, that for the said deed and true duty of alligance he or they shall be in no wise convict or attain of high treason, nor of other offenses for that cause by act of parliament, or otherwise by any process of law, whereby he or any of them shall now forfeit life, lands, tenements, rents, possessions, hereditaments, goods, chattles, or any other thing, but be for that service utterly discharged of any vexation, trouble, or loss; and if any act or acts, or other process of law hereafter thereupon for the same happen to be made contrary to this ordinance, that then that act or acts or other process of law whatsoever they be, stand and be utterly void; provided always, that no person or persons shall take any benefit or advantage by this act, which shall hereafter decline from his or their said alligance." Upon this act these things are observable.

1. That this act was not temporary or for the life of king *Henry VII.* but was perpetual, and extended to all succeeding kings and queens of this realm, for it is for attendants upon the king or sovereign lord of this land *for the time being.*

2. It is observable, that this act extendeth to a king *de* [273] *facto*, tho not *de jure*, for in truth such was *Henry VII.* for his wife was the right heir to the crown, and his regal power was principally by an act of parliament made 1 *H. 7.* before his intermarriage with his queen, tho both titles were derived to his descendants, *viz.* *Henry VIII.* and in default of issue, to his sister, from whom our present sovereign is descended: and this act, tho extended to his successors, which were kings *de jure*, as well as *de facto*, yet was made for the security of himself and his servants in the first place, which appeareth more fully also by the preamble.

3. That tho this act might secure the attendants on the king in his wars against impeachments in an ordinary course of law, and might, as to this purpose, exempt them from the danger of any treason by the statute of 25 *E. 3.* as adherers to the king's enemies; yet it was a vain provision against future acts of parliament, whose hands could not be bound by a former act from repealing it, or taking away the effect thereof in part or in all.

It is true, since that time this kingdom hath had no great experience of changes of this nature, nor need to make use of the advantage of this statute: it is true queen *Mary* began her reign 6 *July*, 1553, she was crowned 6 *Octob.* following, her first session of parliament began 5 *Octob.* 1553. which was the day before her coronation, and the second session thereof was held by prorogation 24 *Octob.* 1 *Mar.*

Upon that 6th of *July*, which was the day of king *Edward's* death; and before queen *Mary* was actually settled, the lady *Jane*

Gray set up a title for herself, and continued in some kind of regal power, until the 1st of *August* following, and during those twenty-four days the styles of deeds, statutes and other things (and possibly also processes) were made in her name, and a special act was made 1 *Mar. sess. 2 cap. 4.* to make them effectual, and to be pleadable in the style, name, and year of queen *Mary*; so that the lady *Jane* seemed an intruder for about twenty-four days; but the truth is, she was not so much as an usurper, or a queen *de facto*: and these her assistants in that business, *viz.* the archbishop of [274] *Canterbury*, the duke of *Northumberland*, the said lady *Jane* and divers others were attainted before commissioners of *oyer and terminer*; and those attainders confirmed by parliament 1 *Mar. sess. 2. cap. 16.* and note in that act of attainder a special proviso, that the possessions of the archbishoprick of *Canterbury* should not be forfeited by that attainder or act of parliament; possibly they thought that the general words of that act, or at least the statutes of 26 *H. 8.* and 33 *H. 8.* which gave forfeitures for treason against successors, and were not repealed by 1 *Mar.* might otherwise have forfeited the lands of the archbishoprick by the attainder of the archbisop; but of this *supra cap. 23. p. 252.*

4. But what was the meaning of the proviso in that act of 11 *H. 7.* "That no persons shall have the benefit of this act who shall decline from his alligeance," is dark and dubious.

But these questions never failed to be soon decided on the victor's part by their parliaments, which were always obsequious enough in these matters to the victor, and ready to pass acts of attainders for his safety and their own, against which no security was, nor could be given by this act of 11 *H. 7.*

I come now to the reign of *Henry VIII.* which was a reign wherein acts concerning treason were exceedingly multiplied, and they are of three kinds: 1. Such acts, as constituted or declared treason. 2. Such acts, as concerned the trial of treason. 3. Such as concerned the punishment or forfeiture of treason.

By the statute of 22 *H. 8. cap. 9.* *Richard Rose* for wilful poisoning of divers persons is by authority of parliament attainted of high treason, and that he be boiled to death: and by authority of parliament murder by wilful poisoning is made treason for the future, and the offender to be boiled to death, and not to have benefit of the clergy: justices of peace to have power to inquire of this offense, and also of counterfeiting coin of any foreign kingdom, suffered to be current here, the title of lords to eschete of the lands of offenders in poisoning is saved to them. (*k*)

This treason is repealed by 1 *Mar. cap. 1.* and the same [275] remains felony as before.

By 26 *H. cap. 13.* "Maliciously to wish, will, or desire by words or writing, or by craft to imagine, invent, practise, or attempt any bodily harm to the king, queen, or their heirs apparent, to deprive

them, or any of them of their dignity, title, or name, or slanderously, or maliciously to publish by express writing, or words, that the king our sovereign lord is an *heretic, schismatic, tyrant, infidel, or usurper*, or rebelliously to detain any of his castles, &c. in this realm, or other his dominions, or rebelliously to detain or keep any of his ships, ammunition, or artillery, and do not humbly render the said castles, fortresses, ships, or artillery, to our sovereign lord, his heirs or successors, or such as shall be deputed by them, within six days after they be commanded thereunto by proclamation under the great seal, is enacted to be treason in the offenders, their aiders, counsellors, consenters and abettors: foreign treason to be tried in any county, where the king shall appoint by commission."

1. It should seem, that this act was intended to be perpetual, for in it and the subsequent clause of forfeitures it mentions the king, *his heirs and successors*. 2. Part of this seems to be treason by the statute of 25 *E. 3. viz.* the practising any bodily harm, if there be an overt-act, and also the rebellious detaining of the king's castles after summons by proclamation; the rest are purely new treasons. 3. But whether it was temporary or perpetual, all treason resting singly, as enacted by authority of this act, is repealed by 1 *E. 6.* and 1 *Mar.* and yet the latter clause⁽¹⁾ concerning forfeiture in relation to all treasons within 25. *E. 3.* stands unrepealed; *de quo vide supra & infra.*

By 27 *H. 8. cap. 2.* counterfeiting privy seal, privy signet, or sign manual is made treason, and the offenders, their counsellors, aiders, and abettors to suffer and forfeit, as in case of treason; this is repealed by 1 *Mar. cap. 1.* and then re-enacted by 1 *Mar. cap. 6.*

By 25 *H. 8. cap. 22.* the divorce between the king and queen [276] *Catharine* is affirmed by parliament, and also the marriage between him and *Anne Bullen*, and the crown with all dignities, honours, pre-eminences, prerogatives, authorities, and jurisdictions to the same annexed or belonging, is entailed after the king's death to the heirs of his body lawfully begotten, *viz.* to the first, second, and other sons of the king and of the said queen *Anne*, and to the heirs of their bodies successively; and for want of such issue male, to the heirs male of the king, and the heirs of their several bodies; and for want of such issue, to the lady *Elizabeth*, their daughter and the heirs of her body, and so to their second, third and other daughters; and for want of such issue, to the king's right heirs.

"If any by writing, printing, or exterior act maliciously do or procure any thing to the peril of the king's person, or to the disturbance of the king's enjoyment of the crown, or to the prejudice or derogation of the marriage between him and queen *Anne*, or to the peril, slander, or disherison of any of the issues or heirs made by this act inheritable to the crown, it shall be high treason.

"If any by words without writing, &c. maliciously publish any

(1) By this latter clause the offender, &c. shall forfeit to the king, his heirs and successors all lands, tenements, and hereditaments of any estate of inheritance in use or possession, by any right, title, or means.

thing to the slander of the said marriage between the king and queen *Anne*, or to the slander or disherison of the issues of the king's body begotten on the said queen *Anne*, or other heirs inheritable to the crown, by virtue of this act, it shall be misprision of treason:" an oath is appointed to be taken in pursuance hereof, and the refusers are guilty of misprision of treason; provision is made for the custody of the heir of the crown during minority.

28 *H. 8. cap. 7.* the last act is repealed, and all intermediate offenses against that act in relation to queen *Anne* or the lady *Elizabeth* pardoned; queen *Anne* and others attainted of treason; the marriage between the king and queen *Catharine* annulled and judged void, and the issues between them to be illegitimate; the marriage between the king and queen *Anne* judged void by sentence of divorce of the archbishop; the same sentence confirmed, and the marriage with queen *Anne* judged and declared null and void, and the issues between them declared illegitimate and excluded from inheriting the crown: *Levitical* degrees settled. Children be- [277] tween the king and queen *Jane* shall be adjudged the king's lawful children, and inheritable to the crown; the crown entailed to king *Henry VIII.* and the heirs of his body lawfully begotten, that is to say, to the first, second, and other sons of the king on the body of queen *Jane* begotten, and the heirs of their bodies severally; and in default of such issue male, then to the first son and heir male of his body, and so to the second and other sons in tail; and for the want thereof, to the first and other issue female between the king and queen *Jane* in tail; and for want of such issue, to the king's first and other issue female in tail; and for lack of issue of the king's body, to such person, and in such manner as he shall appoint by his last will or letters patent; provision against disturbances of the heir of his body so nominated under pain of treason; "And if any shall by words, writing, printing, or other exterior act directly or indirectly do or procure maliciously any thing to the peril of the person of the king, his heirs or successors having the royal estate of the crown, or maliciously or willingly by words, &c. give occasion, whereby the king, his heirs or successors might be interrupted of the crown, or for the interruption, repeal or adnullation of this act, or the king's disposal of the crown according to it, or to the slander, disturbance, or derogation of the marriage between the king and queen *Jane*, or any other lawful wife, which he shall hereafter marry, or to the peril, slander, or disherison of any of the issues and heirs of the king limited to be inheritable to the crown, or to whom the king shall by authority of this act dispose it, or that affirm, &c. the marriage between the king and queen *Catharine*, or between the king and queen *Anne* to be good, or slander the sentences of divorce above said, or publish their issues to be the king's lawful children, or shall attempt to deprive the king, the queen, or any made inheritable to the crown by this act, or to whom the king by authority of this act shall dispose thereof, of their titles, styles, names, degrees, or royal estate or regal power, or refuse to take an oath to answer such [278] questions, as shall be objected to them upon any clause of

this act, or after taking the oath do contemptuously refuse to answer such interrogatories, as shall be objected concerning the same, or shall refuse to take the oath enjoined by this act, they, their aiders, counsellors, maintainers and abettors shall be guilty of treason, and forfeit all their lands, &c. and all sanctuary excluded."

The form of the oath is set down in the act, and power is given to the king by will to dispose of the custody of the king's issue within age.

It is made treason to disturb such disposal, and also power is given to the king to dispose or give by will, &c. to any of his blood any title, style, name, honors, tenements, or hereditaments.

Nota, This act doubted whether the attempting any thing in parliament against the marriage of queen *Anne* might not bring them in danger of the act of 25 *H. 8.* and therefore took care both to repeal the act, and to discharge and pardon what had been attempted against it.

The clause enabling the king to dispose of any honours or lands to those of his blood by will was necessary, for without such an enabling act of parliament the king could not dispose thereof by *will*, but only by *letters patent* under the great seal, or for lands parcel of the duchy of *Lancaster* under the seal of the duchy.

But it seems, that as to the disposal of lands belonging to the crown or duchy by letters patent under these respective seals, the king had power without this act, or the 35 *H. 8. cap. 1.* to dispose thereof, and to bind his successors.

And this by reason of the special penning of those acts, which, as I think, did not entail *the lands*, that the king had *in jure coronæ* or *in jure ducatûs Lancastriæ*, but only limits the succession of the crown and of the dignities, honors, prerogatives, pre-eminences, authorities, or jurisdictions to the same annexed or belonging, which are but so many expressions of the parts or incidents of the regal dignity, and not of the lands or possessions of the crown, but those rested in the crown in fee-simple, as they were before those acts made.

And hence it is, that in the several acts of 34 *H. 8. cap.* [279] 21. 1 *E. 6. cap. 8.* 18 *Eliz. cap. 2.* 35 *Eliz. cap. 3.* 43

Eliz. cap. 1. for confirmation of letters patent, there is no clause to make them good, notwithstanding the entail of the crown, for it was not needful; but the lands granted by king *Henry VIII.* *Edward VI.* queen *Mary*, queen *Elizabeth*, stand effectual without any such confirmation, and yet the entail of the crown by these acts continued till the death of queen *Elizabeth*, at which time it was spent, and king *James* succeeded to the crown as the true heir thereof, without the help of any entail or nomination by *Henry VIII.*

And yet after all this the whole schema was altered by the statute of 35 *H. 8. cap. 1.* for thereby after recital of the statute of 28 *H. 8.* and that the king had issue by queen *Jane* prince *Edward*, and the king had since married the lady *Catharine*; It is enacted, "That if the king and prince *Edward* die without heirs of either of their

bodies, the crown shall remain to the lady *Mary* and the heirs of her body under such conditions, as shall be limited by the king by his letters patent, or his last will; and for want of such issue, or upon breach of such conditions, to the lady *Elizabeth* and the heirs of her body under such conditions, as shall be limited by the king by his last will or letters patent; and in default of such issue, or upon breach of such conditions, to such persons and for such estates, as the king shall limit by his will or letters patent.

This act repeals the former oath of 28 *H. 8.* and directs the form of a new oath to be taken for the extirpation of the pope's pretended supremacy, and limits it to be taken by all that sue livery, have any office of the king's gift, receive orders, take degrees, and by all persons whom the king, &c. shall appoint, and that it shall be treason in such, who obstinately refuse to take the oath.

It is also enacted, "That if any person by words, writing, printing, or exterior act maliciously or willingly do or procure any thing directly or indirectly for the repeal, annulment or interruption of this act, or any thing therein contained, or of any thing that shall be done by the king in the limitation of the crown to be [280] made as aforesaid, or to the peril, disherison or slander of any of the issues and heirs of the king being limited by this act to inherit and to be inheritable to the crown, or to the disherison or interruption of any person, to whom the crown is by this act, or shall be limited by the king as aforesaid, whereby they may be destroyed or interrupted in body or title of the inheritance of the crown, the same shall be high treason in the offenders, their maintainers, aiders, counsellors, and abettors, saving to all persons, other than the parties attainted, their heirs and successors, all rights, &c. in the lands of the persons attaint."

And note, that notwithstanding the caution used in the act of 28 *H. 8.* for the pardon of the attempting to repeal the act of 25 *H. 8.* no such care was thought necessary here for the attempt or procurement to alter the law by act of parliament; for as it could not be restrained by a precedent act, so neither was it concerned within the penalty.

And thus much for those treasons, that related to the succession of the crown, which I have put together, notwithstanding many of them come after those other acts, which I shall hereafter mention.[1]

[1] Of the statutes of treason passed in the reign of *Henry 8.* *Hume* says, they were multiplied beyond all former precedent. Even words to the disparagement of the king, queen, or royal issue, were subjected to that penalty; and so little care was taken in framing those rigorous statutes that they contain obvious contradictions; insomuch that had they been strictly executed, every man without exception must have fallen under the penalty of treason. By one statute, for instance, it was declared treason to assert the validity of the king's marriage, either with *Catherine of Arragon*, or *Anne Bolyn*; by another, it was treason to say any thing to the disparagement or slander of the princesses *Mary* and *Elizabeth*; and to call them spurious, would no doubt have been construed to their slander. Nor would even a profound silence with regard to these delicate points be able to save a person from such penalties. For by the former statute, whoever refused to answer upon oath to any point contained in that act was subjected to the pains of treason. The king therefore, needed only propose to any one a question with regard to the legality

By the 28 *H. 8. cap. 10.* which was the great concluding act against the papal authority, the asserting or maintaining of the papal authority is brought within the statute of *præmunire*, and he that obstinately refuseth the taking of the oath of abjuration thereby enacted, is subjected to the penalty of high treason.

By 28 *H. 8. cap. 18.* marrying any of the king's children or reputed children, or his sisters, or aunts of the father's part, or the children of the king's brethren, or sisters without the king's license under his great seal, or deflowering of any of them, is enacted to be treason.

By 31 *H. 8. cap. 8.* the king and council's proclamation concerning religion or other matters are to be obeyed under such penalties, as they shall think requisite; they, that disobey them and then go beyond sea contemptuously to avoid answering such offense, [281] shall be guilty of treason, &c. saving to every person, other than the offenders, their heirs and successors, all right, &c.

By 32 *H. 8. cap. 25.* the marriage between the king and lady *Anne Cleve*, which had been dissolved by the sentence of convocation, was confirmed by parliament, with liberty for each party to marry elsewhere: if any by writing, printing, or exterior act, word or deed, accept, take, judge, or believe the said marriage to be good, or attempt any thing for the repeal or adnullation of this act, it shall be high treason in them, their aiders, counsellors, abettors, or maintainers, saving the rights of all, other than the offenders, their heirs and successors; and all persons that have acted against the said marriage are pardoned.

By 33 *H. 8. cap. 21.* Queen *Catharine Howard* was attainted of high treason, and all persons that had acted against her were pardoned: any woman, whom the king or his successors shall intend to take to wife, thinking her a pure and clean maid, if she be not so, and shall willingly couple herself in marriage to the king notwithstanding, without discovering it to the king before marriage, shall be guilty of high treason; and if any other know it and reveal it not, it shall be misprision of treason: the queen or prince's wife soliciting any person to have carnal knowledge of her, or any person soliciting the queen or prince's wife to have carnal knowledge of her, is treason in them respectively, their counsellors, aiders and abettors.

By 35 *H. 8. cap. 3.* The king's style (*Henricus octavus Dei gratiâ Angliæ, Franciæ & Hiberniæ rex, fidei defensor, & in terrâ ecclesiæ Anglicanæ & Hiberniæ supremum caput*) is united and annexed to the imperial crown of *England*; and if any shall imagine to deprive the king, queen, prince, or the heirs of the king's body, or any to whom the crown is or shall be limited, of any of their titles, styles, names, degrees, royal estate, or regal power annexed to the crown of

of either of his first marriages; if the person was silent, he was a traitor by law; if he answered either in the negative or in the affirmative, he was no less a traitor. So monstrous were the inconsistencies which arose from the furious passions of the king, and the slavish submission of his parliaments. *Hist. Engl. vol. 1. p. 640.*

England, it shall be high treason, saving the right of all other than the offenders, their heirs and successors.

And thus far concerning the several treasons enacted in [282] this king's time, all which are nevertheless now abrogated and repealed by 1 *E. 6.* and 1 *Mar.* as shall be shewn.

II. There are several acts of parliament in this king's time, which concern trials of treason, some of which are in force at this day, and not repealed by any statute.

By 26 *H. 8. cap. 6.* The treason concerning counterfeiting, washing, clipping and minishing of money current within this realm, as likewise other felonies committed in *Wales* or the marches thereof, may be heard and determined before justices of goal-delivery in the next *English* county; but note, this extends not to other treasons, nor, at this day, to clipping or minishing the coin; for the acts, that made them treason at that time, *viz.* 3 *H. 5.* and 4 *H. 7.* stand now repealed, and the statutes of 5 *Eliz. cap. 11.* for clipping, and 18 *Eliz. cap. 1.* for minishing the coin, direct it to be tried by the course and order of the law; and so it is also for counterfeiting of foreign coin by the statute of 1 *Mar. yea.* and as to counterfeiting the coin of this kingdom, or any other offense touching coin, by the statute of 1 & 2 *P. & M. cap. 11.* the indictment and trial is directed to be according to the course of the common law; so that as to coin also the statute of 26 *H. 8.* is now out of doors.

28 *H. 8. cap. 15.* For trial of treason committed upon the high sea before the admiral, &c. by commission under the great seal; this statute as to trial of treason upon the sea stands unrepealed by 1 *Mar.* and whether as to treasons committed in any rivers, or ports, or creeks within the bodies of counties, it be not repealed by 1 & 2 *P. & M. cap. 10.* or by the statute of 35 *H. 8. cap. 2.* for trial of foreign treasons, is considerable.

By 32 *H. 8. cap. 4.* Treasons and misprisions of treason committed in *Wales*, or in other places where the king's writ doth not run, shall be tried before such commissioners of *oyer* and *terminer*, as the king shall appoint, as if committed in the same counties into which the commission is directed.

This is repealed by the statute of 1 & 2 *P. & M. cap. 10.* cited to be so adjudged in *H. 14 Eliz. (m) Co. R. C. p. 24.* [283] because it is done within this realm, and so may be tried in *Wales.*

33 *H. 8. cap. 20.* Concerning the proceeding touching the enquiry and trial of treason committed by persons, that become lunatic after the treason committed, without putting them to answer, and touching the execution of persons attainted of treason, and afterwards becoming lunatic, is repealed by the statute of 1 & 2 *P. & M. cap. 10. vide Co. P. C. p. 4 & 6.* both as to the indictment and as to the trial; but the forfeiture of persons attainted of treason, as to old treasons, stands in force.

(m) Lord Lumley's case.

33 *H. 8. cap. 23.* Treason or misprision of treason or murder committed by a person examined before three of the council, and found by them guilty, or suspected, may be enquired of, heard and determined before commissioners of *oyer* and *terminer* in any county of *England* to be named by the king, by jurors of the county in such commission: challenge for lack of forty shillings freehold allowed peremptory challenge is ousted in treason or misprision of treason: trial by peers is saved.

This statute as to the indictment and trial of treason in any foreign county stands repealed by 1 & 2 *P. & M. cap. 10.* as was ruled by all the judges of *England* in *Somerville's case*, *M. 26 Eliz.* reported by justice *Clench* n. 17.(n) against the opinion of *Stamford*, *Pl. Cor. Lib. II. cap. 26.* both as to the indictment and also as to the trial, for *Somerville* was indicted in the county where the offense was, and by a commission in *Middlesex* was tried by a jury of the county, where the offense was committed; but as to murder, it seems to stand unrepealed, and accordingly put in ure; *Crompton's justice*.(o)

35 *H. 8. cap. 2.* Treasons, misprisions and concealments of treasons committed out of the realm shall be heard and determined by the court of king's bench, and tried by a jury of that county, where the court sits, or before commissioners and in such shire, where the king shall appoint by his commission, by good and lawful [284] men of the same shire, as if committed in the same shire: trial of a nobleman by his peers is saved.

Upon this statute these points have been resolved: 1. That this act is not repealed by 1 *E. 6.* or 1 & 2 *P. & M. cap. 10.* thus it was resolved in *Orurk's case*, *Co. P. C. p. 24.* 2. It extends to a treason committed in *Ireland*, resolved in *Sir John Perrot's case*,(p) *Co. P. C. p. 11.* 3. It extends to a treason committed in *Ireland*, by a peer of *Ireland*, so resolved in 22 *Car. 1.* in *B. R.* in *Macguire's case*.(q) 4. The commission in this act mentioned may be signed by the king's sign manual, or the warrant to the chancellor to issue the commission may be signed by the king's sign manual, and either of them is warranted by this statute, so resolved *H. 36 Eliz.* cited *Co. Pla. Cor. p. 11.* in the case of *Patrick Ocullen*. 5. If an indictment be taken by virtue of this statute in the county of *Middlesex*, and then the bench is removed by adjournment into another county, if the prisoner pleads not guilty, it shall be tried by a jury of that county where the indictment is taken, because the words are, *that it shall be inquired, heard and determined by good and lawful men of the same county, where the said bench shall sit.* *M. 35 & 36 Eliz. B. R.* in the case of *Francis Dacres* cited *Co. Pl. Cor. p. 34.* but otherwise upon an indictment upon the statute of 5 *Eliz. cap. 1.* for refusing the oath of supremacy. *Co. Pl. Cor. ibidem*.(r)

(n) This is reported l. *And p. 104.*

(p) *State Tr. Vol. I. p. 181.*

(o) p. 22. lord *Grevil's case.*

(q) *State Tr. Vol. I. p. 928.*

(r) The case of *Edmund Bonner*, Bishop of *London*.

III. As touching the *third* point of forfeitures by treason I shall say little more, than what is said before in the preceding chapter concerning the forfeiture of tenant in tail.

Only it seems, that the law was taken upon the statutes of 39 and 36 *H. 8.* before mentioned, that if an abbot or a bishop were attainted of treason, that by force of the general words of *forfeiting all their lands, tenements and hereditaments* they forfeit the lands of their church, tho they had them in *autre droit*.

1. Because in the savings of these statutes, yea and in all the new statutes of treason made in the time of *Henry VIII.* above-mentioned, the saving runs, *saving to all persons other than* [285] *the offenders, their heirs and successors such right, &c.* and the exception of *successors* makes it probable, that they intended, when a sole corporation was attainted of treason, he should forfeit the lands of his church.

2. Because in the act of attainder of the archbishop of *Canterbury*, 1 *Mar. cap. 16.* there is a special proviso, that it should not extend to the lands which he had in right of his archbishoprick; but that these should be saved, as if he had not been attainted.

3. Because by the act of 31 *H. 8. cap. 13.* it appears plainly, that the possessions of Monasteries, where the abbots were attainted of treason, came thereby to the crown, tho they are not annexed to the court of augmentations of the king's revenues.

4. It is clearly admitted by the judges in the case of the Bishop of *Durham*, *Dy. 289.* that by force of the statute of 26 *H. 8.* the lands of abbeys, &c. came to the crown by the attainder of treason of the abbots, &c. and possibly it was in design at the time of the making of that statute.

But it is true, that before that statute of 26 *H. 8.* 1. The lands, which a person had in right of his church, were not forfeited by attainder of treason. 2. That altho the lands of a sole corporation such as were an abbot, prior, bishop, might be forfeited by attainder by the special penning of 26 and 33 *H. 8.* yet the lands of an aggregate corporation, as dean and chapter, mayor and commonalty, were not forfeited by the treason of the dean, or mayor, by virtue of those statutes, for the right of the land was in the commonalty and chapter, as well as in the dean or mayor, and not in them alone. 3. That at this day the attainder of treason doth not forfeit the lands of a bishop, parson or other sole ecclesiastical corporation: 1. Because the statutes of 1 *Eliz. (s)* and 13 *Eliz. cap. 10. (t)* disabling bishops, masters of hospitals, &c. to alien their possessions, disable them to forfeit as well as alien, or otherwise the statute would be illusory. 2. By the special penning of the statutes of *E. 6. cap. 12.* and 1 *Mar.* whereby it is enacted, that no penal- [286] ties shall be inflicted for treason, other than such as be by 25 *E. 3.*

(s) This is not among the printed statutes.

(t) This statute made perpetual by 3 *Car. 1. cap. 4.*

Concerning the forfeiture of lands in a county palatine by the attainder of treason out of a county palatine, or *e converso*.

By the statutes of 9 *H. 5. cap. 2.* 18 *H. 6. cap. 13.* 20 *H. 6. cap. 2.* 31 *H. 6. cap. 6.* outlawries of treason, &c. in the county palatine of *Lancaster* were not to cause a disability of the person outlawed, nor induce any forfeiture of the lands or goods of the party outlawed lying out of that county; but by the statute of 33 *H. 6. cap. 2.* these acts are repealed, and it is ordained, that the indicters in a county palatine (where the indictment supposes any person to be inhabiting out of the county of *Lancaster* within some other county of the realm) have lands to the yearly value of five pounds in that county, and that upon indictment to be taken out of the county palatine of persons residing there, the indicters shall have a yearly freehold of five pounds, and that no process be made out upon any such indictments, till it has been examined by the king's justices, whether the indicters be so qualified.

But now by the statute of 27 *H. 8. cap. 24.* all powers in county palatines for making of justices in eyre, of assise, of peace, of goal-delivery, are resumed, and such commissions are to pass under the great seal of *England*, only in *Lancaster* they are to be under the usual seal of *Lancaster*: all processes to be in the king's name under the *teste* of him, that hath the county palatine; all indictments, &c. are to conclude *contra pacem regis*, and all fines and amerciaments upon officers are resumed; so that now all process of outlawry, attainder, &c. in county palatines are of the same effect and induce the same forfeitures, as if the offenses were committed, tried and determined in any other county of *England*.

But this alters not the title of the bishop of *Durham* or any other, that had royal forfeitures of treasons of lands within their liberty, or county palatine, for that is a distinct franchise, and not at all touched by the act of resumption, as appears by the case in *Dyer*(u) before cited, and by what is said in the precedent chapter [287] touching forfeitures by treason: and thus far for acts touching treason in the time of *Henry VIII.*

As touching treasons in the verge I shall particularly mention the same hereafter.

I come now to the time of king *Edward VI.*

1 *E. 6. cap. 12.* There are these several changes made by these several clauses.

1. It is enacted, that no act, deed or offense being by statute made treason or petit treason by words, writing, cyphering, deeds or otherwise whatsoever, shall be deemed or adjudged high treason or petit treasons but only such as be treasons or petit treasons in or by the statute of 25 *E. 3.* for declaring treason, and such offences, as hereafter by this act are expressed and declared to be treason or petit treason; and no other penalties to be inflicted upon the offenders in treason or petit treason, but what are ordained by that, or this statute.

2d clause repeals the statutes concerning heretics, *Lollards*, the six articles, selling of books of the scriptures, &c. ordained in the time of *R. 2. H. 5* and *H. 8.*

3d clause repeals all felonies made by act of parliament, since 23 *April 1 H. 8.* that were not felonies before, and all penalties touching the same.

4th clause repeals the act of 31 *H. 8.* touching obedience to the king's proclamations, and the statute of 34 *H. 8.* imposing penalties upon the disobedient.

5th clause enacts certain new offenses, *viz.* "If any shall by preaching, express words or sayings affirm and set forth that the king, his heirs or successors, kings of this realm, is not or ought not to be supreme head on earth of the church of *England* and *Ireland* immediately under God, or that the bishop of *Rome*, or any besides the king for the time being, ought by the laws of God to be supreme head of the same churches, or that the king, his heirs or successors, kings of this realm, ought not to be king of *England, France, and Ireland*, or any of them, or do compass by open preaching, express words or sayings to depose or deprive the king, his heirs or successors kings of this realm, from his royal estate or titles to the same kingdoms, or do openly publish, or say by express [288] words or sayings, that any person, other than the king, his heirs or successors kings of this realm, of right ought to be king of the realms aforesaid, or any of them, or to have or enjoy the same or any of them, the offenders, their counsellors, aiders, abettors, procurers and comforters, for the first offense shall lose his goods, and suffer imprisonment during the king's pleasure; and if after such conviction he shall commit the same offense again, other than such as be expressed in the statute of 25 *E. 3.* he shall forfeit to the king the profits of his lands, benefices, and ecclesiastical promotions during his life, and all his goods, and suffer perpetual imprisonment; and for the third offense after a second conviction, he shall be guilty of treason, and suffer and forfeit as a traitor.

6th clause enacts that, "If any person shall by writing, printing, overt-act or deed, affirm or set forth, that the king of this realm for the time being, is not or ought not to be supreme head on earth of the churches of *England* and *Ireland*, or any of them immediately under God, or that the bishop of *Rome* or any person, than the king of *England* for the time being, is or ought to be supreme head on earth of the same churches or any of them, or do compass or imagine by writing, printing, overt-deed or act to depose or deprive the king, his heirs or successors from the royal estate or titles of king of *England, France* and *Ireland*, or any of them, or by writing, printing, overt-act or deed, do affirm, that any person, other than the king, his heirs and successors, of right ought to be king of the realms of *England, France* and *Ireland*, or any of them, then every such offender shall be guilty of treason, and suffer and forfeit, as in case of high treason.

7th clause enacts, "That this act shall not extend to repeal any

statutes touching the counterfeiting, clipping, filing or washing the coin current of this kingdom, or importing counterfeit coin, or counterfeiting the king's sign manual, privy seal, or privy signet, their abettors, &c.

8th clause enacts, "That if the persons declared by the act of 35 *H. 8.* to be inheritable to the crown do usurp one upon the [289] other, or interrupt the king's possession of the crown, they, their abettors, &c. shall be traitors.

9th clause takes away clergy from persons found guilty by verdict, confession, or not directly answering or standing mute in cases of murder of malice prepense, of wilful poisoning, house-breaking, any person being in the house and put in fear, robbing in or near the highway, horse-stealing, sacrilege; but in all other cases of felony clergy allowed, and sanctuary the same as before the 24 *April* 1 *H. 8.*

10th clause provides, that all the statutes of *H. 8.* concerning challenge, or concerning trial of foreign pleas, shall stand in force.

11th clause declares, that no person already arrested or imprisoned, indicted or convicted, or outlawed for treason, petty treason or misprision of treason, shall have any advantage of this act.

12th clause provides, that wilful killing by poison shall be deemed wilful murder, and the offenders, their aiders, abettors, counsellors or procurers shall suffer, as murderers.

13th clause enacts, that a lord of parliament in all cases within the benefit of clergy, tho he cannot read, yet shall be delivered as a clerk convict without burning in the hand, or loss of lands, &c.

14th clause saves the trial by peers for any offenses within this statute.

15th clause enacts, that clergy be allowed, notwithstanding the offender have been married to a single woman or widow, or to two wives or more.

16th clause enacts, that notwithstanding attainder of treason, petit treason, misprision of treason, murder or felony, the wife shall have her dower, and saves to all and every person, other than to the offender attained, convict or outlawed, all such right, title, interest, entry, leases, possession, condition, profit, commodity, and hereditaments, as they had before or at the time of the attainder, conviction, or outlawry.

17th clause provides, that the statute of 27 *H. 8.* for felony in servants stealing the goods of their masters, shall stand in force.

18th clause provides, that no person be put to answer for [290] any of the offenses abovesaid concerning treason by preaching or words only, unless accused before one of the king's council, justice of assise or peace, &c. within thirty days after the offense committed.

19th clause, concealing and keeping secret any high treason shall be misprision of treason, and the offender shall forfeit as heretofore hath been used in case of misprision of treason.

20th clause, calling, writing or printing the *French* king king of *France* shall not be adjudged any offense within this act.

21st clause provides, that no person shall be indicted, arraigned, condemned or convicted for any offense of treason, petit treason, misprision of treason, or for any words before mentioned, whereby he shall suffer pains of death, loss of goods, imprisonment, &c. unless the offender be accused by two sufficient and lawful witnesses, or shall willingly without violence confess the same.

I have mentioned the clauses of this statute at large, and by their numbers, because there be many things observable thereupon.

By the first clause of this statute all those numerous treasons and petit treasons, that were enacted or declared at any time since 25 *E. 3.* are wholly taken away, except *that* of counterfeiting, clipping, washing, or filing of coin, &c. excepted in the 7th clause; but this doth not mention misprisions of treason, but only declares what misprision of treason is, for by taking away the treasons themselves, the misprisions of those treasons must needs cease, as a crime.

But this act did not extend to alter the trials in case of treason, and therefore notwithstanding this act the statute of 28 *H. 8. cap. 15.* for treasons at sea, 26 *H. 8. cap. 6.* for counterfeiting, &c. in *Wales*. 32 *H. 8. cap. 4.* for treasons in *Wales*, 33 *H. 8. cap. 23.* for treasons to be tried out of their county, 35 *H. 8. cap. 2.* for trial of foreign treasons, stood yet in their force, until the statute of 1 & 2 *P. & M. cap. 10.*

Again, notwithstanding that by some former statutes certain offences, which were felony before, as wilful burning of houses and poisoning, were made treason, yet the repeal of those [291] acts that made them treason leaves them nevertheless in the state, wherein they before were, namely felony.

Again, upon consideration and comparison of the 5th and 6th clauses these things are observable, namely, 1. The wisdom of the law-makers, that put the very same offenses in words spoken in a lower rank of punishment than the same things written or printed, making the former but a misdemeanor in the first offense, which in printing or writing was treason in the first offense. 2. it is observable upon that fifth clause, that there were some things within the fifth clause, that might be treason or an overt-act of treason within the statute of 25 *E. 3.* (*other than such* as be expressed in the statute of 25 *E. 3.*) *vide quæ supra dicta sunt cap. 13.* touching the treason in compassing the king's death.

It is also observable upon the 11th clause, that when an offense is made treason or felony by an act of parliament, and then those acts are repealed, the offenses committed before such repeal, and the proceedings thereupon are discharged by such repeal, and cannot be proceeded upon after such repeal, unless a special clause in the act of repeal be made enabling such proceeding after the repeal, for offenses committed before the repeal, as there is in this case.

3 & 4 *Ed. 6. cap. 5.* Tho it primarily concerns riots, yet consequently it concerns treason also: thereby it is enacted,

1. "That if any persons to the number of twelve or more assembled together shall intend, go about, practise or put in ure with force of arms unlawfully, and of their own authority to kill, take or imprison any of the king's privy council, or unlawfully to alter or change any laws established by parliament for religion, or any other laws or statutes of this realm, and being commanded by the sheriff, justice of peace, mayor, &c. by proclamation in the king's name to repair to their houses, if they shall continue together by the space of one whole hour after such proclamation, or after that shall willingly in forcible and riotous manner attempt to do or put in ure any of the things aforesaid; this shall be adjudged treason in all the [292] offenders, their aiders, abettors and procurers." See before in chapter XIV. concerning levying of war, how much of this high treason is within the statute of 25 E. 3.

2. "That if any persons to the number of twelve or more shall intend, go about, practise or put in ure in manner aforesaid to overthrow, cut, break or dig up pales, hedges, ditches or other inclosure of any park, inclosed grounds, banks of pools or fish-ponds, conduits, conduit-heads, or pipes to the same, which may remain open, or unlawfully to have common or way in the said park or grounds, or to destroy the deer, warrens of conies, dove-houses, fish, or to pull down houses, mills, bays or barns, or to burn stacks of corn or grain, or to diminish the rents or yearly values of any manors, lands, &c. or the price of any victuals, corn or grain, or any other thing usual for the sustenance of man, and being required, as before, shall not depart, but continue an whole hour, or shall after that forcibly attempt to do or put in ure the things aforesaid they shall be adjudged felons without benefit of clergy."

Vide supra cap. 14. which of these offenses were a levying of war against the king.

3. "That if any person unlawfully and without authority by ringing of bells, sounding of drums, trumpet, horn, or other instrument, by firing of beacons, by malicious uttering of words, casting of bills or writings, or by any act whatsoever raise or cause to be assembled any persons to the number of twelve, or above, to the intent that they shall do any of the acts aforesaid, who shall not dissolve their assembly upon such proclamation within an hour, or shall commit any of the said acts, then they, that raise such assemblies, shall suffer as felons."

4. "If such assemblies to the number of forty, and above, shall continue together two hours, or shall bring weapons, meat, &c. to the persons so assembled, it shall be high treason.

5. If above the number of two and under twelve attempt such things, &c. as abovesaid, they are to suffer imprisonment for a year, and make fine and ransom, with treble damages to persons damaged.

6. In the cases of treason within this act tenant in tail is [293] to forfeit to the king during life only, and tenant in fee simple to forfeit only as upon attainder of felony.

7. Power is given to the sheriffs, justices, mayor, &c. to raise power, and array them in manner of war against the rioters, to the intent to apprehend the rioters; and if the said rioters do not depart upon proclamation but continue together. it shall be lawful for the sheriff, &c. after such commands to kill the rioters; if after such commandment it fortune any of the riotors be killed upon such account, the sheriff, &c. or any assembled by him shall thereof be discharged: then follows the punishment of those, who refuse to assist the sheriff, or justice in the repression of riots.

Movers to such riots are guilty of felony without clergy, and persons solicited thereunto not revealing it to suffer three months imprisonment.

This act being made in a great measure for the support of the reformed religion under *Edward VI.* was as to all points of treason therein contained, repealed by 1 *Mar. cap. 1.* but in effect the very same offenses were enacted felonies within clergy by 1 *Mar. sess. 2. cap. 12.* which was to continue to the end of the next parliament, and after the death of queen *Mary* was re-enacted by 1 *Eliz. cap. 16.* to continue during her life, and till the end of the next session after her death, but then expired.

That which I would observe upon this act is this, how careful they were in this time not to be over-hasty in introducing constructive treasons, and to shew how the opinions of the parliaments of *Edward VI.* queen *Mary*, queen *Elizabeth* went, as to the point of constructive treason, and how careful they were not to go far in extending the statute of 25 *E. 3.* beyond the letter thereof.

As to the point of indemnifying those, that killed the rioters in assistance of the sheriff, it is true, that the killing of rioters barely for continuing together after proclamation required a new law to indemnify it, as in the statute is provided; but if rioters resist the sheriff in his endeavour to apprehend them, or make head against him, or continue to put in ure their riotous acting, as pulling down houses, inclosures, &c. if the sheriff, or those that [294] come in aid of him, kill any of them, the law and the statute of 2 *H. 5. cap. 8.* do indemnify them, as shall be hereafter more fully declared.

By 5 & 6 *E. 6. cap. 11.* "If any person by open preaching, express words or sayings do expressly, directly and advisedly set forth and affirm, that the king, that now is, is an heretic, schismatic, tyrant, infidel, or usurper of the crown, or that any his heirs or successors, to whom the crown is to come by the statute of 35 *H. 8.* being in lawful possession of the crown, is an heretic, schismatic, tyrant, infidel, or usurper of the crown then such person, his aiders, abettors, procurers, counsellors, and comforters knowing the same, shall for the first offense lose their goods and be imprisoned at the king's will, for the second offense, after conviction for the first, lose the profits of their lands and ecclesiastical benefices during their lives, and be perpetually imprisoned, and for the third offense, after

the second conviction, be adjudged traitors, and lose their lives, and forfeit as in case of high treason.

“If any person shall by writing, printing, painting, carving, or engraving, directly, expressly and advisedly publish, set forth and affirm, that the king, or any his heirs or successors, &c. is an heretic, schismatic, tyrant, infidel, or usurper; it shall be high treason, and he shall forfeit as in case of high treason.

“If any person or persons rebelliously detain the king's castles, or fortresses, ships, ordinance, artillery or fortifications, and do not render them up to the king, his heirs or successors within six days after proclamation under the great seal, it shall be treason, and the offender, his aiders, &c. knowing of the said offenses shall suffer and forfeit as in case of high treason.

“If any the king's subjects commit treason contrary to this act or any other act in force out of the realm, it shall be inquired and presented by twelve men of any county, which the king by commission shall assign, as if committed within the realm, and the like process thereupon, as if done within the realm, and the
[295] outlawry against an offender inhabiting out of the realm shall be as effectual as if he had been resident within the realm.

“But if he render himself upon the outlawry within a year, he shall be received to traverse the indictment.(x)

“Persons attainted of any treason shall forfeit to the king all their lands of any estate of inheritance in their own right at the time of the treason committed, or at any time after.

“No proceeding shall be on any the offenses aforesaid committed only by preaching or words, unless the offender be accused thereof within three months before one of the king's council, justice of assise, justice of peace being of the *quorum*, or two justices of peace in the shire where the offense is committed; concealment of any high treason, shall be adjudged only misprision of treason, and the offender to forfeit as in misprision of treason.

“Provided that no person shall be indicted, arraigned, condemned, convicted or attainted for any of the treasons or offenses aforesaid, or for any other treasons, that now be, or hereafter shall be, which shall be hereafter perpetrated, committed, or done, unless the same offender or offenders be therefore accused by two lawful accusers, which said accusers at the time of the arraignment of the party accused, if they be living, shall be brought in person before the party so accused, and avow and maintain that which they have to say against the said party to prove him guilty of the treasons or offenses

(x) This clause remains, as our author observes below, unrepealed to this day, so that it was great injustice to deny the benefit of a trial within the year to Sir *Thomas Armstrong*, who was out-lawed, while he was beyond sea, 36 Car. 2. and of this opinion was the house of commons by their vote Nov. 19, 1689, when it was resolved, that Sir *Thomas Armstrong's* plea ought to have been admitted according to the statute of 5 & 6 E. 6. see *State Tr.* Vol. III. p. 896. and accordingly the like plea was allowed to *Johnson*, who was indicted for counterfeiting the coin, Mich. 2 Geo. 2. B. R. altho he had broke prison, and was retaken in *England*.

contained in the bill of indictment laid against the party arraigned, unless the party arraigned shall willingly without violence confess the same: a saving of the right of all, other than the offenders and their heirs, or such as claim to their or any of their use: the wife of the party attainted of these or any other treasons shall be barred of dower of the lands of the party attainted, so long [296] as the attainder stand in force.”[2]

Upon this statute many things are observable. 1. That it should seem, that neither the writing of these scandalous words, nor the bare detaining of the king’s forts or ships were treason within the statute of 25 *E. 3.* for if they had been such, this act would not have been made.[3] 2. The *second* thing observable is the great discrimination, which in this act is made between words and writing, the latter being made treason, the former only misdemeanor in the two first offenses, altho the words be the same in both. 3. That so much of this act, as is introductive of new treason, is repealed by the statute of 1 *Mar. cap. 1.* but whether those two penalties previous to treason in case of words, *viz.* for the first and second offense, be repealed by any statute, seems doubtful, for those are not treason. 4. But those clauses in this statute, that concern trial of foreign treasons, concerning outlawry of persons beyond the sea, forfeiture of lands of inheritance of the party attainted, loss of dower by the wife of the party attainted, stand unrepealed to this day; and so it is held by many, that the clause concerning two accusers stands still on foot; *de quo vide postea.*

Touching the clause for the forfeiture of the lands of the party attainted there are these things considerable.

1. That by this clause tenant in tail of the gift of the king doth by his attainder forfeit his estate-tail, notwithstanding the statute of 34 *H. 8. cap. 20.* for as that statute coming after 26 & 33 *H. 8.* did, as to that case, repeal so much of those acts; so this statute of 5 & 6 *E. 6.* coming after 34 *H. 8.* doth repeal that statute, as to the case of attainder of treason of such dohee in tail.

2. That this act varies much from the penning of the acts of 26 and 33 *H. 8.* for they seemed, as hath been observed, to fasten upon lands in right of a corporation sole, as bishop, abbot, &c. but this limits it only to lands in their own right, which possibly, tho an affirmative clause, may correct the extent of the statutes of 26 and 33 *H. 8.* and bind up the forfeiture to lands only in their own right.

As to the point concerning the two lawful accusers these things will be considerable, 1. Whether it extends in law to [297] new treasons made after this act. 2. Whether by any statute

[2] “I do not find upon looking over the *State Trials* that in crown prosecutions any great regard was paid to the acts of *Edw. 6.* for near a century after they were passed; or indeed to the common well known rules of legal evidence. This every man who will do so much penance as to read over the *State Trials* during the reigns of queen *Eliz.* and king *James*, will find to have been the doctrine and practice of the times.” *Fost.* 234.

[3] See *ante*, p. 146.

this be repealed. 3. Admitting it be not, what shall be said two lawful accusers. 4. What a confession.

I. The statute of 5 & 6 *E. 6.* above-mentioned appoints two lawful accusers in case of all treason enacted or to be enacted; therefore if a new treason were made by a subsequent act of parliament without any clause that directs the indictment or trial in any other manner than is appointed by 5 & 6 *E.* by the words of this act there must be two lawful accusers, both upon the trial and indictment.

But there have been great opinions, that tho the words of 5 & 6 *E. 6.* extends to treasons that shall be hereafter enacted, yet this clause doth not extend in law to such new treasons, unless special provision be made for the same in the act making such new treason: others have been of a contrary opinion, because it only concerns the manner of proceeding, which may be directed by a precedent act, as upon the statute of 18 *Eliz. cap. 5.* 21 *Jac. cap. 4.*

II. But certainly, if there be, by a subsequent statute, any derogatory clause from this statute, then there need not be two lawful accusers.

Therefore upon the statutes of 1 & 2 *P. & M. cap. 11.* in treason for counterfeiting the coin current here, or for clipping and impairing of coin (which was then conceived a treason not repealed by 1 *Mar. cap. 1.*) the evidence and course of proceeding at common law both upon the indictment and trial are restored, and so no necessity of two witnesses; this is agreed on all hands. *Co. Pl. Cor. p. 25.*

Again, tho the treason for clipping or washing of coin declared by 3 *H. 5. cap. 6.* were repealed by the statute of 1 *Mar. cap. 1.* as is declared by the preamble of the statutes of 5 *Eliz. cap. 11.* and 18 *Eliz. cap. 1.* and that the same is newly made treason by the statutes of 5 and 18 *Eliz.* and consequently, were there no more in the case, two witnesses might be requisite by the words of the act of 5 & 6 *Ed. 6.* because those are newly made treasons, yet by the penning

[298] of those statutes of 5 and 18 *Eliz.* it is not necessary, because the words in both statutes are *being lawfully convicted or attainted according to the order and course of the law*, which takes in the whole proceeding, as well indictment as trial; for the course of law therein mentioned seems to be intended the common law, and at common law there was no necessity of two witnesses in any case of treason.

And altho the statute of 1 & 2 *P. & M. cap. 11.* did take clipping and washing to be continuing treasons, and therein might mistake, yet there being an express clause in that statute, that in those cases the evidences at common law should be restored; this direction might take off the statutes of 1 & 5 *E. 6.* as to the two witnesses in those cases, and so have an influence upon the statutes of 5 & 18 *Eliz.* or at least may go far in expounding them to restore the evidence required at common law in those cases.

But whether, as to all other treasons, the general clause in the statute of 1 & 2 *P. & M. cap. 10.* *that all trials hereafter to be awarded or made for any treason shall be had and used only*

according to the due order and course of the common laws of this realm and not otherwise, have taken away the necessity of two witnesses upon the indictment, hath been controverted, (y) for on all hands it is agreed, that it takes away the necessity of two witnesses upon the trial, if there were no more in the case.

My lord *Coke* in *Pla. Cor. p. 25, 26.* delivers his opinion, that two witnesses are necessary upon the indictment in case of all treasons, other than those, that are for counterfeiting, clipping, or impairing the coin, and gives many weighty reasons for it, and cites a resolution in 14 *Eliz.* lord *Lumley's* case, and 4 *Mar. Bro. Corone*, 219. for according to him the indictment is a distinct thing from the trial; therefore the statute of 1 & 2 *P. & M. cap. 10.* extending only to the trial doth not take away the necessity of two witnesses upon the indictment, [3] and accordingly the general opinion hath run thus since. (z)

But yet much is to be alledged, that the statute of 1 & 2 *P. & M. cap. 10.* extends as well to reduce the indictment, [299] as the trial, to the course of the common law.

1. Because it seems to be the intent of the statute to involve the indictment under the general appellation of the trial, according to 2 & 3 *P. & M. Dy. 132. a.* and tho it is true, that 1 *P. & M. Dy. 99, 100.* in *Thomas's* case there were two accusers required, yet that was before the statute of 1 & 2 *P. & M. cap. 10.*

2. Because this statute of 1 & 2 *P. & M. cap. 10.* in other cases extends as well to the indictment, as the trial; it is agreed, that the statute of 33 *H. 8. cap. 23.* concerning trial of treason in a foreign county, is wholly repealed by 1 & 2 *P. & M. cap. 10. quod vide Co. P. C. p. 27. Dy. 132.* whereas, if it should only refer to the trial, the indictment might still be in a foreign county, and so he might be indicted in a foreign county, and yet must be tried in the proper county: *vide* accordingly resolved *H. 12 Eliz. Dy. 286. b.* touching the rebels in the *North*, where *Stamford's* opinion, *Lib. III. cap. 26. (a)* is denied by all the judges of both benches; again, the statute of 33 *H. 8. cap. 20.* touching the indictment and trial of lunatics in any county the king shall appoint, is repealed by this act of 1 & 2 *P. & M. cap. 10.* as well to the indictment as the trial: *vide Anders. Rep. n. 154. Arden's case. (b)*

3. The indictment is in common speech a part of the trial, or at least a necessary incident to it; and it should be necessary to have two witnesses to the indictment, it would consequently be necessary

(y) See *Kel. 9, 18, 49.*

(z) *State Tr. Vol. III. p. 56.* the case of lord *Castlemain*, *Ibid. p. 415.* earl of *Shaftsbury's* case; *p. 645.* lord *Russel's* case, *p. 733.* colonel *Sidney's* case.

(a) *S. P. C. p. 90.*

(b) 1 *And. 105.*

[3] This distinction is entirely without foundation even upon the foot of those statutes (the acts of *Edw. 6. & P. & M.*) But the present act, (7 *Will. 3. c. 3. s. 2.*) hath not left room for that distinction. For it enacteth that, "No person shall be indicted, &c. but upon the oaths of two lawful witnesses," &c. *Fost. 232. 1 East, P. C. 128.*

to have them upon the trial also; for by the statute of 5 & 6. *E. 6. cap. 11.* the two witnesses, that are upon the indictment, must avow their testimony in the presence of the party upon his arraignment: and it seems incongruous, that a greater evidence should be required to the indictment, which is only an accusation, than to the trial, (c) where the party is to be convicted; therefore, if the statute of 1 & 2 *P. & M.* intended to take it away upon the trial, it cannot [300] be supposed to continue the necessity of two witnesses upon the indictment.

4. There is also a great authority for this opinion: *vide* the resolution and reason of the judges in *Arden's case*, *Anders. Rep. n. 154.(d)*, where they resolved, that they could not be indicted in a foreign country upon the statute of 33 *H. 8. 23.* because the statute 1 & 2 *P. & M. cap. 10*, restoreth the common law as well in relation to the indictment as the trial, and the trial includes the indictment; and this was by all the justices and barons so resolved, which case is also reported by justice *Clench. n. 17.* to be 19 *Novem. 26 Eliz.* Again *ibidem n. 28.* "Fuit tenus per les justices, que ou le statute de *E. 6.* est, que inditement de treson sera per 2 testes, & le statute de reine *Mary* est, que tresons sey try solonc le common ley, que ore inditements sey solonc le common ley; car inditement est parcel de tryal, car nul tryal poet estre sans inditement, and sic fuit in *Somerville's & Arden's case.*

5. It hath been the care of the parliaments since in their acts to make provision for two witnesses in cases of treasons newly made, *vide* statutes 13 *Eliz. cap. 1.* 13 *Car. 2. cap. 1.* so that it was thought, that the statute of 5 & 6 *E. 6.* was not of force as to the two witnesses, at least as to treasons newly enacted, otherwise in cases of new treasons they needed not these provisions.(e)[4]

(c) Lord Coke *P. C. p. 25.* says the greatest proof is most of all necessary at the time of the indictment, because that is the foundation of all the rest, and is commonly found in the absence of the party accused.

(d) 1 *And. 107.*

(e) If it were only questionable, that was reason sufficient for making such provision *Vide supra, p. 261.*

[4] At common law, one witness was sufficient in case of treason as well as on any other capital charge. The two witnesses were first required by the 1 *Edw. 6. c. 12.* and the 5 & 6 *Edw. 6. c. 11.* The act of 1 & 2 *P. & M. c. 11.* excepts persons accused of treasons relating to the coin. The 7 *Will. 3.* only extends to treasons working corruption of blood, and expressly excludes the counterfeiting the coin, seals, &c.; only one witness is required in the trial of these offences. 1 *Leach, C. C. 42.* The same provision is contained in the 8 & 9 *Will. 3. c. 26. s. 7.* and 6 *Geo. 3. c. 53. s. 3.* By the 39 & 40 *Geo. 3. c. 93.* and 5 & 6 *Vict. c. 51.* where the overt act alleged is an attempt upon the king's life, the party shall be tried as in case of murder. The stat. 7 *Will. 3.* does not require that each overt act shall be proved by two witnesses, but only that the treason shall be so proved. It expressly declares that there shall be either two witnesses to the same overt act, or one witness to one and another witness to another overt-act of the same species of treason. *Fost. 235.* 1 *East, P. C. 129.* But if several overt acts be proved by different witnesses singly, such overt acts must relate to the same kind of treason, otherwise it is insufficient by the express provision of the statute, which in this respect is only declaratory of what was the known rule of law before. *id. 130.* See case of the *Regicides, Kel. 9.* Lord *Stafford's case, 3 St. Tr. 204.* Sir *T. Raym. 407.* The

And thus the reasons stand on both sides, and tho these seem to be stronger, than the former, yet in a case of this moment it is safest to hold that in practice, which hath least doubt and danger; *quod dubitas, ne feceris*, especially in cases of life; (f) but upon misprision of treason two witnesses are requisite both upon the indictment and trial. *Co. Pla. Cor. p. 24.*

III. The third thing considerable in this clause is, what shall be said *two lawful accusers* within this statute, if it be [301] of force.

As to the accusers mentioned in the statute of 5 & 6 *E. 6. cap. 11.* they are no other than the two lawful and sufficient witnesses mentioned in the statute of 1 *E. 6. cap. 12. in fine*; this is agreed by my lord *Coke, Pl. Cor. p. 25.*

Now what are lawful witnesses in this case is considerable; the lawfulness of witnesses must respect either, 1. The persons, or else, 2. The testimony of the witnesses.

1. As in relation to the persons of witnesses, those are said lawful witnesses, which by the laws of *England* are allowed to be witnesses.

A *feme covert* is not a lawful witness against her husband (g) in

(f) However since our author wrote this matter is in great measure settled by 7 *W. 3. cap. 3.* whereby it is enacted, "That in all cases of high treason, whereby any corruption of blood, &c. no person shall be indicted, tried or attainted, but upon the oaths of two lawful witnesses to the same treason; but out of this act are excepted all proceedings in parliament, or proceedings for counterfeiting the king's coin, great seal, privy seal, or signet or sign manual.

(g) *Co. Lit. 6. b.*

necessity of two witnesses to prove the treason extends as well to the finding of the bill of indictment by the grand jury as to the trial itself in open court, by the very words of all the acts, "that no person shall be indicted," &c. 3 *Ina. 25. Fost. 232. 1 East, P. C. 128.* If one overt act be proved by one witness in the county in which the trial is had, which gives the grand jury jurisdiction to inquire, another overt act of the same species of treason proved by another witness in a different county will make two witnesses within the stat. 7 *Will. 3. Case of Jellias, 1 East, P. C. 130. Gavan's case, 2 St. Tr. 873.* Though it requires two witnesses to each treason, yet a collateral fact not tending to the proof of the overt acts, may be proved by one. *Fost. 240. Vaughan's case, 5 St. Tr. 38.*

By the *Constitution, Art. 3. Sect. 3.* No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or confession in open court. The same provision is to be found in the 1st sect. of the act of 30 April, 1790. The provision in the *Constitution*, that the two witnesses must be to the same overt act, was in consequence of a construction which had prevailed in *England*, that though two witnesses were required to prove an act of treason, yet if one witness proved an act and another witness another act of the same species of treason, it was sufficient; a decision which has always appeared to me contrary to the true intention of the law which made two witnesses necessary. Per *Iredell, J. Charge to the Grand Jury, Tr. of Fries, 14.* When two witnesses are produced, who prove the overt act laid in the indictment, there might be then evidence drawn from other counties respecting the intention; this is the opinion of Judge *Foster*, and it is my opinion. *id. 174.* Two witnesses are necessary on the indictment as well as upon the trial in court. *Id. 14.* But it was said by *Marshall C. J. (1 Burr's Tr. 142.)* that, though "the *Constitution* declares that two witnesses are necessary to produce conviction; yet it may not be so strictly and absolutely necessary to authorise an indictment." The same proof is not required to commit a person for high treason as would be necessary to convict him on a trial in chief. *id. 11. Serg. on Const. 375.* See also *Resp. v. McCarty, 2 Dall. 86. Judge Wilson's Works, vol. 2. p. 364. Davis's Virg. Cr. Law, 56.*

case of treason, yet in lord *Castlehaven's* case^(h) upon an indictment for a rape upon his lady by another by her husband's present force, she was received as a witness by the advice of the judges, that assisted at that trial, and upon her evidence he was convicted and executed.

But a woman is not bound to be sworn or to give evidence against another in case of theft, &c. if her husband be concerned, tho it be material against another, and not directly against her husband. *Dalt. cap. 111.(i)*

Upon an indictment upon the statute of 3 *H. 7. cap. 2.* for taking away forceably and marrying a woman, the woman so married may be sworn against her husband, that so marries her, if the force were continuing upon her till the marriage; and thus it was done in the case of lady *Fulwood*, *M. 13 Car. 1. B. R. Croke(k)* and accordingly *seriatim* resolved by all the judges of the king's bench lately in the case of *Brown*, *Trin. 25 Car. 2.(l)* for these reasons: 1. Because otherwise the statute would be vain and useless, for possibly all that were present were of the offender's confederacy. 2. The marriage, tho a marriage *de facto*, yet if it were effected by a continued act of force, was not a marriage *de jure*, for it was dissolvable by [302] divorce, unless ratified by a subsequent free cohabitation or consent. But 3dly and principally, because it was *flagrante crimine*, for the child was taken away upon the *Thursday*, married the *Friday*, and seized by the guardian the next day, before they had lain together, and the force was all that while continuing upon her. 4. There were other witnesses, that proved the first taking away by force against the child's will, tho there were no witnesses to prove the marriage forceable but herself, who expressly swore, that she was married against her will; upon all which circumstances it was ruled, that she should be examined in evidence, and the credibility of her testimony left to the jury; but most were of opinion, that had she lived with him any considerable time, and assented to the marriage by a free cohabitation, she should not have been admitted as a witness against her husband; he was convicted and had judgment of death, and was executed.[5]

Regularly an infant under fourteen years is not to be examined upon his oath as a witness; but yet the condition of his person, as if he be intelligent, or the nature of the fact may allow an examination of one under that age,^(m) as in case of witchcraft an infant

(h) *Hut. 115. Rush. Collect. Vol. II. p. 93-101. State Tr. Vol. I. p. 366.*

(i) *N. Edit. cap. 164. p. 540.*

(k) *Cro. Car. 482, 484, 488, 492.* the like was done in the case of *Haagen Swendsen*, *Mich. 1. Ann. B. R. State Tr. Vol. V. p. 453.*

(l) *1 Ven. 243. 3 Keb. 193.*

(m) By the laws of *Ina* a child ten years old was allowed to be a witness in theft. *Vide L. L. Inæ. l. 7.*

[5] As to the competency of husband and wife to give evidence for or against each other, see *Roscoe; Cr. Ev. (Mr. Sharswood's Edition,) 112.*

of nine years old has been allowed a witness against his own mother.
Dalton.(n)

And the like may be in a rape of one under ten years upon the statute of 18 *Eliz. cap. 6.* and the like hath been done in case of buggery upon a boy upon the statute of 25 *H. 8. cap. 6.*

And surely in some cases one under the age of fourteen years, if otherwise of a competent discretion, may be a witness in a case of treason: *vide quæ supra dixi, p. 26.*

A man concerned in point of interest is not a lawful accuser or witness in many cases, the party to an usurious contract, cannot be a witness to prove an usurious contract, upon an information, if the money be not paid, for he swears to avoid his own debt or security; (o) but if the money be paid he may be a witness [303] to prove it, where another informs, for he is to gain nothing.

And therefore if any man hath the promise of the goods or lands of the party attainted, he is no lawful witness to prove the treason.

A person outlawed in trespass is nevertheless a lawful witness, but no lawful juryman or indicter in case of felony or treason, Sir *William Withipol's case.*(p)

A father or son or adversary in a suit is a witness for or against a person accused of any crime, yet not always a competent juryman.

A *particeps criminis* is in some cases a lawful accuser within this statute, in some cases not.

An approver shall be sworn to his appeal, *Stamf. Pla. Cor.*;(q) but it seems, that he shall not be a witness upon the trial, if the party accused put himself upon his country, because, if he fail in proving the party guilty, he shall be hanged.

In Sir *Percy Cresby's case*, *P. 19 Jac. Noye's Rep. p. 154. placito 676. in Camera Stellatâ*, if two defendants be charged for a crime, one shall not be examined against the other to convict him of an offense, unless the party examined confess himself guilty, and then he shall be admitted.

9 Dec. 15 Car. 2. at Newgate, Henry Trew was indicted of burglary, and by advice of Keeling chief justice, Brown justice, and Wilde recorder, Perrin that was in goal for two other robberies, and confessed himself to be in this burglary, was sworn as a witness against Trew, but he was not indicted of the burglaries or robberies.
Ex libro Bridgman.

10 Dec. 1662. Tonge, Philips, and others(r) were indicted for treason for compassing the king's death, the question was, whether those, that were parties in the compassing, which were not yet pardoned, nor indicted, might be produced as witnesses, namely Riggs and others; and upon conference with all the judges these points were resolved.

(n) *Dalt. Just. N. Edit. p. 341.*

(o) *Co. Lit. 6. b.*

(p) *Cra. Car. 134. 147. W. Jones 198.*

(q) *Lib. II. cap. 56. p. 145. a.*

(r) *Keel. 17. State Trials, Vol. II. p. 488.*

1. That the party to the treason, that confessed it, may be [304] one of the two accusers or witnesses in case of treason, for the statute intended two such witnesses, that were allowable witnesses at common law, and so may a *particeps criminis* be admitted as a witness, and was admitted to give evidence to the jury; but the jury may, as in other cases, consider of the evidence and credit of the witnesses, but he is sufficient to satisfy the statute.

2. That the confession before one of the privy council or a justice of the peace being voluntary made without torture is sufficient as to the indictment or trial to satisfy the statute, and it is not necessary, that it be a confession in court; but the confession is sufficient, if made before him that hath power to take an examination.[6]

3. The king having promised a pardon to *Riggs*, if he would discover the plot, he performed that part by his discovery; and this was held by all no impediment to his testimony, for the promise was not

[6] Though the modern cases are contradictory, none of them have followed to its full extent the doctrine of this resolution. On the trial of the rebels in 1746, the judges admitted the confessions of the prisoners to be given in evidence against them upon proof by two witnesses. *Fost.* 10. *Greg's case*, 1 *East. P. C.* 134. At a conference preparatory to the trial of *Francis*, in the year 1716, it was agreed that the confession which the acts of *Edw. VI.* intended to except, was only a confession upon the arraignment of the party, which amounts to a conviction; that the design of those acts was merely to prevent any other confession from operating as a conclusion and absolute conviction; but that in all cases the confession of a criminal may be given in evidence against him; and that in case of treason, if such confession be proved by two witnesses, it is proper evidence to be left to a jury. *Id.* 133. *Fost.* 241. In *Willis's case*, 8 *St. Tr.* 250. a witness was called to prove what the prisoner said to him touching the share he had in the treason; it was objected that no confession, unless it be made in open court, ought to be admitted; but the judges were clear that such a confession was admissible, and would go in corroboration of other evidence to the overt acts. Though it might be still a disputable point, whether a confession out of court proved by two witnesses, was of itself sufficient to convict. Upon this point *Ward*, C. B. observed, "a confession shall not supply the want of evidence, there must be still two witnesses to the treason. But to say it shall not be given in evidence, there is no ground for it." And the Sol. Gen. Sir *Robert Eyre*, admitted that the prisoners should not be convicted on a trial, without two lawful witnesses, that was the thing provided for. That it was to exclude a precedent that had been settled in *Tong's case*, but it was not designed to exclude all confessions. That they were evidence at law and always must be so. That the design of the act was to exclude confessions from having the force of a conviction, unless it were in a court of record; and to prevent a confession proved by two witnesses from being a sufficient ground for a conviction. See *Vaughan's case*, 5 *St. Tr.* 38. *Salk.* 634. *Case of Smith*, alias *May*, *Fost.* 242. In *Berwick's case*, *Fost.* 11. Lord C. J. *Willie & Mr. J. Abney* thought that a confession after the fact proved by two witnesses, was sufficient to convict under the 7 *Will.* 3. *Foster*, J. doubted; he was clear that it might be given in evidence as a corroborating proof. His doubt was, whether it being proved by two witnesses, is a conclusive evidence, or an evidence sufficient of itself to convict without other proof; since the 7 *Will.* 3. seems to require two witnesses to overt acts, or a confession in open court. The words "open court" are omitted in both of the acts of *Edw. VI.*; they were inserted in the 7 *Will.* 3. in order to carry the necessity of two witnesses to the overt acts further than the statutes of *Edw. VI.* were thought to carry it. *Fost.* 240. see 1 *East*, *P. C.* 131 et seq.

The Constitution, Art. 3. Sect. 3. and Sect. 1. of the act of 30 April, 1790, require the confession to be made in open court. It was held in the *Tr. of Fries*, 171, 176, 206, that the confession of the prisoner, although proved by two witnesses, if made out of court, is not of itself sufficient to convict; though it might be received as corroboratory proof of the intent or *quo animo*; or by way of confirmation of what has been before sworn to. See *Resp. v. Roberts*, 1 *Dall.* 40. *Resp. v. McCarty*, 2 *id.* 86.

applied to witnessing against any other; but two justices(s) held, that if the king promised a pardon upon condition, that he would witness against any others, and that being acknowledged by *Riggs* when he took upon him to give evidence, &c. that will make him incapable to give evidence, because he swears for himself:(t) but in this point the greater number were of a contrary opinion,(u) *ex libro Bridgman verbatim*, and I remember the consultation and resolution accordingly.

And accordingly at the sessions of *Newgate* 1672. *Mary Price* was convicted of treason in clipping the current money of *England* by the testimony of those, that were *participes criminis*,(x) namely *Throgmorton* and others, who brought her broad money upon allowance of 10*l. per Cent.* and carried off the clipt money into their master's cash.

The like conviction was in the same year of *Hyde* and others of robbery upon the highway by one that was a party [305] in the robbery, but not indicted.

But in these and the like cases, 1. The party that is the witness, is never indicted, because that doth much weaken and disparage his testimony, but possibly not wholly take away his testimony. 2. And yet, tho such a party be admissible, as a witness in law, yet the credibility of his testimony is to be left to the jury, and truly it would be hard to take away the life of any person upon such a witness, that swears to save his own, and yet confesseth himself guilty of so great a crime, unless there be also very considerable circumstances, which may give the greater credit to what he swears.

If *A. B.* and *C.* be indicted of perjury on three several indictments concerning the same matter, *A.* pleads not guilty, *B.* and *C.* may be examined as witnesses for *A.* for yet they stand unconvicted, altho they are indicted, 19 *Car.* 1. *B. R. Bilmore's* case.

By the statute of 1 & 2 *P. & M. cap.* 14. justices of peace ought to examine the party and take informations touching offenses brought before them, and certify them at the next goal-delivery.

Tho justices of peace cannot hear and determine treason by virtue of their commission of the peace, no nor take an indictment of it, yet they may take examinations and informations touching such offense of the party brought before them, and certify them according to that statute; and those informations taken upon oath, as they ought to be, and sworn to, by the justice or his clerk, that took them, to be truly taken, may be read in evidence against the prisoner, if the informant be dead, or not able to travel, and sworn so to be; yea by some opinion, if he were bound over and appear not, they may be read, which seems to be questionable.

(s) These were our author and *J. Brown*.

(t) *Vide postea part. 2. cap.* 27.

(u) Of this contrary opinion was the court in the case of *Christopher Laver*, *Mich.* 9 *Geo. I. B. R. State Tr. Vol.* VI. p. 259.

(x) But it does not appear in this case, whether they were promised a pardon or not; the like resolution was in the case of *Joseph Clark* for coining 16 *Car.* 2. see *Kel.* 33. but in that case the witness had actually obtained a pardon.

And in such case information upon oath taken before justices of the peace of one county may be transmitted before justices of goal-delivery of that county, where the offense was committed, *viz.* if the offender were brought before that justice; *quære tamen*, be-
 [306] cause the offense was out of his jurisdiction; yet *vide Dalt. cap. 111. p. 299. accordant.(y)*

He, that hath a remainder expectant upon an estate tail, shall not be allowed as a witness, and so ruled, but a disseisor may be a witness to a deed made to the tenant. 12 *Ass.* 12.

Mich. 1652. A commission issued to examine the validity of a marriage supposed to be done by force, and upon *that* a divorce was had: an indictment was against *Welsh*, that married the woman, the depositions in the cause of divorce were offered to prove the force, but rejected, because in a suit of another nature and jurisdiction, *Welsh's case*.

A man convict of conspiracy, perjury, or forgery is not a lawful witness. *Crompt. de pace regis* 127. *b.* *Dalt. cap. 111.(z)* but if he be pardoned, it seems he may be a witness.

And thus far concerning the capacity or incapacity of the witnesses.

2. In relation to the manner of their testimony, the opinion in *Dyer* of a witness by hearsay 1 *Mar. Dy.* 99. *b.* was rejected by all the judges in the lord *Lumly's case*, *H.* 14. *Eliz. Co. Pla. Cor.* 25. but if it be a hearsay from the offender himself confessing the fact, such a testimony upon hearsay makes a good witness within the statute.

The information upon oath taken before a justice of peace may make a good testimony to be read against the offender in case of felony, where the witness is not able to travel, yet in case of treason, where two witnesses are required, such an examination is not allowable, for the statute requires, that they be produced upon the arraignment in the presence of the prisoner to the end that he may cross examine them. [7]

(y) *N. Edit. cap. 164. p. 544.*

(z) *p. 542.*

[7] By the Act of 7 & 8 *Will. 3. c. 3. s. 8.* no evidence shall be admitted or given of any overt act that is not expressly laid in the indictment. This does not prevent overt acts not laid from being given in evidence, if they be direct proof of any of the overt acts which are laid. *R. v. Rookwood*, 4 *St. Tr.* 661. 697. *Holt*, 683. also, 4 *St. Tr.* 722. 731. 6 *id.* 282. *Fost.* 9. 22. 245. *R. v. Watson*, 2 *Stark. n. P.* 134. The evidence must be applied to the proof of the principal treason; for the overt act is the charge to which the prisoner must apply his defence. And whether the overt act proved be a sufficient overt act of the principal treason laid in the indictment, is matter of law to be determined by the court. *Arch. C. P.* 461. If any overt act be proved against the prisoner in the proper county, acts of treason tending to prove such overt act, though done in another county, may be given in evidence. *Fost.* 9. 22. 4 *St. Tr.* 627. 655. 6 *id.* 292. 8 *id.* 218. 9 *id.* 558. 580. 8 *mod.* 91. 1 *East, P. C.* 125. *Resp. v. Malin*, 1 *Dall.* 35. 1 *Burr's Tr.* 48. If the treason consist of a conspiracy, any act of the defendant's accomplices, done in furtherance of the common design, although not laid as an overt act in the indictment, may be given in evidence, provided it be direct proof of an overt act laid. *R. v. Hardy*, 1 *East, P. C.* 98. *R. v. Stone*, 6 *T. R.* 527. Lord *Levat's case*, 9 *St. Tr.* 670. When several overt acts are laid, proof of any one of them will main-

And thus much concerning the statutes in the time of *Edward VI.* and evidence upon indictments, I shall only add this.

In civil actions, as trespass against *A. B.* and *C.* if no evidence be given against any one to prove him guilty, he may be examined on the part of the defendant, and stands as a competent witness; and I see no reason, why if two or three persons be [307] indicted, and no evidence given against one or more of them, but that he may be a witness for the other; but otherwise it is, if there be but a colourable evidence against him. (†)

(†) Our author should here have proceeded to his fourth general head, and have shown, what would be a confession within this statute of 5 & 6 *Ed. 6. cap. 11.* but probably he thought *that* sufficiently done by the second resolution in *Tonge's* case mentioned by him, p. 304.

CHAPTER XXV.

CONCERNING TREASONS DECLARED AND ENACTED FROM 1 MAR. TILL THIS DAY, VIZ. 13 CAR. 2.

I COME to the statutes concerning treason in the times of queen *Mary*, queen *Elizabeth*, and so downwards.

The first statute in this period is 1 *Mar. cap. 1.* consisting of three clauses.

1. "That no act, deed or offense being by act of parliament made treason, petit treason, or misprision of treason, by words, writing, cyphering, deeds, or otherwise whatsoever, shall be taken, had, deemed, or adjudged to be high treason, petit treason, or misprision of treason, but only such, as be declared and expressed to be treason, petit treason, or misprision of treason, in or by the act of parliament of 25 *E. 3.* touching treason or the declaration of treasons, and none

tain the count, provided the overt act so proved is a sufficient overt act of the species of treason charged in the indictment. *Fost.* 194. If the overt act be laid with circumstances not necessary to constitute the act of high treason, they need not be proved, but may be regarded as surplusage. *Lowick's case*, 4 *St. Tr.* 722. When words of incitement have reference to an act, after giving evidence of the words, you may give evidence of the act, in order fully to explain them. *R. v. Lord George Gordon*, *Dougl.* 590. The intention may possibly be gathered at the place where the act was committed, or it may not; if not, evidence is admissible to prove it elsewhere. *Tr. of Fries*, 175. In order to maintain a count for levying war, evidence must be given to prove a war actually levied, and not merely a conspiracy to levy war. 1 *Hawk. c.* 17. s. 27. The fact that the persons adhered to being enemies, may be proved by the proclamation of war; or public notoriety is sufficient evidence of it. *Fost.* 219. The time at which the overt acts are alleged to have been committed need not be proved as laid; it is enough if they be proved to have been committed at any time within three years before the finding of the indictment. *R. v. Charnock*, *Salk.* 288. *R. v. Lord Balmarino*, 9 *St. Tr.* 589. *R. v. Townly*. *Fost.* 7. 1 *East, P. C.* 125. On motion to commit, no evidence of a treasonable intent will be received, till the fact of treason having been committed is first proved; but it is otherwise on the trial of an indictment for treason. 1 *Burr's* 96. 469. See 1 *East, P. C.* 96. 115, *Tucker's Bl. Com. Apdx.* 41. *Fost.* 362. *Davis' Virg. C. L.* 56.

other, nor that any pains of death, penalties, or forfeitures in any wise ensue or be to any offender or offenders for doing or committing any treason, petit treason, or misprision of treason, other than such as be in the said act ordained and provided, any statute made [308] before or after the said 25th year of *Edward III.* or any declaration or matter to the contrary notwithstanding.

2. "That no advantage be given by this act to any person arrested or imprisoned for treason, petit treason, or misprision of treason the last day of *September* last past, or heretofore indicted or outlawed, or attainted of treason, &c. or excepted out of the queen's pardon.

3. "That all offenses made felony, or appointed to be within the case of *præmunire* by any statute since the first day of the first year of king *Henry VIII.* (not being felony or within the case of *præmunire* before) and all and every branch, article, clause mentioned or declared in the same statutes concerning making of any offense felony, or within the case of *præmunire*, and all pains and forfeitures concerning the same, or any of them, shall be from henceforth void and repealed."

This excellent law at one blow laid flat all those numerous treasons, misprisions, &c. at any time enacted since 25 *E. 3.* and all felonies and *præmunires* enacted in or after 1 *H. 8.*

As touching the first of these.

1. Hereby all those numerous treasons newly enacted in any former king's time since 25 *E. 3.* a catalogue of most of which is before given, are wholly taken away.

2. Hereby all those treasons, that were declared treasons, so far forth as those treasons had their strength from such declarations, and were not really within the statute of 25 *E. 3.* are wholly taken away, and left purely to be determined according to the statute of 25 *E. 3.* and so far forth and no farther, than that statute warranteth.

And therefore the declaration of 3 *R. 2.* touching the killing of an ambassador, namely *John Imperiall*, the declaration of 3 *H. 5.* concerning clipping and impairing of coin, the declaration of *Mortimer's* treason in breaking prison 2 *H. 6.* and all others of that kind are now wholly put out by this statute, *Coke* upon the statute *de frangentibus prisonam*, (a) tho it is true, that it appears by 1 & [309] 2 *P. & M. cap. 11.* they thought that clipping and impairing of money had remained treason by the declarative law of 3 *H. 5.* but the statute of 5 *Eliz. cap. 11.* hath declared the contrary, and put that out of question.

3. But it repeald not the forfeitures for old treasons, tho those forfeitures were enacted by statutes made after 25 *E. 3.* and therefore the forfeiture of estates-tail for treason given by 26 *H. 8.* continues notwithstanding this statute, *Co. P. C. p. 19.* and so it was resolved by all the judges of *England* in the lord *Sheffield's* case, (*)

(a) 2 *Co. Instit.* 590.

(*) *Palm.* 351. *W. Jones*, 69.

Stamf. 187. *b.* 12 *Eliz. Dy.* 289. the reason is before given; *cap.* 23. *p.* 241. for the relation of the repealing clause is only to *treasons* not contained in 25 *E.* 3. not to *forfeitures* not contained in 25 *E.* 3. for indeed 25 *E.* 3. creates no forfeitures, but only declares what the common law was, and enacts no farther touching forfeitures.

4. But this act did not meddle with those new laws, that directed special proceedings, trials, &c. or other matters of that nature relating to treason, but that was done after by 1 & 2 *P. & M. cap.* 10. *de qua postea.*

5. The preamble is very considerable, which takes notice of the severity of former statutes, that made words only without other fact, or deed, to be high treason, which was one of the causes of this general repeal.

Touching the second clause, as is before observed in the precedent chapter, the repeal by 1 *Mar.* had discharged all offenses committed before that repeal against the statutes repealed, if it had not been specially provided to the contrary by the proviso of this act touching persons formerly indicted.

Now as to the third clause, it also took away all new felonies made since the first day of the reign of *Henry VIII.* but whether either of these clauses of repeal did take away those previous punishments, which for the first offense was made forfeiture of goods, and the second or third offense made treason, whether, I say, this statute took away those penalties, which were less than felony or treason in the first or second offense, or only those punishments which were made treason or felony, may be a question; as for instance, that of 1 *E.* 6. *cap.* 12. the 5th clause, [310] which makes certain offenses by words punishable with forfeiture of goods for first offense, loss of profits of lands for second offense, and treason for the third offense; whether this statute extends to successors, and (tho the penalty of treason for the third offense be repealed by this act) whether the penalties for the first and second offenses be repealed, seems to me doubtful; I rather think they are not.

And now this act having laid all former new treasons, felonies, and misprisions flat, and reduced all to the standard of 25 *E.* 3. the necessity of state and public peace puts the queen and her parliament nevertheless to begin new provisions.

1 *Mar. sess.* 2 *cap.* 6. "If any person shall falsely forge or counterfeit any such kind of coin of gold or silver, as is not the proper coin of this realm, and is or shall be current within this realm by the consent of the queen, her heirs or successors, or if any person do falsely forge or counterfeit the queen's sign manual, or privy signet, or privy seal, then every such offense shall be adjudged high treason, and the offenders, their counsellors, procurers, aiders and abettors judged traitors against the queen, her heirs and successors, and suffer and forfeit as in high treason."

Concerning this statute much hath been said before.

1. It is a perpetual act, and not personal only to the queen, for as

the word *king* may include a successor, so the word *queen* may include a succeeding king or queen, and that it was so intended here is apparent by the words in the conclusion *shall be adjudged traitors against the queen, her heirs and successors*; and accordingly it hath been often resolved.

2. That the foreign coin (the counterfeiting whereof is made treason by this act) must be such, as is so made current by proclamation, for by the statute of 17 R. 2. cap. 1. foreign coin is not to run in payment in *England*, and therefore there must be an act under the great seal, as all proclamations ought to be, before it can be current within this statute: *vide accordant statut. 5 Eliz. cap. 11. and 18 Eliz. cap. 1.*

3. It must be a counterfeiting of that foreign coin, which [311] is stamped in *gold or silver, viz. the greatest part gold, or the greatest part silver, for denominatio fit a maiore parte*; therefore if there be a foreign coin of copper, or brass and copper, it is not within this statute, but it is not necessary, that the counterfeit of it must be gold or silver, for if that be copper gilt, or alchymy after the similitude of foreign coin of gold or silver, it is within this act, because the prototype is a coin of gold or silver.

1 Mar. sess. 2. cap. 12. The act against riotous assemblies is the very same in substance with that of 3 & 4 E. 6. cap. 5. only changing treason into felony within clergy, and *nota bene* the power given to suppress such assemblies by force, and indemnifying the suppressors, tho some of the rioters be killed: this act was continued by 1 Eliz. cap. 16. during that queen's life, and till the next session after, and then expired. (b)

1 & 2 P. & M. cap. 3. "If any person shall maliciously and of his own imagination speak any false, seditious and slanderous news, rumors, sayings, or tales, of the king or queen, then the person being convict and attainted, as in the act is expressed, shall be set upon the pillory and have both his ears cut off, unless he pay one hundred pounds, and suffer three months imprisonment; and if it be of the reporting of any other, then to stand on the pillory and lose one of his ears, unless he pay one hundred marks within one month after judgment, and suffer one month's imprisonment.

"And if any shall maliciously devise, write, print, or set forth any writing containing any false matter of slander, reproach, or dishonour to the king or queen, or to the encouraging, stirring or moving of any insurrection or rebellion within this realm or the dominions thereof, or shall procure the same to be written, printed, or set forth (the said offense not being punishable as treason within the statute of 25 E. 3.) the offender shall for the first offense have his right hand stricken off.

"The second of any of these offenses after a former conviction [312] is made punishable with loss of goods and perpetual imprisonment: justices of assise, &c. shall have power

(b) But a new act to much the same purpose was made, 1 Geo. 1. cap. 5. which is perpetual.

to hear and determine offenses, &c. and to commit persons suspected without bail; no person impeachable for words, unless convict within three months after the offense: peers to be tried by their peers."

Upon this act these things are observable: 1. That the law-makers did not take seditious words to be within the statute of 25 *E. 3.* for then they would have added the same clause as in the other case, *viz. (not being treason within the statute of 25 E. 3.)* Again, 2. That they did take it, that some seditious writings might be treason within the statute of 25 *E. 3.* for it is an overt-act, as hath been formerly observed.(†) 3. That as some writings exciting insurrection *might be* treason within the statute of 25 *E. 3.* so some writings, that might possibly by construction have the same effect, *might not be* within that statute, for the law-makers cannot be supposed to intend to make any thing, that was treason within the statute of 25 *E. 3.* to be less than treason; and by consequence and consequential illation many things might by a witty advocate be construed and heightened to be to move insurrection and rebellion, which immediately, and in their own nature, nor in the intention of the writer, were never so intended; this statute died with the queen, but was revived 1 *Eliz. cap. 6.* during that queen's life.

1 & 2 *P. & M. cap. 9.* "If any by express words or sayings have prayed, or shall pray, that God would shorten the queen's life, or take her out of the way, or any such like malicious prayer amounting to the same effect, they, their procurers and abettors shall be adjudged traitors.

"But as to any the offenses aforesaid perpetrated during that session of parliament, if the offenders shall show themselves penitent upon their arraignment, no judgment of treason shall be given against them, but a lesser punishment may be inflicted."

So that they took not this to be a treason within the statute of 25 *E. 3.* neither is it thought to be a very great [313] offense, for it is an appeal to God, who we are sure is not moved by such wishes and prayers contrary to his own command, *Thou shalt not curse the ruler of thy people*, *Exod. xxii, 28.*

1 & 2 *P. & M. cap. 10.* consisteth of several remarkable clauses.

1. "If any during the marriage between the king and queen shall imagine to deprive the king from having jointly with the queen the style, honor, and kingly name of the realms and dominions belonging to the queen, or to destroy the king during the matrimony, or to destroy the queen, or the heirs of her body, being kings or queens of this realm, or to levy war within the realm or marches of the same against the king during the marriage, or against the queen or any of her said heirs, kings or queens of this realm, or to depose the queen or the heirs of her body kings or queens of this realm from the imperial crown of this realm, and the said compassings maliciously, advisedly and directly shall utter by open preaching, express words or sayings, or if any person by express words shall maliciously,

advisedly, and directly declare or publish, that the king during the marriage ought not to have jointly with the queen the style, honor and kingly name of this realm, or that any person, being neither the now king or queen, during the marriage between them ought to have the style, honor and kingly name of this realm, or that the now queen is not, or of right ought not to be queen of this realm, or after her death the heirs of her body, being kings or queens of this realm, ought not so to be or to enjoy the same, or that any person, other than the queen during her life, or after death, other than the heirs of her body, as long as one of the heirs of her body, shall be in life, ought to be queen or king of this realm, then every such offender shall lose to the queen all his goods and chattles, and forfeit the issues of his lands during his life, and have perpetual imprisonment; the second offense after a former conviction shall be treason.

2. "And if any by writing, printing, overt-act, or deed [314] shall maliciously, advisedly and directly utter the things aforesaid, then they, their abettors, procurers, counsellors, aiders, and comforters knowing the said offense to be done, and being thereof convicted and attainted by the laws and statutes of this realm, shall be adjudged high traitors, and forfeit their goods, lands and tenements to the queen, her heirs and successors, as in case of high treason.

3. "Provision for the government of the queen's children.

4. "If any person, during the time that the king shall have the ordering of the queen's children, shall compass to destroy the king, or to remove him from the government of the said children, it shall be treason.

5. "That all trials hereafter to be had, awarded or made for any treason, shall be had and used only according to the due order and course of the common laws of this realm, and not otherwise, saving to all persons, (other than the offenders and their heirs, and such persons as claim to any of their uses,) all such rights, titles, interests, possession, leases, &c. which they had at the day of the committing of such treasons, or at any time before, as if this act had never been made.

6. "Concealment of any high treason shall be adjudged only misprision of treason, and to forfeit and suffer as in case of misprision notwithstanding this act.

7. "Trial by peers is saved in treason or misprision of treason.

8. "None to be impeached for words, unless indicted within six months after the offense.

9. "Witnesses examined to or deposing any treasons in this act, or at least two of them shall be brought forth before the party arraigned, if he require the same, and say openly in his hearing what they can say against him concerning the treasons in the indictment, unless the party arraigned shall willingly confess the same upon his arraignment.

10. "In all cases of high treason concerning coin current [315] within this realm, or counterfeiting the king's or queen's

signet, privy seal, great seal, or sign manual, such manner of trial, and no other, shall be observed and kept, as heretofore hath been used by the common laws of this realm, any law, statute or other thing to the contrary notwithstanding.

“The counsellors, procurers, comforters, and abettors for the first offense to suffer as the principal in the first offense, and procurers, comforters and abettors for the second offense to forfeit as the principal in the second offense.”

This statute for so much as concerns the forfeiture or punishment inflicted for words, &c. and likewise the treasons newly enacted was but temporary, and died when the queen died without issue.

But there is still observable,

1. The great distinction, that was used between words and writing; those very things, which written were made in the first offense *treason*, being only spoken were in the first offense *but misdemeanor*, altho many of the words there mentioned sounded high, as namely that the queen is not or ought not to be queen, but some person else, whereby we may gather the opinion of parliaments in those times, that regularly words, tho of a high nature, were not treason, nor an overt-act of compassing the king's death.

The second thing observable is, that here are some treasons newly enacted, which yet were treasons within 25 E. 3. as compassing to destroy and depose the queen, and declaring the same by writing or overt-act; and therefore this clause was omitted in the statute of 1 Eliz. cap. 6. and left to the statute of 25 E. 3.

The 3d thing observable herein is, that the queen's husband is not within the act of 25 E. 3. therefore it was necessary to have an act of parliament for the securing of him, who was only the queen's husband.

4. That tho there was a communication of the regal title to the queen's husband, yet even that could not have been but by act of parliament, and yet no more is communicated, but the title and name, not the authority and rule of a king of [316] *England*.

The fifth clause concerning restoring of trial of treason according to the course of the common law is of great consequence and use, and is perpetual.

1. By this clause of the statute as to the case of high treason, the statutes of 27 E. 3, cap. 8. 28 E. 3. cap. 13. 8 H. 6. cap. 29. for trial of an alien *per medietatem lingue* are wholly repealed, and the trial shall be by *Englishmen*, 1 Mar. Dy. 144: *Shirty's case*, H. 36 Sliz. Dr. Lopez's case[1] ruled *per omnes justiciarios*. Co. P. C. p. 27.

2. The trial of a lunatic without issue joined by 33 H. 8. cap. 20. and in a foreign county by 33 H. 8. cap. 23. and for treasons in *Wales* 26 H. 8. cap. 6. 32 H. 8. cap. 4. are all repealed by this statute. Co. P. C. p. 24, 27.

3. But whether the statute of 1 E. 6. and 5 & 6 E. 6. concerning

[1] There is an account of Dr. Lopez's treason in *Lord Bacon's Works*, 2 vol. p. 216.

two witnesses be hereby repealed *vide supra p. 298.* only the 9th and 10th clauses of this statute seem strongly to imply, that this statute intended the repeal of it, for otherwise why should that special provision be added in this statute, for at least two of the witnesses formerly examined to repeat their testimony to the prisoner, if he desires it, when the statute of 5 & 6 *E. 6.* had more effectually provided for the same thing.

4. But the statute of 28 *H. 8. cap. 15.* concerning the trial of treason committed upon the high sea is not repealed, nor the statute of 35 *H. 8. cap. 2.* for trials of treasons out of the realm, because there was no way regularly appointed at common law for the trial of those treasons being done out of the bodies of counties; but it seems the trial of treasons committed in any place in rivers, or parts within the bodies of counties, tho the admiral claimed jurisdiction there, is restored to the common law, where it was originally triable.[2]

Neither doth the act extend to petit treason, for treason generally spoken is intended of high treason; therefore the trial, as to that, stands in the same manner, as it was before the making of that act.

5. Peremptory challenge in case of high treason is restored [317] by this act, and the statute of 33 *H. 8. cap. 23.* as to that point repealed, *vide accordant Co. P. C. p. 27. & libros ibi;* so that at this day he may challenge thirty-five, *viz.* under three juries peremptorily. *Co. P. C. ibidem.*

1 & 2 *P. & M. cap. 11.* "Whosoever shall bring from the parts beyond sea into this realm, or into any of the dominions of the same, any false and counterfeit money, being current within this realm by the sufferance and consent of the queen, knowing the same coin to be false and counterfeit, to the intent to utter or make payment with the same within this realm, or any of the dominions of the same, by merchandizing or otherwise, the offenders, their counselors, procurers, aiders and abettors in that behalf, shall be adjudged offenders in high treason, and after lawful conviction shall suffer and forfeit, as in cases of high treason.

"If any be accused or impeached of any offense within this statute, or of any other offense concerning the impairing, forging, or counterfeiting any coin current within this kingdom, he shall be indicted, arraigned, tried, convicted, or attainted by such like evidence, and in such manner and form, as hath been used and accustomed within this realm before the first year of the reign of *Edward VI.* any law, statute, &c. to the contrary notwithstanding."

Upon this statute several things are observable.

1. That the foreign coin in this case must be such, as is made current in this realm by the consent of the queen, which cannot be without proclamation by writ under the great seal, as hath been before said *p. 213 & 310.*

2. That the party, that brings it in, must know it to be counterfeit.

[2] 1 *East P. C.* 103.

3. That it must be brought into the king's dominions from some place, that is out of the king's dominions, and therefore the importation out of *Ireland* is held not to be an importation, within this statute, for that is within the dominions of this realm, tho not within the realm. [3] 3 *H.* 7. 10. & *vide supra cap.* 20. *p.* 225. *Co. P. O.* *p.* 18.

4. It must be brought with an intent to merchandize or make payment within this realm, and this intent may be [318] tried by circumstances, tho the offender hath not yet actually made payment or merchandize with it: *vide antea p.* 229.

5. This is a new law, for the statute of 4 *H.* 7. *cap.* 18. whereby it was formerly enacted, is repealed by 1 *Mar. cap.* 1.

6. It is a law perpetual, tho it speaks only of coin made current by the consent of the king and queen our sovereign lord and lady, and so it hath been still taken.

7. That at this time it was taken, that impairing of the coin current within this realm was treason as to the proper coin of this realm by force of the declarative law of 3 *H.* 5. *cap.* 6. and that this was not repealed by 1 *Mar. cap.* 1. for there was no other law in force newly enacted for making impairing of the coin treason between 1 *Mar. cap.* 1. and 1 & 2 *P. & M. cap.* 11. but this error is reformed by the declaration of 5 *Eliz. cap.* 11.

8. That without any difficulty in the case of counterfeiting coin current in this kingdom there is no necessity of two witnesses, neither upon the trial nor upon the indictment, so that questionless, as to this treason, the clause of the statutes of 1 and 5 *E.* 6. concerning two witnesses is wholly repealed, for the statute saith, he shall be *indicted, &c.* the omission of which word in the general clause of 1 & 2 *P. & M. cap.* 10. which concerns treasons in general, is that which gave the great countenance to that opinion of my lord *Coke*, that in other treasons there must be two witnesses upon the indictment, tho that statute, as to the trial, remitted the course of the common law.

I come now to the time of queen *Elizabeth*.

The statutes, that concern treason, I shall range in three ranks: 1. Such as more immediately concern the safety of the queen's person. 2. Such as concern the money of the kingdom. 3. Such as concern the safety of the queen's government in relation to papal usurpations and matter of religion.

I. I begin with the first rank, such as concern more immediately the safety of the queen's person.

1 *Eliz. cap.* 5. The statute of 1 & 2 *P. & M. cap.* 10. is recited, and that *that* statute extended only to queen [319] *Mary* and the heirs of her body, the very same statute in effect is enacted over again, only with an application thereof to queen *Elizabeth*, and the heirs of her body, and almost all the same clauses are over again, except *that* which concerns the trial of

treason according to the common law, and the clause of compassing to destroy the queen, and manifesting the same by writing or overt-act; two witnesses are required to the indictment and arraignment of the prisoner: this act expired upon the queen's death without issue.

1 *Eliz. cap. 6.* The statute of 1 *Mar. sess. 2. cap. 3.* concerning seditious and false rumours is revived, as in relation to queen *Elizabeth*, under the same pains and penalties, as are therein contained, as tho the same act had extended to the heirs and successors of queen *Mary*, any doubt to the contrary notwithstanding; but this was personal to the queen and the heirs of her body, and was repealed by 23 *Eliz. cap. 2.*

13 *Eliz. cap. 1.* "If any person during the natural life of the queen shall, within the realm or without, compass or imagine the death or destruction, or bodily harm tending to death or destruction, maiming or wounding of her person, or to deprive or depose her from the style, honour, or kingly name of the crown of this realm, or of any other realm or dominion belonging to her majesty, or to levy war against her majesty within the realm or without, or to move or stir any foreigners with force to invade this realm, or any other her majesty's dominions being under her obeysance, and such compasses, imaginations, devices, or intentions, or any of them shall maliciously, advisedly, and directly publish, hold opinion, affirm or say by any speech, express words or sayings, that the queen during her life is not, or ought not to be queen of this realm of *England*, and also of *France* and *Ireland*, or of any other her majesty's dominions being under her obeysance during her life, or shall by

[320] writing, printing, preaching, speech, express words or sayings, maliciously, advisedly, and directly publish and affirm, that the queen is an heretic, schismatic, tyrant, infidel, or usurper of the crown, every such offense shall be taken, deemed, and declared by authority of this parliament to be high treason; and the offenders, their abettors, counsellors and procurers, and the aiders and comforters of the same offenders, knowing the same, being indicted, convicted, and attaint according to the usual order and course of the common law, or according to the act of 35 *H. 8.* for trial of treasons out of the realm, shall be deemed traitors, and suffer and forfeit as traitors.

2. "If any person of any condition, place, or nation during the queen's life pretend, utter, or publish themselves, or any of them, or any other, than the now queen, to have right to enjoy the crown of *England* during the now queen's life, or shall during the queen's life usurp the crown, or the royal title, style or dignity of the crown of *England*, or shall during the queen's life, hold, or affirm, that the now queen hath not right to hold the said crown, realm, style, title, or dignity, or shall not, after demand made on the behalf of the queen, acknowledge effectually, that the now queen is true and rightful queen of this realm, they shall be disabled during their natural

lives only to enjoy the crown by succession after the queen's death, as if such person were naturally dead.

3. "If any person shall during the queen's life hold or affirm a right, interest or succession to the crown to be in any such claimer, usurper, or pretender, or not acknowledger after notification by proclamation of such claim, usurpation or pretense, such person shall suffer as a traitor.

4. "If any shall maintain, that the common laws, not altered by parliament, ought not to direct the right of the crown of *England*, or that the queen [*Elizabeth*] with and by the authority of parliament is not able to make laws of sufficient force to limit and bind the crown of *England*, and the descent, limitation, inheritance, and government thereof, or that this statute, or any statute to be made by authority of parliament with the queen's royal assent for the limiting of the crown to be justly in the queen's person is not, or ought not to be of sufficient force to bind, [321] limit, restrain, and govern all persons, their rights and titles, that in any way might claim an interest, or possibility in or to the crown of *England* in possession, remainder, inheritance, succession, or otherwise, every such person so holding, affirming or maintaining during the queen's life shall be judged a high traitor, and every person so holding after the queen's death shall forfeit all his goods and chattles.

5. "If any by writing or printing declare, before the same be declared and established by act of parliament, that any particular person ought to be right heir to the queen (except the natural issue of her body) or that shall print, set up, or sell such book, for the first offense he shall suffer one year's imprisonment, and forfeit half his goods, and for the second offense it shall be a *præmunire*.

6. "Trial of a peer by his peers is saved.

7. "Saves the right of all, other than the offenders and their heirs, claiming only as heir to the offender.

8. "Offender within the queen's dominions shall be indicted within six months, and out of the dominions within twelve months.

9. "No person to be arraigned for any offense within this act, unless it be proved by the testimony, deposition, or oath of two lawful and sufficient witnesses, who shall at the time of the arraignment of such person be brought before the party offending face to face, and there declare all they can say against the party arraigned, unless the party arraigned shall without violence confess the same.

10. "The aider or comforter of such, as shall affirm the queen a schismatic, heretic, tyrant, infidel, or usurper, shall for his first offense, knowing the same to be committed, incur a *præmunire*, and for his second offense, after conviction of the former, shall be a traitor.

11. "Provided, that giving charitable alms in money, meat, drink, apparel or bedding for sustentation of the body, or health of any offender in any offense, made treason or *præmunire*, [322]

during the time of his imprisonment, shall not be taken to be any offense."

Tho this act be antiquated by the death of queen *Elizabeth*, yet there are (as in other acts of this nature that are expired,) divers matters that are observable for the true understanding of the common law, and therefore I have repeated many acts of this nature at large.

1. This act doth contain and enact some treasons as new treasons, which certainly were treasons by the statute of 25 *E. 3.* as compassing to destroy or depose the queen, and manifesting the same by writing, printing, or overt-act; but it was thought or at least doubted, that manifesting the same barely by words were not within 25 *E. 3.* and it appears by the preamble, that this act was made to take away some doubts, as well as to provide new remedies.

2. It partly appears by this act, that the bare conspiracy to levy war was not treason by the statute of 25 *E. 3.* without a war levied, and accordingly it was resolved *P. 39 Eliz. Burton's case, Co. P. C. p. 10.* and therefore we are to be careful not to apply all convictions of treason in the queen's time, as judgments declarative of the statute of 25 *E. 3. de proditionibus*, because they were oftentimes indicted upon this statute in the queen's time, and the general conclusion of the indictment *contra formam statuti*, and sometimes generally *contra formam statut.* with an abbreviation was applicable to any statute then in force, which was most effectual to this purpose.

In *Anderson's reports, part. 2. n. 2.(c)* it appears that in 37 *Eliz.* divers apprentices were committed for great riots, divers other apprentices conspired to deliver them out of prison, to kill the lord mayor of *London*, to burn his house, to break open two houses near the *Tower*, where there were arms for three hundred men, and to furnish themselves; after which divers apprentices threw about libels moving others to join with them and to assemble at *Bunhill*, where divers to the number of three hundred assembled, where they had a trumpet and a cloke upon a pole instead of a flag, and as they were going towards the mayor's house, they were [323] met by the sheriffs and swordbearer, against whom the apprentices offered resistance.

It was resolved, that this was treason within the statute of 13 *Eliz.* for it was an intention to levy war, and altho they intended no harm to the person of the queen, yet because it concerned her in her office and authority, and was for such things, which the queen by law and justice ought to do, it was a levying war against the queen, and they were condemned and executed.

This proceeding was upon this statute, and yet perchance, the circumstances of the case wholly laid together, this might have been

an actual levying of war within the 25 E. 3. but they thought it safer to proceed upon this statute.

3. That, tho regularly words alone make not an overt-act of compassing of the queen's death, yet printing or writing may do it. *Co. P. C.* p. 12, 14. and therefore an act of parliament was requisite to make it an overt-act; yet observe how cautiously it is penned, *maliciously, advisedly, and directly, &c.* leaving as little, as possibly may be, to construction.

4. That defamatory words, tho of a very high nature, do not always make treason; there cannot be more venomous words ordinarily thought of, than to say, the queen was an *heretic, schismatic, tyrant, usurper*, yet an act of parliament was necessary to make it treason.

5. That to make a man a principal in treason by comfort or aid after the offense committed it must be *knowingly*, and therefore I never thought that opinion of *Stamford. fol. 41. b.* to be law, that a receipt of a felon after attainder in the same county made a person accessory without notice, because he is bound at his peril to take notice, that he was attainted, for it oftentimes lies as little in the knowledge of many persons, who are convict or attainted of felony or treason, as whether a man be guilty of it: *vide tamen Dyer 355.*

6. That regularly in a new treason the aiding and comforting of the traitors, knowing them to be such, makes a man guilty of treason, and therefore here is care by express provision to make the first offense a *præmunire*.

7. Here is great care to disable the heir to the crown from succeeding, if he usurp during the queen's life; but tho [324] all the care imaginable was there used, yet it hath been held, that by the accession of the crown to the person so disabled, all these disabilities have vanished, *vide 1 H. 7. 4. (d)* see *Mr. Plowden's* learned tract touching the right of succession of *Mary queen of Scotland.*

8. *Nota* concerning the power of the king to limit the crown by consent of parliament.

9. That they took the statutes of 1 and of 5 & 6 E. 6. concerning two witnesses to be determined, or at least not to extend to treasons afterwards enacted, for otherwise there needed not this special care and provision *de novo* for two witnesses.

10. That as the aiding or comforting of one, that speaks seditious words, made treason on the second conviction, must be for the second

(d) The words of that book, are, *That the king was a person able and discharged from any attainder eo facto, that he took upon him the government and the being king; so that it was not the bare accession or descent of the crown, but the being in actual possession of the regal government, which was construed to remove all disabilities; this case therefore is no argument that the statute of 13 Eliz. could not bar the right of the successor, and hinder him from succeeding, but only that if notwithstanding he should get possession of the government, that possession would purge all disabilities, which is just as much as to say, that he, who can get the power into his hands notwithstanding an attainder or act of parliament to the contrary, will not think himself bound by such attainder or act of parliament.*

offense, after a conviction of the former, so the second offense, tho committed after a former, is not treason, unless it be also committed after a former conviction: the like method is in forgery upon the statute of 5 *Eliz. cap. 14.* and generally that exposition holds in most cases, where the second offense is subjected to a severer punishment than the former, for it is intended of such offense committed after the conviction of a former, *Co. P. C. 172.*

11. It is provided that charitable relief shall not make a party guilty of treason or *præmunire*, as an aider or abetter: this was a necessary provision to avoid question.

Regularly relief by victuals or clothes of a felon or of a traitor, after he is in custody or under bail, makes not a man an accessory in felony, nor a principal in treason; but if he help him to [325] escape, that makes him an accessory in one case and a principal in the other, *Dalt. cap. 108. p. 286., (c)* and with this agrees this proviso in the case of high treason; but *nota* it extends no farther than during the time of his imprisonment, yet the law is all one, if he be under bail, for he is *in custodia* still, for the bail are in law his keepers, and he, that is delivered to bail in the king's bench, is nevertheless said to be *in custodia marescalli.*

14 *Eliz. cap. 1.* "If any person do within this realm, or elsewhere unlawfully, and of his own authority compass, imagine, conspire, practise, or devise by any ways or means with force, or by craft maliciously and rebelliously to take, detain or keep from the queen any of her towers, castles, fortresses or holds, or maliciously and rebelliously take, burn or destroy them, having any of the queen's munition in them, or being appointed to be guarded with soldiers within the queen's dominions, and the same compassing do advisedly by express words or deeds utter and declare for any the malicious or rebellious intents aforesaid, it shall be adjudged felony in the offenders, their aiders, comforters, counsellors and abettors without clergy.

"If any shall with force maliciously or rebelliously detain from the queen any of her majesty's castles, towns, fortresses or holds within any of her dominions, or any of her ships, ordinance or artillery, or munition of war, and not render the same within six days after proclamation, or wilfully or maliciously burn or destroy any of her ships, or bar any of her havens, this shall be treason."

This act to continue during the queen's life.

We may see by this act, that the opinion of the parliament in that time was, that this conspiring to take forts or ships by force or deceit was not treason; but indeed the actual taking them by force was levying of war against the king by the statute of 25 *E. 3.*

But if a man detains the king's town, or castle, or ships, and when any commissioned by the king demands the same, and it is refused to be delivered, and thereupon the king's commissioner [326] raiseth a power, makes an assault, and they within stand upon their guard, and repel force with force, this had been

treason within the statute of 25 *E. 3.* for it is a levying war, and so not a bare detaining; *quod vide Co. P. C. p. 10. bis in eadem paginâ.*

Again, if this detaining the king's castle or fort, or the castle of any other be barely such and without assault, yet if it be in compliance with a foreign enemy, or in confederacy with him, this is treason within the act of 25 *E. 3.* and an overt-act of adhering to the king's enemies; that therefore, which this act makes treason in detaining after proclamation, is a simple detaining without the concurrence of the circumstances above-mentioned, which was not treason before the making of this act.

14 *Eliz. cap. 2.* "If any person shall conspire, imagine, or go about unlawfully and maliciously to set at liberty any person committed by the queen's special command for any treason or suspicion of treason concerning the person of the queen before indictment of the person imprisoned, and such imagination or conspiracy shall set forth, utter or declare by express words, writing, or other matter, it shall be misprision of treasons; but if the party imprisoned be indicted of any treason concerning the person of the queen, it shall be felony so to conspire and declare such conspiracy, *ut supra.*

"If it be after attainder or conviction, then such conspiracy so declared as aforesaid shall be high treason:" this act to last during the queen's life.

These things are observable upon this act, 1. Here is no provision against the actual discharge or setting at liberty, neither needed it, for if the party committed had really committed treason, this was treason even within the statute of 25 *E. 3.* but if it were only a commitment for treason, but no treason committed by the person in custody, such delivery was not treason, as appears before *cap. 22.* But 2. The conspiracy to do this, tho manifested by open act, was neither treason, misprision of treason, nor felony; neither is it at this day, but only a bare misdemeanor punishable by fine and imprisonment, tho the party imprisoned were indicted, [327] yea attainted. And 3. This act extends only to such treasons as concerned immediately the queen's person, not to treasons touching her seal or coin.

And these are all the acts, that were made in the queen's time touching treasons; which more especially related to the safety of her person, all which expired at her death.

II. I come to those treasons, which were enacted in the queen's time concerning coin, and they are three.

5 *Eliz. cap. 11.* "Makes the filing, washing, rounding, and clipping of the coin of this realm, or foreign coin, made current by proclamation, for lucre or gain, and their counsellors, consenters, and aiders to be high treason by virtue of this act."

14 *Eliz. cap. 3.* "Makes the counterfeiting of foreign coin of gold or silver, not current within this realm, misprision of treason in the offenders, their procurers, aiders and abettors."

18 *Eliz. cap. 1.* "Makes the impairing, diminishing, falsifying,

sealing or lightning of the coin of this kingdom or foreign coin made current by proclamation for lucre-sake to be high treason in the offenders, their counsellors, consenters and aiders."

But of these sufficient hath been said before in the business of money, forfeiture and upon the statutes of 1 and 5 & 6 *E. 6.* The sum of which is this:

1. That the treasons made by the acts of 5 and 18 *Eliz.* are new treasons, newly made by virtue of this act, and every body is estopped to say the contrary by reason of the special recital and penning of this act, *viz. shall be adjudged treason by virtue of this act.*

2. That the foreign coin, the clipping and impairing whereof is made treason by this act, must be such as is made current by proclamation, for it cannot be otherwise current by reason of the prohibition of the statute of 17 *R. 2 cap. 1.* and also, the word *proclamation* in those acts refer to foreign coin so legitimated by proclamation, not to the proper coin of this kingdom, which needs not a proclamation to legitimate it.

3. The trial and whole proceeding is to be according to [328] the course of the law by the express words of these acts and of 1 & 2 *P. & M. cap. 11.* and therefore there need not two witnesses required by the acts of 1 and the 5 & 6 *E. 6.*

4. Not only the offenders themselves, but the counsellors, consenters and aiders are within those acts; but altho regularly in case of any old or new treason made; the comforters and receivers of the offender are impliedly guilty of treason by a kind of necessary comitance, yet it seems to me by the special penning of this act, it extends only to counsellors, aiders and consenters (according to the resolution in *Conyer's case, Dy. 296.*) as to the offenses made treason by those acts, tho possibly it may be treason, as to the receiver of a counterfeit within the statute of 25 *E. 3.* according to my lord *Coke's* opinion, *Ca. P. C. cap. 64. p. 138.* for that is an old treason, and no such restriction by express words to counsellors, aiders and assenters.

5. The clipping and impairing, that makes treason within these acts, must by the express words of the act be *for gain or lucre*, and so laid in the indictment.

6. Counterfeiting of coin not current to bring it within a *præmunire* by the statute of 14 *Eliz. cap. 3.* must be a counterfeiting of such foreign coin, as is of gold or silver, or consists thereof for the greatest part, and extends not to the foreign copper, or leather coin.

7. No corruption of blood or loss of dower are to be by attainders of these treasons.

III. Therefore I come to the third sort of statutes made in this queen's time, which relate to the queen's government, and especially in relation to papal usurpation.

1 *Eliz. cap. 3.* is an act of recognition of the queen to be rightful sovereign of this realm, and all acts repugnant thereunto are repealed; and *cap. 1.* the oath of supremacy is enacted to be taken by the

persons therein described: the tenor of which oath followeth in these words, viz.

"I *A. B.* do utterly testify and declare in my conscience, that the queen's highness is the only supreme governor of this realm, and of all other her highness's dominions and countries, as [329] well in all spiritual or ecclesiastical things or causes, as temporal, and that no foreign prince, person, prelate, state, or potentate hath or ought to have any jurisdiction, power, superiority, preeminence or authority, ecclesiastical or spiritual within this realm, and therefore I do utterly renounce and forsake all foreign jurisdictions, powers, superiorities and authorities, and do promise, that from henceforth I shall bear faith and true allegiance to the queen's highness, her heirs and lawful successors, and to my power shall assist and defend all jurisdictions, privileges, preeminences and authorities granted or belonging to the queen's highness, her heirs and successors, or united and annexed to the imperial crown of this realm." So help me God and by the contents of this book. (f)

Every person appointed to take the oath, and refusing, shall lose his offices and benefices, and be disabled to take any office or benefice, &c. and then proceeds to other penalties upon refusers.

And by that act it is enacted, "That if any person inhabiting within the queen's dominions shall by writing, printing, teaching, preaching, express words, deed or act advisedly, maliciously, and directly affirm, hold, stand with, set forth, maintain, or defend the authority, preeminence, power or jurisdiction, spiritual or ecclesiastical of any foreign prince, prelate, person, state or potentate whatsoever, heretofore claimed, used or usurped within this realm, or any dominion or country under the queen's obeysance, or shall advisedly, maliciously, and directly put in ure, or execute any thing for the extolling, advancement, setting forth, maintenance, or defence of any such pretended or usurped jurisdiction, power, preeminence or authority, or any part thereof, every person so offending, his abettors, aiders, procurers and counsellors, being convicted according to the course of the common law, shall for the first offense forfeit his goods and chattles, and, if not worth twenty pounds, [330] shall also suffer a year's imprisonment, and all his ecclesiastical benefices and dignities shall be void, and for a second offense committed after attainder of the first shall be within penalty of *præmunire*, and for the third offense committed after his second conviction, it shall be adjudged high treason."

None to be impeached for words only, unless indicted within a year after the offense committed; and if imprisoned, to be set at liberty, unless indicted within half a year after the offense; trial of a peer by peers.

None to be indicted, &c. without two witnesses, which if living shall be brought face to face before the prisoner upon his arraignment, and testify what they can say, if the prisoner require it.

(f) This oath, and this statute so far as relates to the said oath, are abrogated by a W. & M. cap. 8.

Giving of relief, aid or comfort to offenders shall not be punishable, unless proved by two witnesses, that he had notice of the offence at the time of such relief given.

5 *Eliz. cap. 1.* "If any person dwelling, inhabiting, or residing within the queen's dominions or under her obeysance, shall by writing, cyphering, printing, preaching, deed or act, advisedly and wittingly hold, or stand with, to extol, set forth, maintain or defend the authority, jurisdiction, or power of the bishop of *Rome*, or his see, heretofore claimed, used, or usurped within this realm or any dominion or country under the queen's obeysance, or by speech, open act or deed advisedly and wittingly attribute any such manner of jurisdiction, authority, or preeminence to the said see or bishop of *Rome* for the time being within this realm or any the queen's dominions, then every such person, their procurers, abettors and counsellors, and also their aiders, comforters and assistants upon the purpose aforesaid, to extol the authority of the bishop of *Rome*, being lawfully convicted within one year shall incur a *præmunire*.

It directs who shall take, and give the oath of supremacy.

Any person appointed to take this oath by this statute or the statute of 1 *Eliz.* who shall refuse to take the same, being [331] thereof lawfully indicted within one year, and convict or attain at any time after, shall incur a *præmunire*, 16 *R. 2.*

Certificate of refusal to be made into the king's bench within forty days after refusal; the king's bench may proceed to indict the party refusing within a year by a jury of the same county, where the court sits.

If any person convict of the offenses within the first clause of the statute shall after conviction thereof do the said offenses or any of them, or if any person appointed to take the oath, do after three months after the first tender refuse to take the same being tendered a second time, the offender shall suffer as in case of high treason.

Attainder of treason upon this act shall not make corruption of blood, disherit the heir, or forfeit dower.

Members of the house of commons shall take the said oath, otherwise shall be disabled to sit.

Temporal lords of parliament shall not be bound to take the oath, nor subject to the penalties for refusing the same.

The charitable giving of reasonable alms to an offender without fraud or covin shall not be construed an abetting, counselling, aiding, assisting, procuring or comforting of an offender within this act: peers indicted shall be tried by peers, as in other cases of treason.

No person compellible to take the oath upon second tender, but such as have ecclesiastical preferments, or such as have offices in ecclesiastical courts, or such as refuse wilfully to observe the orders established for divine service, or such as shall deprave the rites and ceremonies of the church of *England*, or that shall say or hear private mass.

Not lawful to kill person attain in *præmunire*.

No person to be indicted for aiding, assisting, comforting, abetting

any person for extolling the power of the bishop of *Rome*, unless accused by such lawful proof, as shall be thought by the jury sufficient to prove him guilty of the offence.

The things observable upon this act,

1. Tho the indictment for the refusal of the oath upon the first tender may be in the county, where the king's bench sits, yet the trial must be by a jury of the county where the refusal [332] is, 6 & 7 *Eliz. Dy. 234. a Bonner's case.*

2. If books extolling the pope's jurisdiction be written beyond sea and brought in hither, it was ruled by the advice of all the judges, 1. The importer, that delivers them out to extol the pope's authority. 2. He that reads them, and in conference with others allows them to be good, 3. He that hears the contents, and in open speech with others commend and affirm them to be good. 4. He that hath such books in his custody, and secretly conveys them to his friends to the intent to perswade them to be of that opinion. 5. He that prints such books in this realm, and utters them, are within the first clause of this statute against extolling of papal authority; but those that receive and read them without allowing them in conference, are not within this act.

3. An indictment against an aider, &c. must be, *knowing* the principal to be a maintainer of the jurisdiction of the pope, and *contra formam statuti* only, is not sufficient. *Dy. 363. a.*

4. *Nota* this special clause of giving alms not to make an aider or comforter, if the alms be reasonable, and without covin, tho the offender not imprisoned, nor under bail, seems to be but agreeable to the common law; *vide quæ supra dicta sunt super statutum 13 Eliz. cap. 1.* and therefore it seems, even by the common-law, if a physician or chirurgeon minister help to an offender sick or wounded tho he know him to be an offender, even in treason, this makes him not a traitor, for it is done upon the account of common humanity, not *intuitu criminis vel criminosi*; but it will be misprision of treason, if he know it, and do not discover him.

23 *Eliz. cap. 1.* "All persons whatsoever, who have or shall have or pretend to have power, or shall any way put in practice to absolve, perswade, or withdraw any of the queen's subjects; or any within her dominions from their natural obedience to her majesty, or to withdraw them for that intent from the religion now by her highness's authority established within her highness's dominions to the *Romish* religion, or to move them or any of them to promise any obedience to any pretended authority of the [333] see of *Rome*, or of any other prince, state or potentate, to be had or used within her dominions, or shall do any overt-act to that intent or purpose, they shall be adjudged traitors; and the persons who shall be willingly absolved, or withdrawn as aforesaid, or willingly reconciled, or shall promise obedience to any such pretended authority, prince, state, or potentate as aforesaid, they, their procurers and counsellors thereunto shall suffer as in case of high treason.

"Aiders and maintainers of the persons offending, knowing the

same; or who shall conceal such offense, and not within twenty days disclose the same to some justice of peace, &c. shall forfeit as in misprision of treason: justices of peace to have cognisance of offenses, except treason and misprision of treason."

Nota the words (*for that intent*) run through the whole clause of dissuading from the religion of the church of *England*: *vide postea*, statute 3 *Jac. cap. 4*.

The religion established within the meaning of this act seems to be that book of articles mentioned and enjoined to be assented to by all men taking orders by the statute of 13 *Eliz. cap. 12*.

23 *Eliz. cap. 2*. "Advised and malicious speakers of seditious or scandalous tale of the queen of their own imagination shall for the first offense be set upon the pillory, lose both ears (or at the offender's election pay two hundred pounds) and suffer six months imprisonment.

"If any shall advisedly and with malicious intent report false, seditious and slanderous news or tales of the queen of the reporting of another, then to be set on the pillory and lose one of his ears (unless he pay two hundred marks) and suffer imprisonment three months: second offense after a first conviction shall be felony without clergy.

"If any shall within or without the queen's dominions advisedly and with a malicious intent against the queen devise and write, print, or set forth any book or writing, containing any false, seditious or scandalous matter against the queen, or to the encouraging, stirring, or moving any insurrection or rebellion within the realm or dominions thereof; or if any person within or without the realm shall advisedly, and with a malicious intent against the queen procure or cause any such book or writing to be written, printed, published or set forth, (the said offense not being punishable by the statute of 25 *E. 3*. concerning treason, or by any other statute, whereby an offense is made or declared treason) every such offense shall be judged felony without the benefit of clergy.

"If any person either within or without the queen's dominions shall by erecting a figure, casting nativities, prophecying, witchcraft, conjurations, or other like unlawful means seek to know, and shall set forth by express words, deeds, or writings, how long the queen shall live, or who shall reign after her, or maliciously utter any direct prophecies to that purpose, or shall maliciously by words, writings or printing wish, will or desire the death or deprivation of the queen, or any thing directly to the same effect, the offender, their aiders, procurers and abettors in or to the said offenses shall suffer as felons without the benefit of clergy."

Offenses made felony by this act committed by persons out of the realm shall be inquired, heard and determined in the county where the king's bench sits, and limits the proof and manner of proceeding; no corruption of blood, loss of dower, or forfeiture of lands longer than during life.

Two witnesses required to prove words.

The act of 1 & 2 *P. & M.* and 1 *Eliz.* concerning scandalous words are repealed: this act to continue only during the queen's life.

These things are observable upon this act,

1. There may be some words or writings, that consequentially may be construed to stir up insurrection, and yet are not within the statute of 25 *E. 3.* for this statute supposes some may be within it, and some may not.

2. That casting the king's nativity, how long he shall live, who shall succeed him, or using prophecies to that effect, tho done maliciously, or wishing the king's death, was not treason within the act of 25 *E. 3.* or of any statute then in force, tho they are great offenses; for had they been treason, this statute would never have made it only felony, and that only during the queen's life.

27 *Eliz. cap. 1.* "If any open invasion or rebellion shall be made within her majesty's dominions, or any act attempted tending to the hurt of her majesty's person by or for any person, that shall or may pretend title to the crown after the queen's death, or if any thing shall be compassed or imagined tending to the hurt of the queen's person by any person or with the privity of any person, that shall or may pretend title to the crown of this realm, then by her majesty's commission twenty-four privy counsellors and lords of parliament at least, with the assistance of such judges of the courts of *Westminster*, as the queen shall appoint, or the greater number of them, shall by virtue of this act have authority to examine all and every the offenses aforesaid, and all circumstances thereof, and thereupon to give sentence or judgment, as upon good proof the matter shall appear unto them; and after such sentence or judgment given, and declaration thereof by her majesty's proclamation under the great seal, all such persons, against whom such judgment or sentence shall be given or published, shall be excluded and disabled to claim or pretend to have any title to the crown of *England*.

"And all the queen's subjects may by virtue of this act and her majesty's direction by all possible means pursue to death every such wicked person, by whom such invasion or wicked act shall be attempted, or other thing compassed or imagined against her majesty's person, and all their aiders, comforters and abettors.

Provision is made in case the queen should be killed by such attempt for prosecution of the offender, and exclusion of the person offending from succession to the crown, &c.

Nota, this extraordinary commission was issued thus by authority of parliament in relation to the queen of *Scots*, who was by virtue thereof sentenced to death and executed.

This was but a temporary act, but the precedent of this commission to sentence and give judgment without a trial [336] by jury, was the first of that nature that I remember to have been issued by parliament.

27 *Eliz. cap. 2.* "It shall not be lawful for any jesuit, seminary

priest, or other such priest, deacon, or religious or ecclesiastical person whatsoever, being born within this realm or other her highness's dominions, and made, ordained or professed, or to be made, ordained or professed by any authority or jurisdiction derived, challenged or pretended from the see of *Rome* by or of what name, title or degree soever the same shall be called or known, to come into, be or remain in any part of this realm, or any of her highness's dominions after the end of forty days, other than in such special cases, and upon such special occasions only, and for such time only, as is expressed in this act; and if he do, then every such offense shall be high treason, and every such person as shall wittingly and willingly receive, relieve, comfort, aid, or maintain any such priest, &c. being at liberty and out of hold, knowing him to be such, shall be guilty of felony without clergy.

“If any of the queen's subjects (not being a jesuit, seminary priest, deacon, or religious or ecclesiastical person) be brought up in any college or seminary beyond sea, shall not return within six months after proclamation in *London*, and within two days after his return before the bishop of the diocese, or two justices of the peace submit to her majesty's laws, and take the oath of supremacy, then such person, who shall otherwise return into this realm or other the queen's dominions, shall be adjudged a traitor.

“Sending relief to any jesuit, seminary priest, or college of priests or jesuits beyond the seas, or to one not returning out of such college into *England*, shall incur a *præmunire*.

“Every offense against this act shall be tried in the king's bench in the county where it sits, or in any other county, where the offense was committed, or offender apprehended.

“If a jesuit, seminary priest, &c. within three days after his arrival in the queen's dominions submit to some archbishop, [337] bishop, or justice of peace, and take the oath of supremacy, and by writing under his hand profess to continue obedient to the laws, then he shall not be subject to any penalty.

“Trial of peers in the case of treason, felony, or *præmunire* to be by peers.

“Any person knowing such priest to be within the realm contrary to this act, and not discovering it to a justice of peace, &c. within twelve days, shall be fined and imprisoned during the queen's pleasure, and a justice of peace to whom such discovery is made, not informing one of the privy council, &c. shall forfeit two hundred marks.

29 *Eliz. cap. 2.* “No attainder of treason that now is, where the party is executed, shall be reversed for error.

25 *Eliz. cap. 2.* “A suspected jesuit or priest refusing to answer directly upon his examination shall be imprisoned for his contempt, until he shall make direct answer.

And these are all the acts concerning treason in the queen's time, that I remember, except particular acts of attainder, whereof some are temporal, some perpetual.

In the time of king *James*, besides the particular acts touching the treason of the conspirators of the powder-plot, and the treasons of the lords *Cobham* and *Gray*, there are some general clauses touching treason in the statutes of 3 *Jac. cap. 4.* (g) and 5. and among them this special clause which enlarged the statute of 23 *Eliz. cap. 1. viz.*

“If any person shall upon or beyond the seas, or in any other place within the dominions of the king, his heirs or successors, put in practice to absolve, perswade or withdraw any of the king's subjects from their natural obedience to his majesty, his heirs or successors, or to reconcile them to the pope or see of *Rome*, or to move any of them to promise obedience to any pretended authority of the see of *Rome*; or any other prince, state or potentate, then such persons, their procurers, counsellors and aiders, and maintainers knowing the same shall be adjudged traitors, and likewise [338] the persons willingly absolved or withdrawn, &c. their aiders, abettors, maintainers, &c. knowing the same shall be adjudged traitors, to be indicted and proceeded against in any county where taken, as if the offense were committed in that county.

This act is much more strictly pen'd against such offenders, than the statute of 23 *Eliz. cap. 1.* 1. It extends larger as to the place of such offense. 2. The words (*to that intent*) which bound up the statute of 23 *Eliz.* more strictly, are here omitted. 3. The disjunctive clauses in this statute have a greater latitude. 4. It extends to maintainers of the offenders knowing the same.

Neither do I find any special new act generally touching treason from this time till the 13th year of king *Charles II.*

13 *Car. 2. cap. 1.*

1. “If any person after 24 *June* 1661. during the king's life shall within the realm, or without, compass, imagine, invent, devise, or intend death or destruction, or any bodily harm tending to death or destruction, maim, wounding, imprisonment, or restraint of the person of the king, or to deprive or depose him from the style, honour, or kingly name of the imperial crown of this realm, or of any other his majesty's dominions or countries, or to levy war against his majesty within the realm, or without, or to move or stir up any foreigner to invade this realm, or any other his majesty's dominions being under his majesty's obeysance, and such compassings, imaginations, inventions, devices, or intentions, or any of them shall express, utter, or declare by any printing, writing, preaching, or malicious and advised speaking, being legally convicted thereof upon the oath of two lawful and credible witnesses upon trial, or otherwise convicted or attainted by due course of law, then every such person shall be deemed a traitor, and suffer and forfeit as in cases of high treason.

“2. If any after 24 *June* 1661. during his majesty's life shall ma-

(g) The oath of alligance appointed hereby, and this statute so far as relates to the said oath, are abrogated by 1 *W. & M. cap. 8.*

liciously and advisedly publish or affirm, that the king is an heretic or papist, or endeavours to introduce popery, or maliciously and advisedly by writing or speaking shall express, publish, utter [339] or declare any words or things to incite the people to hatred or dislike of his majesty or the established government, shall be disabled to enjoy any office or promotion ecclesiastical, civil, or military, or other employment, than that of peerage, and suffer such farther punishment as may be by law inflicted.

3. "Any that shall maliciously and advisedly affirm the parliament of 3 Nov. 1640. is yet in being, or that there lies obligation upon any by any oath, engagement or covenant to endeavour a change of government in church or state, or that both or either house of parliament have a legislative power without the king, shall incur the penalty of a *præmunire* 16 R. 2.

4. No person to be prosecuted for any of the said offenses, except treason, but by order of the king under his sign manual, or of the council, nor unless prosecuted within six months after the offense, and indicted within three months after prosecution.

5. "None to be indicted, arraigned, convicted, or condemned of any of the said offenses, unless the offender be accused by two lawful and credible witnesses upon oath, which witnesses upon his arraignment shall be brought in person before the offender face to face and maintain upon oath what they have to say against him, unless the party arraigned shall willingly without violence confess the same.

6. "This shall not deprive members of parliament of their free debates.

"Trial by peers: peer convicted disabled to sit in parliament till his majesty pardon him.(h)

(h) The acts relating to treason and offenses of that nature, which have passed since our author wrote, may be reduced to these three heads; 1. Such as more immediately relate to the king and his government. 2. Such as relate to the coin. 3. Such as relate to the manner of trials and other proceedings.

I. As to the first, such as relate to the king and his government.

By 9 W. 3 cap. 1. "If any of the king's subjects, who have voluntarily gone into France, or any the French king's dominions in Europe before 11 Dec. 1688. without licence from the king or queen, or who have at any time during the late war with France born arms in the service of the French king, or who have since the 13th February 1688, been in arms under the command or in the service of the late king James in Europe, shall return into this kingdom of England, or any other the king's dominions without licence from the king under the privy seal, such person shall be adjudged guilty of high treason: Where the offense shall be committed out of the realm, it may be tried in any county."

[340] Upon this act these things are observable.

1. That this act doth enact some treasons, which certainly were so by 25 E. 3. as bearing arms in the service of the French king during the war with France, which is plainly an adhering to the king's enemies; and tho' 25 E. 3. says *adhering to the king's enemies in the realm*, yet it immediately adds *giving them aid and comfort in his realm or elsewhere*, Co. P. C. p. 11. Vaughan's case, 2 Salk. 635. indeed all the treasons by this act are compounded of this old treason, altho' they be new in form for the sake of facilitating the proof in some instances, Hil. 2 Ann. Boucher's case, State Tr. Vol. V. p. 511.

2. That a pardon under the great seal (after having been in the service of the French king and before returning) of all treasons, &c. will not amount to a licence to return,

because it is the returning, which is the treason punishable by this act. 3 Ann. *Lindsay's case*, State Tr. Vol. V. p. 528.

3. That a *Scotchman* going out of *Scotland* into *France* (especially if formerly resident in *England*) after the time mention'd in the act, and returning into *England* is within the words and meaning of the act, even tho' he had a licence to return into *Scotland*. *Ibid.*

4. That a person offending against this act by returning into *England* may be indicted in any county where he is taken, altho' it be not the first *English* county into which he came. *Ibid.*

5. That this act is perpetual and extends to the king's successors, altho' the act speak only of the king generally and not of his successors, according to the resolution 12 Co. Rep. 109. *vide supra* p. 100.

By 13 & 14 W. 3. cap. 3. "The pretended prince of *Wales* is attainted of high treason, and it is made high treason for any of the king's subjects by letters, messages or otherwise to hold correspondence with him or any person employed by him, or to remit any money for his use knowing the same. And by the 17 Geo. 2. this is extended to the pretender's son. Provides that offenses against this act committed out of the realm may be tried in any county.

By 1 Ann. cap. 17. "It is made high treason to attempt by overt act or deed, to deprive or hinder any person next in succession to the crown (according to the limitation of the crown by 1 W. & M. sess. 2 cap. 2. and 12 W. 3. cap. 2.) from succeeding after the decease of the queen; but this succession has now happily taken place, and thereby put an end to this statute.

By 3 & 4 Ann. cap. 14. "If any subject, who has voluntarily gone into *France* since 4 May 1702. or into any the *French* king's dominions in *Europe* without licence from the queen, or has since the said 4 May born arms in the service of the *French* king, shall return into *England* without licence from the queen under her privy seal, he shall be adjudged guilty of high treason.

By 4 Ann. cap. 8. "It is made high treason for any one maliciously to affirm by writing or printing, that the pretended prince of *Wales*, or any other person hath any right to the crown of these realms, other than according to 1 W. & M. and 12 W. 3. or that the kings of *England* are not able by authority of parliament to make laws to bind the descent, limitation, inheritance and government of the crown. To declare the same things by preaching, teaching or advised speaking is made a *præmunire*.

This act (which is in the main transcribed from 13 Eliz. cap. 1.) was re-enacted upon occasion of the union 6 Ann. cap. 7. Upon this statute *Matthews* the printer was convicted and executed for printing a pamphlet intitled. *Vox Populi Vox Dei*, Octob. 30. 1719. at the *Old Bailey*.

By 7 Ann. cap. 4. "It is high treason for any officer of the army or soldier by land or sea to hold correspondence with any rebel or enemy to her majesty, or to treat with such rebel or enemy without her majesty's licence.

By 7 Ann. cap. 21. "Whatever is high treason or misprision of treason in *England*, (and none else) shall be high treason or misprision of treason in *Scotland*.

II. Such as relate to the coin.

By 8 & 9 W. cap. 25. "Whoever shall knowingly make or mend, or assist in making or mending, or shall buy or sell, or have in his possession any instruments proper for the coinage of money, or convey such instruments out of the king's mint, or shall mark on the edges any coin current or diminished coin of the kingdom, or any counterfeit coin resembling the coin of the kingdom with letters or other marks [341] like to those on the edges, of money coined in the king's mint, or shall colour, gild or case over any coin resembling the current coin of the kingdom, or any round blanks of base metal, &c. shall be guilty of high treason. No attainder by this act shall work corruption of blood or loss of dower, nor prosecution be for any offense against the same, unless commenced within three months after the offense committed;" this act was but temporary.

But by 7 Ann. cap. 25. it is made perpetual and the time of prosecution enlarged from three months to six months after the offense committed.

Other statutes relating to the coin enacted since the edition of this book in 1736, are the 15, 16. Geo. 2. ch. 28. concerning gilding, washing colouring, &c. coin; and rewards for convicting offenders; and pardon to accomplices informing:—the 11 Geo. 3. ch. 40. concerning counterfeiting halfpence and farthings.—The 13 Geo. 3. ch. 71. concerning what is to be done with false money.—The 14 Geo. 3. ch. 92. concerning weights for coin.

III. Such as relate to the manner of trials and other proceedings.

By 7. W. 3. cap. 5. "Every person indicted for high treason, whereby corruption of blood may be made, shall have a true copy of the whole indictment, but not the names of the witnesses, delivered to him five days before his trial, paying for it not exceeding five shillings, and shall be admitted to make his defence by counsel, and witnesses on oath, the said counsel not to exceed two, and to be assigned by the court, and to have access to the prisoner at all reasonable times.

"No person shall be indicted, tried, or attainted but on the oaths of two lawful witnesses, which two witnesses must be to the same treason," altho' it be not necessary they should both be to the same overt-act.

"No prosecution to be for any such treason unless the party be indicted within three years after the offense committed, unless it be for a design or attempt to assassinate the king by poison or otherwise.

"The prisoner shall have a copy of the pannel of the jurors two days before his trial, and shall have like process to compel the appearance of witnesses for him, as is usually granted for witnesses against him.

"No evidence shall be given of any overt-act not expressly laid in the indictment.

"No indictment, process, &c. shall be quashed for mis-writing mis-spelling, false or improper *Latin*, unless exception be taken in court before any evidence given upon such indictment, nor shall any such mis-writing, &c. be cause to stay Judgment after conviction, but such judgment may nevertheless be reversed upon writ of error, as before the making this act.

"In the trial of a peer or peeress all peers intitled to vote in parliament shall be summoned twenty days before the trial, and every one so summoned and appearing shall vote at such trial first taking the oaths to the government, &c.

"Provided that this act shall not extend to impeachments or other proceedings in parliament, nor to indictments of high treason, nor any proceedings thereupon for counterfeiting his majesty's coin, great seal, privy seal, sign manual, or privy signet.

By 1 Ann. cap. 9. "In any trial for treason or felony the witnesses for the prisoner shall be upon oath.

By 7 Ann. cap. 21. "After the decease of the present pretender no attainder of treason shall work a disheirson of the heir, nor affect any other right, save that of the offender for his natural life only, and every person indicted for high treason or misprision of treason shall have a list of the witnesses to be produced against him on his trial, and of the jury, mentioning the places of their abode, &c. given to him together with the copy of the indictment ten days before his trial, in the presence of two credible witnesses.[1]

[1] The following are the different Acts of Parliament concerning treason that have from time to time been passed since the 7th of Queen Anne, recited in the note above.

By the 20 Geo. 2. c. 30. persons impeached by the House of Commons of high treason, whereby corruption of blood shall be made, or for misprision thereof, shall be admitted to make their full defence by two counsel, who shall be assigned for that purpose, in like manner as upon indictments and other prosecutions.

The 30 Geo. 3. c. 48. alters the judgment in the case of women from burning to hanging.

By the 36 Geo. 3. c. 7. s. 1. if any person after the day of passing this act, during the life of the king and until the end of the next session of parliament after the demise of the crown, shall within the realm, compass, imagine, invent, devise, or intend death or destruction, or any bodily harm, tending to the death or destruction, maim or wounding, imprisonment or restraint of the person of the king his heirs or successors: or to deprive or depose him of them from the style, honor or kingly name of the imperial crown of this realm, or of any other of his majesty's dominions or countries; or to levy war against his majesty, his heirs and successors, within this realm, in order by force or constraint to compel him or them to change his or their measures or counsels; or in order to put any force or constraint upon, or to intimidate or overawe both houses or either house of parliament; or to move or stir any foreigner or stranger with force to invade this realm, or any other his majesty's dominions or countries under the obeisance of his majesty, his heirs and successors. And such compassings, imaginations, inventions, devices, or intentions, or any of them, shall express, utter, or declare by publishing any printing or writing, or by any overt act or deed being legally convicted thereof upon the oaths of two lawful witnesses upon trial, or otherwise convicted or attainted by due course of law, then every such person shall be deemed, declared, and adjudged to be a traitor, and shall suffer the pains of death, and also loss and forfeit as in cases of high treason.

By the 57 Geo. 3. c. 7. s. 1. the provisions of the last act, which relate to the heirs and successors of the king, are made perpetual.

The 39 & 40 Geo. 3. c. 93. and the 5 & 6 Vict. c. 51. take away the right of the prisoner to have a copy of the indictment, with a list of the witnesses and jurors in the cases of high treason in compassing or imagining the death or destruction or any bodily harm tending to the death or destruction, maiming or wounding of the queen, and of misprision of such treason when the overt act alleged in the indictment shall be any attempt to injure her person; in which case the prisoner is triable in the same manner, and upon the like evidence, as if charged with murder.

The 54 Geo. c. 146. alters the judgment in high treason. See p. 351.

The 9 Geo. 4. c. 31. s. 2. abolishes petit treason, and makes this offence murder. p. 382.

By the 3 & 4 Vict. c. 52, s. 4. it is treason, in some cases for any person to aid in obtaining a marriage with the queen's issue under the age of eighteen, without consent of parliament.

The 5 & 6 Vict. c. 51. s. 2. makes it a high misdemeanor wilfully to discharge or aim fire arms, or to throw any offensive matter or weapon with intent to injure or alarm the queen; with a proviso, that nothing in that act contained shall be deemed to alter in any respect the punishment which may by law be inflicted upon persons guilty of high treason, or misprision of treason.

The 2 Will. 4. c. 34. the statute relating to the coin. It repeals all other acts touching the coin, the provisions of which it amends and consolidates into one act. See chap. 17, 18, 19, 20.

The 11 Geo. 4. 1 Will. 4. c. 66. s. 2 & 1 Vict. c. 84. s. 1. repeal the statutes of treason relating to the great seal, sign manuel, signet, &c. to counterfeit these signatures is still treason, though not punishable with death.

By the 29 sect. of the act of Congress of April 30, 1790, it is enacted, That any person who shall be accused and indicted of treason, shall have a copy of the indictment, and a list of the jury, and witnesses to be produced on the trial for proving the said indictment, mentioning the names and places of abode of such witnesses and jurors, delivered unto him at least three entire days before he shall be tried for the same; and in other capital offences, shall have such copy of the indictment and list of the jury two entire days at least, before the trial; and that every person so accused and indicted for any of the crimes aforesaid, shall also be allowed and admitted to make his full defence by counsel learned in the law; and the court before whom such person shall be tried, or some judge thereof shall, and they are hereby authorized and required immediately upon his request to assign to such person such counsel, not exceeding two, as such person shall desire, to whom such counsel shall have free access at all seasonable hours; and every such person or persons accused or indicted of the crimes aforesaid, shall be allowed and admitted in his said defence to make any proof that he or they can produce, by lawful witness or witnesses, and shall have the like process of the court where he or they shall be tried, to compel his or their witnesses to appear at his or their trial, as is usually granted to compel witnesses to appear on the prosecution against them.

Sect. 30. That if any person or persons be indicted of treason against the United States, and shall stand mute, or refuse to plead, or shall challenge peremptorily above the number of thirty-five of the jury, the Court in any of the cases aforesaid, shall notwithstanding proceed to the trial of the person or persons so standing mute or challenging, as if he or they had pleaded not guilty, and render judgment thereon accordingly.

Sect. 31. That the benefit of clergy shall not be used or allowed, upon conviction of any crime, for which by any statute of the United States the punishment is or shall be declared to be death.

Sect. 32. That no person or persons shall be prosecuted, tried or punished for treason or other capital offence aforesaid, wilful murder, or forgery excepted, unless the indictment for the same shall be found by a grand jury within three years next after the treason or capital offence aforesaid shall be done or committed. *Provided*, that nothing herein contained shall extend to any person or persons fleeing from justice.

Sect. 33. That the manner of inflicting the punishment of death shall be by hanging the person convicted by the neck until dead.

On the trial of the rebels in 1746, the prisoners had copies of their indictments five days before their arraignment, exclusive of that day and of the days copies were delivered, and also exclusive of the intervening Sunday. *Fast.* 2. 230. See Lord George Gordon's *Tr.* 21 *St. Tr.* 648. *Dougl.* 569. An indictment for treason was found on the 11th of December; on the 12th, copies of the indictment and of the jury panel were delivered to the

prisoner, and on the 17th a copy of the list of witnesses was delivered to him. The prisoner was arraigned on the 31st of *December* and pleaded; and upon the first witness being called for the crown, it was objected that the list of witnesses had not been delivered according to the statute. Upon a case reserved, it was held by nine judges to six, that the delivery of the list was not a good delivery in point of law; but it was also held by a like majority, that the objection came too late after plea pleaded. And it was agreed by all the judges, that if the objection had been taken in due time, the only effect of it would have been a postponement of the trial, to give time for a proper delivery of the list. *R. v. Frost*, 2 *Mood. C. C.* 140. 9 *C. & P.* 129. In the case of the *Insurgents*, 2 *Dall.* 342. it was held that copies of the caption as well as of the indictment ought to be delivered to the defendant under the Act of Congress. It was also held that the place of abode of the jurors and witnesses should be clearly designated. The object of the law is to enable the party accused to prepare for his defence; and to identify the jurors who try and the witnesses who are to prove, the indictment against him. It is contrary to the spirit and intent of such a provision that the whole range of the state or of a county, should be allowed as descriptive of a place of abode. In regard to the place, the court thought the township in which the jurors and witnesses respectively reside, should be specified; but the act of Congress does not require a specification of their occupations. See *Dorr's Tr.* 7. 1 *East, P. C.* 111. *Stewart's case*, 2 *Dall.* 335. The 29 sect. of the act of Congress has been construed to mean that, any person charged with a crime in the courts of the *United States*, has a right *before*, as well as after the indictment to the process of the court to compel the attendance of his witnesses. 1 *Barr's Tr.* 126.

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CHAPTER XXVI.

CONCERNING THE JUDGMENTS IN HIGH TREASON AND THE PARTICULARS RELATING THEREUNTO, AND TO ATTAINDERS.

THIS chapter divides itself into these particulars: 1. Touching the person against whom the judgment is to be given. 2. By whom it is to be given. 3. What the form of the judgment is. 4. What the consequents thereof are.

I. Touching the person, against whom a judgment in treason is to be given.

In antient time, if a man had been slain in open war against the king either in rebellion, or adhering to the king's enemies, the king did *de facto* take a forfeiture, sometimes by presentment in *Eyre*, sometimes by presentment in the king's bench, and sometimes by inquisition by the escheator: for this see the whole pleading in the chancery, *Olaus.* 29 *E.* 3. *M.* 2. & 4. for the coheirs of *Robert de Ross* for the manor of *Werk*.

But in all other cases, whether of felony or treason, if the party had died before attainder, tho he were killed in the pursuit, *Claus.* 26 *E.* 3. *m.* 29. *pro. Ricardo filio Adæ Peschall*; and *H.* 16 *E.* 1. *Rot.* 27. *coram rege. Sussex, pro. Stephano Northup* *M.* 20 & 21 *E.* 1 *Rot.* 4 *in dors. coram rege pro Johanne de Beking-*

[343] *ham*, or tho he died after conviction and before judgment, 7 *H.* 4. 27. *a.* there ensued neither attainder nor forfeiture of lands.

But the law was practised antiently, and it seems continuing to this day, if a traitor or a felon rescue himself, or will not submit to be arrested and on resistance is slain, upon presentment thereof he

shall forfeit his goods and chattles, 3 *E. 3. Corone* 290, 312. *Co. P. C. p. 227.* for if a person be arraigned for felony or treason, tho he be acquitted, yet if it be found he fled, he forfeits his goods, and this is but in nature of a presentment of *fugam fecit*.

But whether that presentment be traversable, *vide Stamf. P. C. Lib. III. cap. 21.*

Yet the former practice by degrees grew out of use, for in 8 *E. 3. 20. a.* the judges would not allow an averment, that a party died in rebellion or adhering to the king's enemies, without a record of his conviction, for it is possible he might be there against his will.

But now by the statute of 25 *E. 3. de proditionibus*, which requires an attainder by conviction and attainder *per gentes de lour condition* that attainder after death for adhering to the king's enemies is ousted.

And because it might be said, that an inquest before the escheator might satisfy those words, the statute of 34 *E. 3. cap. 12.*

hath in express terms for the future ousted such attainders [344] or convictions after the parties death, at least in other cases than of forfeitures of war, and except forfeitures of old times judged after the parties death by presentment in *Eyre*, or in the king's bench, as of felons of themselves; and therefore *Jack Cade*, who was slain in open rebellion, could not be attaint but by act of parliament, and so it is recited in the act of his attainder 29 *H. 6. cap. 1.*

Yet after the statute of 34 *E. 3.* the earl of *Salisbury* and others, who conspired against *Henry IV.* and levied war against him, and in their flight were taken, had their heads stricken off by those that apprehended them, without any judgment given against them, and after their death judgment of treason was given against them by the king and lords in parliament, *Rot. Par. 2 H. 4 n. 30.* upon which the heir of the earl of *Salisbury* brought a petition of error, *Rot. Par. 2 H. 5. part. 1. m. 13.* and assigned for error among other errors, that his ancestor was dead at the time of the judgment given in parliament, but yet the judgment was affirmed; yet afterwards *Rot. Par. 9 H. 5. n. 19.* to avoid all questions he was restored by act of parliament.

Again, no man ought to be attainted of treason without being called to make his defense and put to answer, which is called *arreatio* or *ad rationem positus*.

Claus. 1 E. 3. part. 1. m. 21. dors. Thomas earl of *Lancaster* was condemned to death, as a traitor by *Edward II.* at *Pontefract*, *Henry* his brother brought a petition of error in the parliament of 1 *E. 3.* upon that judgment, the record was removed in these words.

"Placita coronæ coram domino *Edwardo* rege filio domini regis *Edwardi* tenta in præsentia ipsius domini regis apud Pontem-fractum die lunæ proximè ante festum annunciationis beatæ *Mariæ* virginis anno regni sui quintodecimo.

"Cum *Thomas* comes *Lancastriæ* captus pro proditionibus, homicidiis, incendiis, depredationibus, & aliis diversis feloniiis ductus esset coram ipso domino rege, præsentibus *Edmundo* comite *Kant*,"

Johanne comite Richemund', Adomaro de Valenciâ comite Penbroch', Johanne de Warennâ com' Surr', Edmundo com' [345] Arundell', David com' Athol, Roberto comite de Anegos, baronibus & aliis magnatibus regni, dominus rex recordatur, quod idem *Thomas* homo ligeus ipsius domini regis venit apud *Burton* super *Trentam* simul cum *Humfr'o de Bohun* nuper com' *Heref'*, proditore regis & regni invento cum vexillis explicatis apud *Pontem Burgi* in bello contra dominum regem, & ibidem interfecto, & *Rogero Damory* proditore adjudicato, & quibusdam aliis proditoribus & inimicis regis & regni cum vexillis explicatis, & ut de guerrâ hostiliter resistebat & impedivit ipsum dominum regem & homines & familiares suos per tres dies continuos, quo minus pontem dictæ villæ de *Burton* transire potuerunt, &c.—Et unde dominus rex, habito respectu ad tanta dicti *Thomæ* comitis facinora, & iniquitates ejus, & ejus maximam ingratitude, nullam habuit causam ad aliquam gratiam eidem *Thomæ* comiti de pœnis prædictis super ipsum adjudicatis pardonand' in præmissis faciend', quia tamen idem *Thomas* comes de parentelâ excellenti & nobilissimâ procreatus est, dominus rex ob reverentiam dictæ parentelæ remittit de gratiâ suâ speciali prædicto *Thomæ* comit executionem duarum pœnarum ad judicatarum, sicut prædictum est, scilicet quod idem *Thomas* comes non trahatur, neque suspendatur, sed quod executio tantummodo fiat super ipsum *Thomam* comitem, quod decapitetur.

“Thereupon the record being read in præsentia domini regis procerum & magnatum regni & aliorum in hoc parlamento, he assigned these errors: 1. Quod erratum est in hoc, quod cum quicunque homo ligeus domini regis pro seditionibus, homicidiis, robberiis, incendiis & aliis felonis tempore pacis captus, & in quâcunque curiâ regis ductus fuerit, de hujusmodi seditionibus & aliis felonis sibi impositis, per legem & consuetudinem regni arrenari debet, & ad responsionem poni, & inde per legem &c. convinci, antequam fuerit morti adjudicatus; licet prædictus *Thomas* comes, homo ligeus prædicti domini regis patris, &c. tempore pacis captus, & coram ipso rege ductus fuit, dictus dominus rex pater, &c. recordabatur ipsum *Thomam* esse culpabilem de seditionibus and felonis in prædictis recordo & processu [346] contentis, absque hoc, quod ipsum inde arrenavit seu ad responsionem posuit, prout moris est secundum legem, &c. & sic absque arrenamento & responsione idem *Thomas* erroneè, & contra legem terræ tempore pacis morti extitit adjudicatus, unde cum notorium sit & manifestum, quod totum tempus, quo impositum fuit eidem comiti prædicta mala & facinora in prædictis recordo & processu contenta fecisse, & etiâ tempus, quo captus fuit, & quo dictus dominus rex pater recordabatur ipsum esse culpabilem, &c. & quo morti extitit adjudicatus, fuit tempus pacis, maximè cum per totum tempus prædictum cancellaria & aliæ placeæ curiæ domini regis apertæ fuerunt, & in quibus lex cuicunque fiebat, prout fieri consuevit, nec idem dominus rex unquam in tempore illo cum vexillis explicatis equitabat, prædictus dominus rex pater, &c. in hujusmodi tempore pacis contra ipsum comitem sic recordari non debuit, nec

ipsum sine arrenamento & responsione morti adjudicasse. Dicit etiam, 2. Quod erratum est in hoc, quod cum prædictus *Thomas* comes fuisset unus parium & magnatum regni, & in Magna Carta de libertatibus *Angliæ* contineatur, quod nullus liber homo capiatur, imprisonetur, aut disseisietur de libero tenemento suo, vel libertatibus, seu liberis consuetudinibus suis, aut utlagetur, aut exulet, nec aliquo modo destruatur, nec dominus rex super eum ibit, nec super eum mittet, nisi per legale iudicium parium suorum, vel per legem terræ, prædictus *Thomas* comes per recordum regis, ut prædictum est, tempore pacis erroneè morti fuit adjudicatus absque arrenamento seu responsione, seu legali iudicio parium suorum, contra legem, &c. & contra tenorem Magnæ Cartæ prædictæ: and therefore, as brother and heir of *Thomas*, prays that the judgment be annulled, and he restored to his inheritance, & quia inspectis & plenius intellectis recordo & processu prædictis, &c. ob errores prædictos & alios in eisdem recordo & processu compertos consideratum est per ipsum dominum regem, proceres, magnates & totam communitatem regni in eodem parlamento, quod prædictum iudicium contra prædictum *Thomam* comitem redditum tanquam erroneum, revocetur & annulletur, & quod prædictus *Henricus*, ut frater [347] & hæres ejusdem *Thomæ* comitis, ad hæreditatem suam petendam & habend' debito processu inde faciend', prout moris est, admittatur, & habeat brevia cancellariæ, & quod justic', in quorum placeis dicta recordum & processus irrotulantur, eadem recordum & processus irritari faciunt & annullari, &c. *P. 15 E. 2. B. R. Rot. 69. & Pasch. 39 E. 3. Rot. 49. coram Rege.*

This notable record, even before the statute of 25 *E. 3.* gives us an account of these things: 1. That in time of peace no man ought to be adjudged to death for treason, or any other offense without being arraigned and put to answer. 2. That regularly, when the king's courts are open, it is a time of peace in judgment of law. 3. That no man ought to be sentenced to death by the record of the king without his legal trial *per pares*. 4. That in this particular case the commons, as well as the king and lords, gave judgment of the reversal.

John Matravers was attainted of treason in the parliament of 4 *E. 3. n. 3.* for the death of the earl of *Kent*, as hath been before shewn, *cap. 11. p. 82.* in his absence, *Rot. Par. 21 E. 3. n. 65. dors.* the same *John Matravers* sued in parliament to reverse that judgment, and assigned for error, *qil est adjudge a mort in un parlement tenuis a Westminster en l' absence de lui, nient indite, nient arayne, ne appell a respons, cointre le ley de realm & les usages approves;* he did not prevail in that parliament but *Rot. Par. 25 E. 3. n. 54 & 55.* he had a restitution by the king confirmed in parliament.

Roger Mortimer earl of *March* was condemned for treason for the death of king *Edward II.* *Rot. Par. 4 E. 3. n. 1.* his cousin and heir *Roger Mortimer*, *Rot. Par. 28 E. 3. n. 9 & 10.* brought a petition of error upon that judgment, whereupon the record of his attainder

was removed into parliament, and there entred of record, and errors assigned; the judgment of reversal is thereupon given in this form.

“ Les queux record & judgment lues & examine in plein parlement le dit *Roger* cosin & heyre de dit counte dit & alledge, qe les record & judgment susdit sont erroynes & defective in tous points, & [348] nosment en tant come le dit counte estoit myse a mort & disherite sans nul accusement & sans estre mesme en judgment, ou en respons, dont il prie, qe les record & judgment avant dits soient revers and adnulls, & sur ceo ove bone deliberation ed avise ed grant leisure per nostre dit seigneur le roy, prelates, prince, & ducs, countes, & barons avant dit, il peirt clerement, qe mesmes les judgment & records sont erroynes & defectives en tous points, par quoi nostre dit seigneur le roy & les dits prelates, prince, ducs, countes, & barons par accord des chivalers des countes & des commons repellent, & anyentissent, & pur erroyn & irrit adjuggent les records & judgment susdits,” and restore *Roger* the petitioner to the title of earl of *March*, and to the lands, &c. of his grandfather.

But if the party accused declined his appearance, it is true then, that the law of the land is; that he should be proceeded against to an outlawry, and may thereby be attainted by process of outlawry without answer, for he declines it by his own default.

And sometimes there was a more compendious way, namely, the issuing of a proclamation-writ to appear in a month, two, or three in the court of king's-bench, or that in default thereof the party should be attainted of treason or such other offense, wherewith he was charged; and this was frequently done by act of parliament in particular cases, not unlike the process enacted in case of an assault upon a member of parliament by the statute of 5 *H. 4. cap. 6.* and 11 *H. 6. cap. 11.*

Sometimes the lords house did make such a direction, as in the case of *Talbot*, *Rot. Par. 17 R. 2.* mention'd before, p. 265. but it could not be effectual to attain the party upon his default of appearance upon the return of proclamation without act of parliament, or process of outlawry.[1]

Again, as a man could not be attainted of treason without arraign-

[1] By Art. 1. Sect. 9. of the Constitution of the United States, no Bill of Attainder, or *ex post facto* law shall be passed: The same provision may be found in the Constitutions of *Maine, Vermont, Connecticut, New Jersey, Pennsylvania, Maryland, South Carolina, Mississippi, Alabama, & Michigan.* Before the Articles of Confederation were agreed to, Congress had recommended to the several States to confiscate, as soon as might be, and to make sale of all the real and personal estates therein, of their inhabitants, and other persons who had forfeited the same, and the right to protection of their respective States. In consequence of this recommendation, several of the States passed acts to confiscate the estates of persons inimical to the independence and liberties of the United States within such States. 1 *Dall.* 53. 401. During the revolutionary war, says Mr. Justice *Story*, bills of attainder were passed to a wide extent; and the evils resulting therefrom, were supposed, in times of more cool reflection, to have far outweighed any imagined good. The injustice and iniquity of such acts, in general, constitute an irresistible argument against the existence of the power. In a free government it would be intolerable; and in the hands of a reigning faction, it might be, and possibly would be, abused to the ruin and death of the most virtuous citizens. *Story on Const.* 211. 239.

ment, if present, or process of outlawry, if absent, so neither could he be arraigned without an accusation; and this accusation was of three kinds: 1. If he were taken with the *mainour*. 2. By way of appeal. 3. By way of indictment.

1. In antient time, sometimes as well in case of treason, as in case of felony a man, that was taken *cum manu opere*, [849] was thereupon arraigned, an instance we have thereof, *T. 10. E. 2. Rot. 132. Bucks* cited before *p. 186.*

But this is wholly disused and ousted by the statutes of 5 *E. 3. cap. 9.* and 25 *E. 3. cap. 4.* by which statutes none shall be put to answer without indictment or presentment of good and lawful men of the neighbourhood.

2. By appeal, and this was usual at common law, as appears by *Britton, cap. 22.* but this kind of proceeding by appeal in the king's ordinary courts in cases of treason hath been long disused, and it seems is wholly taken away by the statutes of 5 and 25 *E. 3.* above-mentioned.[2]

But yet notwithstanding that course of appeal continued still in parliament, as appears by several instances, especially in the great appeal of treason by the lords appellants in 11 and 21 *R. 2.*, (d) but by the statute of 1 *H. 4. cap. 14.* all appeals in parliament are wholly taken away, and accordingly upon reference to the judges upon the impeachment made in the lord's house by the earl of *Bristol* against the earl of *Clarendon* in the present parliament, it was resolved and reported by all the judges.(e)

But yet that statute hath not taken away impeachments by the house of commons in cases of treason or other misdemeanors, and therefore tho' since 1 *H. 4. cap. 14.* all appeals of treason by particular persons are taken away, and have been wholly disused, yet impeachments by the commons have been ever since very frequently used, because they are rather in the nature of grand indictments, than appeals.

3. By way of indictment, this is the regular and legal way of proceeding in case of treason.

And thus far for the persons against whom judgment of treason may be given, and the manner of deducing them unto judgment.

II. As touching the persons, by whom judgment of treason may be given; this concerns more especially the jurisdiction of courts: a word touching it.

1. Justices of peace cannot regularly arraign, try or give judgment in case of treason, unless in such cases, as are by [350] special act of parliament committed to their cognizance, as

(d) *State Tr. Vol. I. p. 4.*

(e) *State Tr. Vol. II. p. 552.*

[2] In 1631 there was a trial by battle awarded in the court of chivalry, on an appeal of treason beyond the seas. *Lord Rea v. David Ramsay, Rushworth, vol. 2. part. 2. p. 112.* But it is expressly taken away by the 59 *Geo. 3. c. 46.* which enacts, that it shall thenceforth not be lawful for any person to sue an appeal for treason, murder, felony, or other offence. This act was occasioned by *Thornton's case. 1 B. & Ald. 405.*

26 *H. 8. cap. 6.* 5 *Eliz. cap. 1.* 13 *Eliz. cap. 2.* 23 *Eliz. cap. 1.* and some others, because their commission extends not to it, yet they may take examinations touching treason in order to the discovery thereof and preservation of the peace.

2. Justices of *oyer* and *terminer* may give judgment in case of high treason, for it is expressly within their commission.

3. Justices of goal-delivery may give judgment in case of treason on any person in prison before them, and that is proved by the statute of 1 *E. 6. cap. 7.* and by the constant practice.

4. Justices of *Nisi prius* may give judgment in case of treason by the statute of 14 *H. 6. cap. 1.* but *quære*, whether it be barely by force of that commission, or whether it must be by virtue of some other commission.

5. Justices of the king's bench in the court of king's bench may give judgment in case of treason, for it is the highest court of ordinary justice, especially in criminals.

6. If a peer be indicted and plead not guilty to his indictment, and is tried by his peers and found guilty, the lord steward commissioned by the king for that office gives the judgment, and orders execution.

7. If a peer be tried in parliament by the lords, they usually elect a person to be lord steward to gather up their votes and pronounce the judgment, but for the most part that steward so elected, tho in parliament, is commissioned by the king under his great seal; but of this more hereafter.

III. I come to the form of the judgment.

The judgments in case of treason are of two kinds, *viz.* the solemn and severe judgment, and the less.

The solemn or severe judgment against a man convict of high treason is set down, *Co. P. C. p. 210, Stamf. Lib. III. cap. 19, (f)* 1 *H. 7. 24. a Stafford's case & alibi*, "Et super hoc visis & per curiam hic intellectis omnibus & singulis præmissis consideratum est,

1. Quod prædictus *R.* usque furcas *T.* trahatur.[3] 2. Ibi-
[351] dem supendatur per collum, & vivus ad terram prosternatur.

3. Interiora sua extra ventrem suum capiantur. 4. Ipsoque vivente(g) comburantur, & 5. Caput suum amputetur. 6. Quodque corpus suum in quatuor partes dividatur. 7. Et quod caput & quarteria illa ponantur, ubi dominus rex ea assignare voluerit.[4]

(f) p. 182. a.

(g) These words are so material, that the judgment was reversed for want of them in the case of *Walcot. 35 Cor. 2. Show. Ca. Parl. 127, 1 Salk. 632.*

[3] The "drawing" in the judgment for treason, was performed by tying the culprit's feet to the horse's tail and dragging him along the ground. *Luders. 151.*

[4] By the 54 *Geo. 3. c. 146.* entitled, "An act to alter the punishment in certain cases of high treason," after reciting the judgment formerly required by the law in high treason, it is enacted, "That in all cases of high treason, in which, as the law now stands, the sentence or judgment ordained by law is as aforesaid, the sentence or judgment to be pronounced or awarded, from and after the passing of this act, against any person convicted or adjudged guilty, shall be, that such person shall be drawn on a hurdle to the place of execution, and be there hanged by the neck until such person be

The king may and often doth discharge or pardon all the punishment, except beheading, and in as much as that is part of this judgment, it may be executed by the king's special command, tho the rest be omitted.

In the case of a woman her judgment is to be drawn and burnt, as well in high treason, as petit treason, and she is neither hanged nor beheaded.[5]

The less solemn judgment is only *to be drawn and hanged*, and this is regularly the judgment in case of counterfeiting the coin of this kingdom, for that was the judgment in that case at common law, which was not altered by the statute of 25 *E. 3. viz.* "Super quo visis, &c. consideratum est, quod *B. usque furcas de T. trahatur, & ibidem suspendatur per collum, quousque mortuus fuerit.*"

But the judgment in that case also for a woman is to be drawn and burnt, 25 *E. 3. 85. b.*

And it seems the same judgment was also for importing counterfeit coin, and yet that was not treason at common law.

And the same judgment was for counterfeiting the great or privy seal at common law, as may be easily gathered out of *Bracton, Lib. III. de Corona, cap. 3.* but expressly by *Fleta, Lib. I. cap. 22.* *Crimen falsi dicitur, cum quis accusatus fuerit quod sigillum regis, vel appellatus, quod sigillum domini sui de cujus familiâ fuerit, falsaverit, & brevia inde consignaverit, vel cartam aliquam vel literam ad exheredationem domini vel alterius damnum sic sigillaverit, & quibus casibus, si quis inde convictus fuerit, detractari meruit & suspendi.*

And accordingly the like judgment hath been given, as in case of petit treason, for counterfeiting the great seal after the statute of 25 *E. 3.* as appears by 2 *H. 4. 25.* and the record [352] is accordingly; (h) and tho it is true my lord *Coke* saith, it is a mistake *Co. P. C. p. 15.* yet I rather think it was a mistake in my lord *Coke*, and that the judgment may be given either way, *viz. dis-*

(h) *Vide supra in notis p. 181.*

dead; and that afterwards the head shall be severed from the body of such person, and the body divided into four quarters, shall be disposed of as his majesty and his successors shall think fit."

Sect. 2. enacts, that the king, after judgment pronounced may, by warrant under his sign manual, countersigned by one of the principal secretaries of state, declare it to be his pleasure, and may order and direct that such person shall not be drawn, but shall be taken in such manner as in the said warrant shall be expressed, to the place of execution, and that such person shall not be hanged by the neck, but in stead thereof the head shall be there severed from the body of such person whilst alive, and in such warrant may direct and order how and in what manner the body, head, and quarters of such person shall be disposed of, and it shall be lawful for the sheriff or other person to whom such warrant shall be directed and whom it shall concern, to carry the same into execution accordingly.

By the 33d *Sect.* of the act of Congress of April 30, 1790, the manner of inflicting the punishment of death shall be by hanging the person convicted by the neck until dead.

[5] But now by the 30 *Geo. 3. c. 48.* women are to be drawn to the place of execution and hanged.

trahatur & suspendatur, or distrahatur, suspendatur & decapitetur.

In the case(i) 16 *Jac.* for counterfeiting the privy signet, which was made treason by the statute of 1 *Mar. cap. 6.* the judgment was the great and solemn judgment of drawing, hanging and quartering.

But suppose the judgment were so in case of counterfeiting the seal, great or privy, yet the question is whether the same judgment must be in those new treasons enacted by 1 & 2 *P. & M. cap. 11.* for counterfeiting foreign coin made current by proclamation, and also upon the statutes of 5 *Eliz.* and 18 *Eliz.* for clipping and washing, whether must they have the solemn judgment to be hanged and quartered, or only the judgment of petit treason to be drawn and hanged.

And herein by *Stamf. Lib. III. cap. 19.(k)* and *Co. P. C. p. 17.* the judgment is to be the solemn judgment, and not the judgment to be drawn and hanged, because it is a new treason made by act of parliament, and therefore must have the solemnity of the great judgment in case of high treason.

And surely this is regularly true, and therefore in the case of popish priests, and those other acts of treason newly enacted in the queen's time, the judgment is to be drawn, hanged and quartered; but it seems to me, that the law is otherwise in relation to those new treasons enacted in the time of queen *Mary* and queen *Elizabeth* relating to coin, and that in all those cases the judgment at least may be only to be drawn and hanged; and my reasons are, 1. Because they are *in cognata materia falsificationis monetæ*, and therefore tho they are made treason, yet they are within the verge of the crime of falsification of money, and are to be under the same punishment. 2. It were unreasonable to think, that the parliament should make the counterfeiting of foreign coin to have a greater kind of punishment, than the counterfeiting of the coin of this kingdom,

[353] or that clipping *English* or foreign coin should have a greater punishment, than counterfeiting of the coin of this kingdom. 3. As the statute of 25 *E. 3.* tho it declares as well counterfeiting of money as levying of war to be high treason, yet leaves them under the several degrees of punishments proportionable to their nature, and what they had before, so tho these statutes make those to be new treasons, that were not before, yet in as much as the punishments of treasons were not equal, but that concerning coin was a punishment of a lower allay, therefore the subject matter of those acts shall govern the degree of their punishment according to that punishment of treason, that relates to coin. 4. And accordingly in the book of *T. 6 Eliz. Dy. 230. b.* it is agreed by the justices, that the punishment *pro tonsurâ monetæ* is only to be drawn and hanged, and upon a strict search into the precedents of *Newgate* from 5 *Eliz.* downwards, tho some judgments for clipping be the solemn judgments, yet the most and latest are only to be drawn and hanged, and

(i) *Robinson's case*, 2 *Roll. Rep.* 50.

(k) *p.* 182. *b.*

accordingly it was resolved and done upon great deliberation lately in the king's bench upon the conviction of two *Frenchmen* for clipping of the king's coin. (l)

But however it seems, that the judgment either of one kind or the other seems not to be erroneous, for hanging and drawing is part of the solemn judgment, and tho either may be perchance warrantable enough, yet certainly the judgment of petit treason in all treasons touching coin is the most warrantable and safe. [6]

IV. I come to consider of the consequents of a judgment in treason.

If the judgment be given by him, that hath authority, and it be erroneous, it was at common law reversible by writ of error; only the statute of 29 *Eliz. cap. 2.* secures all former attainders, where the party is executed, from reversal by writ of error, but meddles not with other attainders, neither doth the statute of 33 *H. 8. cap. 20.* take away writs of error upon attainder of treason, as hath been resolved against the opinion of *Stamf. P. C. Lib. III. cap. 19. (m) Co. P. C. p. 31.*

But it is true, that the statutes of 26 *H. 8. cap. 13.* and 5 & 6 *E. 6. cap. 11,* take away from a person outlawed in [354] treason the advantage of reversal of an outlawry, *because the party outlawed was out of the realm,* but extends not to other offenses.

The consequents of a judgment in treason are, 1. Corruption of blood of the party attaint. 2. Loss of dower to his wife. 3. Forfeiture to the king of all his lands, goods and chattles. 4. Execution, whereof in the next chapter. [7]

CHAPTER XXVII.

TOUCHING CORRUPTION OF BLOOD AND RESTITUTIONS THEREOF, LOSS OF DOWER, FORFEITURE OF GOODS, AND EXECUTION.

THE consequence of the judgment in high treason, petit treason, or felony, is corruption of blood of the party attaint; unless it be in such special treasons or felonies enacted by parliament, wherein it is especially provided, that the attainder thereof shall make no corruption of blood, as upon the statutes of 5 and 18 *Eliz.* in treason for clipping and washing of coin; and upon the statutes of 21 *Jac. cap. 26.* for acknowledging a recognizance, &c. in another's name, 1 *Jac. cap. 11.* for bigamy, and many others.

(l) The case of *Bellew and Norman*, *Raym.* 234. 1 *Ventr.* 254. (m) p. 182. b.

[6] The 2 *Will. 4. c. 34.* abolishes the punishment of death in all cases of offences relating to the coin. By the 3 *sect.* the counterfeiting the gold and silver coin is punished, at the discretion of the court, by transportation for life, or for seven years, or imprisonment not exceeding four years. The subsequent sections provide for the punishment of the several other offences of this nature.

[7] For the learning relating to the judgment in high treason, see *Luders' Tracts*, 149. 1 *East, P. C.* 137.

If a man be attaint of piracy before commissioners of *oyer and terminer* grounded upon the statute of 28 *H. 8. cap. 15.* by indictment and verdict of twelve men according to the course of the common law, he forfeits his lands and goods by the statute of 28 *H. 8. cap. 15.* but this works no corruption of blood, because it is an offense whereof the common law takes no notice, and tho it be enacted,
 [355] they shall suffer and forfeit as in case of felony, yet it alters not the offense, *Co. P. C. cap. 49. p. 112. vide tamen contra Co. Litt. § 745. p. 391.*

If a man be attainted before the admiral of treason or felony committed upon the sea, or before the constable and marshal for treason or murder committed beyond the sea, according to the course of the civil law, it works no corruption of blood, for tho these offenses within the cognizance of the common law are felonies or treasons, yet the manner of the trial being according to the course of the civil law, the judgment thereupon, tho capital, corrupts not the blood.

If there be an attainder of treason or felony done upon the sea upon this statute of 28 *H. 8.* by jury, according to the course of the common law, it seems that the judgment thereupon works a corruption of blood, because the commission itself is under the great seal warranted by act of parliament, and the trial is according to the course of the common law, and therefore the proceeding and judgment thereupon is of the same effect, as an attainder of foreign treason by commission upon the statute of 35 *H. 8. cap. 2.* or any other attainder by course of the common law, and with this agrees *Co. Litt. § 745. p. 391.* nay, I think farther, that if the indictment of piracy before such commissioners upon the statute of 28 *H. 8.* be formed as an indictment of robbery at common law, *viz. vi & armis & felonice, &c.* that he might be thereupon attainted, and the blood corrupted; for whatever any say to the contrary, it is out of question, that piracy upon the statute is robbery, and the offenders have been indicted, convicted, and executed for it in the king's bench, as for a robbery, as I have elsewhere made it evident.

But indeed, if the indictment before these commissioners run only according to the style of the civil law, *viz. piratice deprædavit*, then the attainder thereupon upon the statute of 28 *H. 8.* though it gives the forfeiture of lands and goods, corrupts not the blood, and so are those two books of the same author, *Co. P. C. cap. 49.* and *Co. Litt. § 745.* to be reconciled, which without this diversity would be contradictory: *vide H. 13. Car. B. R. Hilliar & Moore.*

By the statute of *Westminster 2. de donis conditionalibus*,
 [356] if tenant in tail be attaint of felony or treason, there is no corruption of blood wrought as to the issue in tail, because the very blood as well as the land, is entailed, and yet for the advantage of the issue there is a corruption of blood, as if the tenant in tail alien with the warranty and assets, and then is attainted, the lien of the warranty is gone, for that lien was not entailed. *Litt. § 747.* but if the warranty were annexed to the gift in tail, the attainder of the donee doth not destroy the warranty to the issue, for the warranty is entailed.

The statutes of 26 and 33 *H. 8.* subject estates-tail to forfeiture by attainder of treason, and so the law stands at this day, notwithstanding the statutes of 1 *E. 6.* and 1 *Mur.* whereof before. [1]

But yet these acts are not absolutely a repeal of the statute of *donis conditionalibus*, for notwithstanding the forfeiture of the lands entailed by the attainder, yet the blood is not corrupted as to the issue in tail.

And therefore if the son of the donee in tail be attainted of treason in the life of the father, and dies having issue, and then the father dies, the estate shall descend to the grandchild, notwithstanding the father's attainder; but otherwise it would have been in case of a fee-simple. 3 *Co. Rep. Downtie's case*, 10 *b.*

In all cases (but only in cases of entails as before) attainder of treason or felony corrupts the blood upward and downward, so that no person that must make his derivation of descent to, or through the parties attaint, can inherit, as if there be grandfather, father, and son, the father is attainted, and dies in the life of the grandfather, the son cannot inherit the grandfather. (a)

In cases of collateral descents of lands in fee simple, if there be father and two sons, and the eldest is attainted in the life of the father, and dies without issue in the life of the father, the younger son shall inherit the father, for he needs not mention his elder brother in the conveying of his title; but if the elder son attaint survive the father but a day, and die without issue, the second son cannot inherit, but the land shall escheat *pro defectu hæredis*, for the [357] corruption of blood in the elder son surviving the father impedes the descent. 31 *E. 1. Barr.* 315.

But otherwise it is in case the eldest son had been an *alien nœe*, for then notwithstanding such son alien were living, the land will descend from the father to the youngest son born a denizen.

If a man hath two sons and then is attaint of treason or felony, the elder son purchaseth land and dies without issue, either in the lifetime or after the death of the father, the attainder of the father is no impediment of the descent from the brother to the brother. Sir *Philip Hobby's case*, *Co. Litt.* 8.

And the same law is in case the father were first attaint, and then had issue two sons, the elder purchases lands in fee simple and dies without issue, the younger shall inherit, for tho both derive their blood from the father, yet the descent from the brother to the brother is immediate, and is not impeached by the attainder of the father, this tho made a doubt, *Co. Litt. p. 8.* yet was agreed generally by the judges in the exchequer-chamber in the case of the earl of *Holderness*. (b)

(a) *Dyer* 274.

(b) *P. 16 Car. 2.* reported by the name of *Collingwood and Pace*, 1 *Sid.* 193. 1 *Ven.* 413.

[1] Tenant in tail attainted of treason by the act of the legislature of *New Jersey* of the 11th *December*, 1778, forfeits his life estate only. *Donn ex dem. Hinchman v. Clark et al. Coxe's Rep.* 340.

But if there be two brothers, the elder is attaint and have issue, and dies in the life of the younger, and then the younger die without issue, the lands in fee-simple of the younger shall not descend to the nephew, for the attainder of his father is an impediment to the derivation of his descent.

And accordingly it is, if the son of the person attaint purchases lands and dies without issue, it shall not descend to his uncle, for the attainder of his father corrupted his blood, whereby the bridge is broken between the nephew and uncle, and the one cannot inherit the other, but the land shall eschete *pro defectu hæredis*: vide accordant ruled in *Courtney's case infra Co. P. C. p 241* [2]

Thus far for corruption of blood.[3]

[358] Touching restitutions in blood they are of two kinds, by pardon, and by act of parliament.

The king's pardon, tho it doth not restore the blood, yet as to issues born after it hath the effect of a restitution.

A. hath issue *B.* a son, and then is attaint of treason or felony, and then is pardoned and purchaseth land in fee simple, and then hath issue *C.* if *A.* dies, and *B.* survives, and after dies without issue, yet the land shall eschete *pro defectu hæredis*, for the pardon restores not the blood between *A.* and *B.* that was born before; but if *B.* had died without issue in the life of *A.* and then *A.* had died, the land should descend to *C.* because he was not in being while his father's attainder stood in force, but was born after the purging of the crime and punishment by the pardon. *Co. Litt. § 747.*

But restitution of blood in its true nature and extent can only be by act of Parliament.

Restitutions by parliament are of two kinds, one a restitution only in blood, which only removes the corruption thereof, but restores not to the party attaint or his heirs the manors or honours lost by the attainder, unless it specially extend to it; the other is a general restitution not only in blood, but to the lands, &c. of the party attaint.

A restitution in blood may be special and qualified, but generally a restitution in blood is construed liberally and extensively.

A. hath issue *B.* a son, and is attaint of treason and dies, *B.* purchaseth land in fee simple, *B.* by parliament is restored only in blood, and enabled as well as heir to *A.* as to all other collateral and lineal ancestors, provided it shall not restore *B.* to any of the lands of *A.* forfeited by the attainder, *B.* dies without issue; it was ruled, that

[2] At common law the curtesy estate of the husband is not forfeited to the commonwealth by his attainder of treason, committed in the lifetime of the wife and after issue born; but on the death of the wife the estate passes to her heir or devisee discharged of the curtesy. *Pemberton v. Hicks*, 1 Binn. 1. S. C. 3 Dall. 479. 4 id. 168. The widow of a man who was banished from the State of South Carolina, and whose estate was confiscated by an act of the legislature of 1782, for adhering to the British in the course of the revolutionary war, was held to be entitled to her dower in all his lands. *Wills v. Martin*, 2 Bay Rep. 20.

[3] Corruption of blood is now only peculiar to treason and murder, being abolished in other cases, by the 54 Geo. 3. c. 145.

the lands of *B.* shall descend to the sisters of *A.* as aunts and collateral heirs of *B.* 1. Because the corruption of blood by the attainder is removed by the restitution. 2. Altho the words of the act of restitution be to restore *B.* only as heir to *A.* &c. yet this doth not only remove the corruption of blood, and restore him and his lineal heirs in blood, but also his collateral heirs, and removes that impediment, which would have hindered the descent to them. [359]
Co. P. C. cap. 106. Courtney's case.

It appears *Rot. Parl. 25 E. 3. n. 54, 55.* that *John Matravers*, that was attainted of treason in 4 *E. 3.* obtained letters patent from the king of restitution in blood, but it was not effectual, and therefore there is enacted a general restitution as well in blood, as to his land by a charter enacted and confirmed in parliament, namely by the king with the consent of the lords at the petition of the commons.

II. As to the second matter, namely the forfeiture of the wife's dower.

At common law the husband being attainted of treason or felony the wife should lose her dower, tho it were dower assigned *ad ostium ecclesie* or *ex assensu patris*, *Co. Litt. §. 41. p. 37. ibidem §. 747.* but not upon attainder of misprision of treason; but by the statute of 1 *E. 6. cap. 12.* and 5 *E. 6. cap. 11.* tho her husband be attainted of felony or murder, she shall not lose her dower.

But by attainder of her husband of high treason or petit treason the wife shall lose her dower at this day, unless in case of attainders of such treasons, where by special provision of parliament the wife's dower is saved, as upon the statutes of 5 and 18 *Eliz.* touching coin.

But if the husband seised in right of the wife hath issue by her, and then the wife commits treason, and is attainted and dies, it seems the husband shall be tenant by the courtesy, otherwise it were, if the treason were committed before issue had: *vide Co. Litt. §. 35.*

III. As to the third thing, namely the forfeitures, that happen by attainder, they are of these kinds, of lands, or of goods and chattels, or of dignities and honours.

1. As to the forfeiture of lands, generally the lands of all persons attainted of treason belong to the king, but by special privilege they may belong to a subject, as in case of the bishop of *Durham*, &c. *de quo supra p. 254. &c.*

If at common law tenant in tail were attainted of treason, or at this day be attainted of felony, tho the inheritance neither eschete nor be forfeited, yet the king hath (upon office found) the freehold during the life of the tenant in tail, and not barely [360] a pernaney of profits: adjudged *T. 29 Eliz. Clenche's rep.*

Venable's case, and 3 *Leon. n. 236.(c) Co. Litt. §. 747.* and the same law it is for tenant of life attaint.

But an attainder of treason or felony of a copyholder gives the

king no forfeiture, but regularly it belongs to the lord, unless special custom be to the contrary.

By the custom of *Kent*, if the ancestors be attaint of felony and executed, yet his lands shall not eschete but descend to the heir; but if he be attaint by outlawry, or abjure, they are not privileged by the custom from eschete.

But if he be any way attaint of treason, yet the forfeiture thereof belongs to the king notwithstanding that custom. 8 *E. 2. Prescription* 50. *Lambard's Perambulatio Kentiæ*, p. 551.

If the tenant hold lands of a common person, and commit treason and be attaint, yet the forfeiture belongs to the king of common right, as a royal eschete; but if such person commit felony or petit treason and be attaint, the lands eschete to the lord, of whom they were immediately held, only the king shall have the year, day, and waste of the tenement so escheted for felony or petit treason. *Stamf. Prærogativa Regis*, cap. 16.(d)

The commencement of this year and day is neither from the attainder nor from the death of the party attaint, but from the time of the inquisition found, tho the same be not found for many years after the death of the person attaint. 49 *E. 3. 11.*

If tenant in tail or for life, or the husband seised in right of his wife be attaint of felony, the king shall have the year, day and waste against the wife, the issue in tail, and him in reversion. *Stamf. P. C. Lib. III. cap. 30.(e)* 3 *E. 3. Coro.* 327, but of this more hereafter.

The relation of the forfeiture or eschete of lands for treason or felony to avoid all mesne incumbrances is to the time of the offense committed.

A. and *B.* joint tenants in fee, *A.* is attaint of treason or felony and dies, the land survives to *B.* but yet subject to the title [361] of the forfeiture. *H. 10 Car. Ret.* 342. *B. R. Harrison and Walden.*

If a man seised in fee alien, and then be attaint of treason or felony by confession or abjuration upon an indictment supposing the felony committed before the alienation, the alienee may not only falsify the attainder in the point of the time of the felony supposed, but also in the very point of the felony or treason itself, and is not concluded by the confession of the alienor, tho the alienor himself be concluded. 49 *E. 3. 11.* 7 *E. 4. 1. Co. P. C. cap. 104. p. 231.*

But if he be attaint of felony or treason by verdict upon an indictment, supposing the offense before the alienation, tho the alienee cannot falsify the attainder by supposing there was no felony committed, yet he may falsify it as to the point of time, viz. he may allege contrary to the indictment, that the felony or treason was committed after the alienation, and not before, *Co. P. C. ubi supra* 32 *Eliz. Syer's case.*

If a man be indicted of a felony or treason supposed the 1st of April 24 *Car.* and in truth it was committed 1 Junii 24 *Car.* yet he

(d) See *Mag. Chart. cap. 22. 2 Co. Inst. 36.*

(e) 190 b.

shall be convicted notwithstanding that variance, for the day is not material; yet in such case for the avoiding of the danger and trouble, that may ensue by the relation of such attainder to the day mentioned in the indictment, it is fit for the jury to find the true day: *vide Syer's case, ubi supra.*

If a man be outlawed upon an indictment of felony or treason, and pending the process he alien the land, yet the king or lord shall have the land, which he held at the time of the felony committed, for the indictment contains the year and day, when it was done, unto which the attainder by outlawry relates.

But if a man sue an appeal by writ of felony or murder, and pending it the party aliens, and then is outlawed before appearance, the lords eschete is lost, because it relates only to the time of the outlawry pronounced, in as much as the writ of appeal is general, and contains no certain time of the offense committed, cited to be adjudged 5 E. 6 Co. Litt. § 4. fol. 13 a.

But it seems, that if the defendant had appeared and the plaintiff had declared upon his writ, and the defendant had [362] been convict and attaind by verdict or confession, or if the appeal had been by bill, and thereupon the party had been outlawed, tho before appearance, the eschete had related to the time of the fact committed to avoid mesne incumbrances, for in the declaration in the one case, and in the bill in the other case, the year and day of the felony is set forth.

Touching forfeiture of goods.

The goods of a person convict of felony or treason, or put in exigent for the same, or that fled for these offenses, or that stands mute, are forfeit to the king.

But the relation of these forfeitures refer not to the time of the offense committed, nor to the time of the flight, but only to the conviction or to the time presented, or to the time of the exigent awarded.

And therefore an alienation made by the felon or traitor, or person flying *bonâ fide* and without fraud, mesne between the offense or the flight, and the conviction or presentment of the flight is good, and binds the king, but if fraudulent, then it is avoidable by the statute of 13 Eliz. cap. 5. 3 E. 8. Coron. 296. *ibidem* 344.

If a man commits a felony and be pursued, and in the flight be killed, whereby he can neither be indicted nor convict, yet if this matter be found by inquisition before the justices in *eyre* or of *oyer* and *terminer*, he shall forfeit the goods he had at the time of the flight, and not those only, which were his at the time of the inquisition found, for there it must relate to the flight, because the party is dead, and can be no farther proceeded against, 3 E. 3. Coron. 290. 312.

If a party be acquitted of treason or felony, the jury that acquits him ought to enquire of his flight for it, and if they find he fled, what goods he had, for his goods and chattles are thereby for-

feited; (4) but this is but an inquest of office, and therefore is traversable by the party : *vide Stamf. P. C. Lib. III. cap. 21. (f)*

But upon an inquisition before the coroner of the death of [363] a man *super visum corporis*, tho the party accused be acquitted, yet if it be presented, that he fled for it, it is doubted whether that inquisition as to the flight be traversable : *vide Stamf. P. C. Lib. III. cap. 21.*

But on all hands it is agreed, that if the coroner upon the inquest *super visum corporis* presents one as guilty, and that he fled for it, and the party is arraigned and found not guilty, and also that he did not fly, yet that doth not avoid the first inquisition as to the flight, but the best shall be taken for the king, tho both are in the nature of inquests of office. 22 Ass. 96. Forfeitures 27. 3 E. 4. Forfeitures 35. H. 13 H. 4. Forfeitures 32. 7 Eliz. Dy. 238. b.

A *fugam fecit* by the principal or accessory *before*, in murder, if the fact be presented before the coroner, entitles the king to the goods of the offender, for these are within the cognizance of the coroner, but the coroner hath no power to enquire of accessories *after*, nor consequently of their flight, and therefore a presentment before the coroner of the flight of an accessory *after* gives the king no title to the goods. 4 H. 7. 18.

The usage was always upon a presentment of homicide before the coroner, or of flight for the same, or upon a conviction of felony by the petit jury, or the finding of a flight for the same, to charge the inquest or jury to enquire, what goods and chattels he hath, and where they are, and thereupon to charge the *Villata* where such goods are with the goods to be answerable to the king : *vide 3 E. 3. Corone 296. & alibi, vide statute 31 E. 3. cap. 3.*

But tho the goods of an offender be not forfeited till the conviction or flight found by inquest, yet whether they may be seised upon the offense committed, hath been controverted.

1. It seems clear, that at common law if a man had committed felony or treason, or tho possibly he had committed none, yet if he had been indicted or appealed by an approver, the sheriff, coroner, or other officer could not seize and carry away the goods of the offender or party accused.

2. Again, he could not in that case have removed the [364] goods out of the custody of the offender or party accused, and deliver them over to the constables or to the *Villata* to answer for them. 13. H. 4. 13.

3. But if the party were indicted or appealed by an approver, the sheriff, or other officer might make a simple seizure of them only to inventory and appraise them, and leave them in the custody of the servants or bailiff of the party indicted, in case he would give secu-

(f) p. 183. b.

[4] By the 7 & 8 Geo. 4. c. 28. s. 5. it is enacted, that where any person shall be indicted for treason or felony, the jury impaneled to try such person shall not be charged to inquire concerning his lands, tenements, or goods, nor whether he fled for such treason or felony.

rity against their being imbezzled, or in default thereof he might deliver them to the constable or *Villata* to be answerable for them, but yet so that the party accused and his family have sufficient out of them for their livelihood and maintenance, (g) viz. *Salvis capto & familiæ suæ necessariis estoveriis suis, & si captus convictus fuerit de felonîâ unde rettatus est, residuum bonorum ultra estoverium illud regi remaneat.* *Bract. Lib. III. 123. Fleta, Lib. I. cap. 26. 43 E. 3. 24. 44 Ass. 14. Stamf. P. C. Lib. III. cap. 32. Co. P. C. 228, 229.*

4. And possibly the same law was, tho he were not indicted or appealed, but *de facto* had committed a felony, but with this difference, if he had been indicted or appealed by an approver, this kind of seizure might have been made, whether he committed the felony or not; for in the books of 43 *E. 3.* and 44 *Ass.* there is no averment, that the felony was committed, but only that he was thus *accused* of record, and so is the book of 13 *H. 4. 13.*

But in case there were no indictment, then it is at the peril of him that seisseth, if he committed not the felony, and therefore it is issuable.

Now touching alterations by the statutes after made.

It seems, that by the statute of 5 *E. 3. cap. 9.* and the ensuing statutes, whereby it is enacted, that no man's goods shall be seized into the king's hands without indictment or due process of law, that it was held, that this kind of seizure of the goods of a person accused of felony, tho it be only *in custodiam & causa rei servandæ*, hath been held unlawful, if the person were not first indicted, or at least appealed by an approver; and so the books seem to [365] import of 43 *E. 3. 24.* and 13 *H. 4. 13.* and expressly my lord *Coke, P. C. cap. 103. p. 228.*

By the statute of 25 *E. 3. cap. 14.* where a party is indicted of felony, the process directed by that statute is first a *capias*, and if he be not found a second *capias* together with a precept to seize his goods, and if he be not found then, an exigent and the goods to be forfeit.

And this is more than a simple seizure, such as was before at common law, for if the party came not in, his goods are forfeit upon the award of the exigent; and if he came in, tho his goods be saved, yet there is no direction for delivering his goods upon security; but it seems the sheriff is to take them into his custody, and yet out of them must allow sufficient for the sustenance of the prisoner and his family.

Quære, Whether in the case of such a seizure, a sale for a valuable consideration before conviction and after seizure do not bind the king, as it seems it doth in a case of seizure and delivery to the *Villata*: vide 8. *Co. Rep. 171. Fleetwood's case.*

This statute extends as well to treason as to felony, and yet it mentions only felony, and therefore at this day the exigent goes out upon the second *Capias* returned *non inventus*, as well in treason, as felony.

(g) See *State Tr. Vol. IV. p. 615. Sir W. Parkin's case.*

By the statute of 1 R. 3. cap. 3. it is enacted, "That neither sheriff, &c. nor other person take or seize the goods of any person arrested or imprisoned before he be convict of the felony according to the law of *England*, or before the goods be otherwise lawfully forfeited, upon pain of forfeiting the double value of the goods so taken."

Mr. *Stamford* thinks this is but an affirmance of the common law, only that it gives a penalty, but it seems to be somewhat more than so, for this prohibits the seizure of the goods of a party imprisoned, tho he were also indicted, but not yet convicted, where unquestionably the common law allowed such a seizure, as is before declared, if the party or his friends did not secure the forth-coming of the goods, where the party was indicted.

But upon this statute these things are considerable.

1. Whether it extends to treason; it seems it doth, for as [366] all treason is felony and more, so in a statute of this nature for advancing of justice it seems comprised in it, for it is within the reason of the law, and *vide Co. P. C. p. 228*, tho I know it was otherwise held, or at least doubted in the case of Sir *Henry Vane*, whose rents were stopt in the tenants hands, and no precept was granted for their delivery, tho before conviction, yea and before the indictment, tho after imprisonment 1661.

2. Whether it extends to a party, that is at large and out of prison, whether indicted or not indicted, and as to that, 1. It seems clearly, that it doth not repeal the statute of 25 E. 3. cap. 14, touching the second *Capias* with a seizure of goods. But 2. As to other persons, that are at large and not indicted, nor process, as before, made upon their indictment, it seems to me, that if they fly not, there can be no seizure at all made, whether they are indicted or not, for the statute did not intend a greater privilege to a party imprisoned for an offense of this nature, than he that is at large. 3. That if he be at large and fly for it, yet his goods cannot be seized and removed, whether he be indicted or not indicted. 4. That if he be indicted and at large, yet the goods cannot be removed, but only viewed, appraised, and inventoried in the house or place, where they lie. 5. That altho the goods may not be removed, because the statute now hath taken away that removal, that was in some cases at common law, yet neither in case of treason nor in case of felony, where the party is at large, is it within the penalty of the statute as to the point of forfeiture of the double value, for as to that the statute is penal, but it is within the directive and prohibitory part of the statute, which by an equal construction and interpretation prohibits the thing to be practised, and hath altered the law as to the removing of the goods of the party before conviction.

And yet I know not how it comes to pass, the use of seizing of the goods of persons accused of felony, tho imprisoned or not imprisoned, hath so far obtained notwithstanding this statute, that it passeth for law and common practice as well by constables, sheriffs [367] and other the king's officers, as by lords of franchises, that there is nothing more usual: *vide Dalton's Justice of Peace*,

cap. 110.(h) in affirmation of it, viz. that the officer may still take surety, that the goods be not embezzled, and for want of sureties may seize and praise them, and then deliver them to the town safely to be kept, until the prisoner be convict or acquit, and cites for it *Stamf.* 192. 8 *Rep.* 171. and *B. Forfeiture* 44.

It seems the opinion therefore of my lord *Coke*, *P. C. cap.* 103. hath truly stated the law, at least as it stands upon the statute of 1 *R.* 3.

1. That before the indictment the goods of any person cannot be searched, inventoried, nor in any sort seized.

2. That after indictment they cannot be seized and removed, or taken away before conviction or attainder; but then it may be said, to what purpose may they be searched and inventoried after indictment, if they may not be removed, but are equally liable to embezzling as before.

I think he is not bound to find sureties, neither hath the officer at this day any power to remove them in default of sureties, and commit them to the vill, but only to inventory them and leave them where he found them, (unless in case of the second *Capias*, whereof before) for the prisoner or party indicted may sell them *bond fide*; and if he may do so, the vendee may take them, and the *Villata* cannot refuse the delivery of them to the vendee, tho the goods had been delivered to them.

But there is this advantage by the viewing and appraising, that thereby the king is ascertained what the goods are, and may pursue them that take or embezzle them, by information, (if the party happen to be convict) and try the property with them, whether they are really sold, or sold only fraudulently without valuable consideration to prevent the forfeiture, and so forfeited by the statute of 13 *Eliz. cap.* 5. notwithstanding such fraudulent sale.[5]

IV. Lastly, touching execution of judgments of treason, they are directed by the judgment, whereof before.

There be nevertheless some things, that accidentally happen, that suspend or abate the execution. [368]

1. Reprieves *ex arbitrio regis vel judicis*, the king may by command or precept under his great or privy seal, privy signet, or sign manual, yea by signification under the hand of the secretary of state,

(h) *New Edit. cap.* 163. p. 538.

[5] By the Constitution of the *United States*, Art. 3. Sect. 3. it is provided that, Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted. The constitutions of *Connecticut*, *Pennsylvania*, *Delaware*, *Tennessee*, *Ohio*, *Indiana*, *Illinois*, *Alabama*, *Missouri*, and *Arkansas*, contain similar provisions. By Sect. 24 of the Act of Congress of April 30, 1790, it is enacted, that no conviction or judgment for any capital or other offences, shall work corruption of blood, or any forfeiture of estate. See *Hylton v. Brown*, 1 *W. C. C. R.* 343. The doctrine of corruption of blood, says Mr. *Rawle*, (*Cons.* 146.) arises from an odious fiction, founded on a compound of cruelty and avarice, springing from a perversion of the system of tenures, and at variance with the liberal principles of modern times, and the very elements of justice.

or at this day by the subscription of a master of requests, command the reprieve of one condemned of treason or felony.

And altho the judge, by whom judgment is given, ought to be very cautious in granting a reprieve of one condemned for treason before him, yet he may, upon due circumstances do it, as well in case of treason, as felony.

And this reprieve he may grant, and after he hath granted it may command execution after the sessions and adjournment of the commission. *Dy. 205.*

There are other reprieves, which are not arbitrary, but *quasi de jure*.

1. In respect of pregnancy, for tho pregnancy be no plea to delay judgment, yet it is a plea to delay execution, and therefore whenever any judgment in treason or felony is given against a woman, it is the duty of the judge, before he finish his sessions, to demand of her what she can allege why execution should not be made; yea in all cases, where a prisoner attaint is brought into another court, or reprieved to another sessions, he ought not to have any award of execution against him, till he be first demanded, what he can say, why it should not be, for possibly he may have a pardon after judgment. *22 Ass. 71.*

This plea of pregnancy *in retardationem executionis* hath these incidents to it: 1. She must be with child of a quick child. 2. If it be alleged, the judge, before whom it is alleged, must impanel an inquest of women *ex officio* to enquire of the truth of her allegation, *viz.* whether she be with child of a quick child, and if they find she is, then her execution is to be respited, if not, she is to be executed.

If it be found by the jury of women, that she is so with child, some have used to command a respite of her execution till a convenient time, for instance a month after her delivery, and then to be [369] executed; but this seems irregular, for she may have a pardon to plead, and therefore it is to be respited till another sessions. *12 Ass. 10.*

If she have once had the benefit of this reprieve and be delivered, and afterwards be with child again with another quick child, she shall not have the benefit of a farther respite of the same judgment for that cause; *quod vide 23 Ass. 2 Coron. 188. 22 E. 3. ibidem 253.*

If the jury of women be mistaken in their verdict, and find her quick with child, where in truth she was not at all with child, (as once it happened at *Alesbury*,) if the next sessions of goal-delivery, or *oyer* and *terminer* happen at that distance, that it is impossible by the course of nature, that she could be with child, but she must be delivered mesne between the former sessions and this, as if it were ten months, &c. she shall be executed; but if the second sessions happen within such time after the first, that by course of nature she may still continue with child, as if it be within the distance of six months or the like, then she shall continue under the first reprieve till another session, *nam licet tempus ordinarium vitalis fœtus sit post*

16. vel 18. septimanas post impregnatam, tamen in quibusdam citius contingere potest juxta medicorum placita.

If in truth she were not with child with a quick child at the time, when the jury gave their verdict, but became quick after, nay tho she were not at all with child then, but became with child before the time of the second session with a quick child, in my opinion she shall have a second reprieve by reason of pregnancy, for the advantage that she had at first was not really because of pregnancy, but by a mistake of the jury of women, and therefore *in favorem protis* she shall now have it.

And therefore, as hath been said, in all cases of reprieves for pregnancy the judge ought to make a new demand, what the prisoner hath to say, wherefore execution should not be awarded, for the first respite being by a kind of matter of record shall not be determined without a new award of execution; and altho clerks of assises enter these respites and awards only in a book of [370] *Agenda*, yet regularly they are supposed to be entered of record, and these memorials are warrants for such entries, tho *de facto* it be not usually done. [6]

Another cause of regular reprieve is, if mesne between the judgment and the award of execution the offender become *non compos mentis*, (i) the judge in that case may both in case of treason and felony swear a jury to inquire *ex officio*, whether he be really so, or only feigned or counterfeit; and thereupon if it be found that he be really distracted, must award a reprieve *de jure* till another sessions, *Co. P. C.* p. 4. and the statute of 33 H. 8. cap. 20. that directed an execution of parties convict of treason notwithstanding insanity intervening after judgment is repealed, by 1 & 2 P. & M. *de quo supra* p. 283.

Now as to the abating of some parts of the execution in case of high treason, as drawing, hanging, evisceration and quartering, and leaving the offender only to be beheaded, this may be, and usually is by the king's warrant under his great seal, privy seal, yea or his privy signet, or sign manual, as usually is done in case of noblemen or great men falling under that judgment, for one part of the judgment, viz. decollation, and the substance of the whole judgment, viz. the death of the party, is performed. [7]

(i) See Sir John Hawles's remarks on the trial of Charles Bateman, *State Tr.* Vol. IV. p. 204.

[6] The warrant to execute a man in *England* is nothing more than a marginal note! 4 *Bl. Com.* 403.

[7] 2 *Bl. Com.* 251. 4 *id.* 380. 388. 1 *Burn's Just.* 306. "Attainder." 1 *Chit. Cr. Law.* 723.

CHAPTER XXVIII.

TOUCHING THE CRIME OF MISPRISION OF TREASON, AND FELONY, &c.

THO the order proposed in the beginning should refer misprision of treason to that series of offenses, that are not capital, yet because this offense hath relation to treason, and may be of use to explain the nature of it, I shall here take it into consideration, referring misprision in its large and comprehensive nature to its proper place.

Misprision of treason is of two kinds.

1. That which is properly such by the common law.

2. That which is made misprision of treason by act of parliament.

Misprision of treason by the common law is, when a person knows of treason, tho no party or consenter to it, yet conceals it and doth not reveal it in convenient time.

Tho' some question was antiently, whether bare concealment of high treason were treason, yet that is settled by the statute of 5. & 6 E. 6. cap. 11. and 1. & 2 P. & M. cap. 10. viz. that concealment or keeping secret of high treason shall be deemed and taken only misprision of treason, and the offender therein to suffer and forfeit, as in cases of misprision of treason; as hath heretofore been used: tho in the time of *Henry VIII.* and *Edward VI.* some things were made misprision of treason, that were not so formerly, yet by the statute of 1 Mar. cap. 1. it is enacted, that nothing be adjudged to be treason, petit treason, or misprision of treason, but what is contained in the statute of 25 E. 3. and altho that act of 25 E. 3. do not make or declare misprision of treason, yet it doth it in effect by declaring and enacting what is treason, which is the matter or subject of [372] misprision of treason, tho the misprision or concealment thereof be a crime, which the common law defines what it is.

Therefore since the statute of 25 E. 3. is by the statute of 1 Mar. cap. 1. made the standard of treason, it remains to be enquired, what shall be said the concealment of such a treason according to the reason and rule of the common law.

If a man knew of a treason, by the old law in *Bracton's* time he was bound to reveal it to the king or some of his council within two days, *quod si ad tempus dissimulaverit & subticuerit, quasi consentiens, & assentiens erit seductor domini regis;*(a) but at this day it is but misprision, if he reveals it not as soon as he can to some judge of assise, or it seems to some justice of peace, for tho the crimes of treason or misprision of treason be not within the commission of a justice of peace to hear and determine, yet, as it is a breach of the peace, the justices of peace may take information upon oath touching it, and take the examination of the offenders

(a) *Bract. Lib. III. de corona, cap. 3.*

and imprison them, and bind over witnesses, and transmit these examinations and informations to the next sessions of gaol-delivery or *oyer* and *terminer* to be further proceeded upon as is truly observed by Mr. Dalton, (b) *cap.* 90. nay, I have known chief justice *Rolls* affirm, that justices of the peace may take an indictment of treason, tho they cannot determine, viz. as an information or accusation tending to the preservation of the peace.

But some treasons enacted by some statutes are limited to be heard and determined by them, as appears in some of the statutes before mentioned, *p.* 350.

It is said 3 *H.* 7. 10. *Stamf.* 38. a. Dalton, *cap.* 89., (c) the uttering of false money known to be false is misprision of treason; but it is a mistake; indeed it is a great misprision, but not misprision of treason, unless the utterer know him that counterfeited it, and conceal it, this indeed is misprision of treason, but not the uttering of it, for the money is not the traitor, but he that [373] counterfeited it, and his counterfeiting is the treason.

As all treasons and declarations of treasons between 25 *E.* 3. and 1 *Mar.* are repealed by 1 *Mar.* *cap.* 1. so consequently all misprisions of any other treason not contained in 25 *E.* 3. are thereby repealed, *Coke P. C.* *p.* 24. hath these words, *Misprision of treason is taken for concealment of high treason or petit treason, and only of high treason or petit treason specified and expressed in the act of 25 E. 3. and in the margin, that is of such treason high or petit, as is expressed in the act of 25 E. 3. and of no other treason;* and accordingly uttering of counterfeit coin was agreed by the court (d) at *Newgate*, August 1661. to be neither treason or misprision of treason within the statute of 25 *E.* 3. but only punishable with fine and imprisonment; *ex libro domini Bridgman manu sua scripto.*

If a subsequent act of parliament after 1 *Mar.* make a new treason, the concealment of such a treason is certainly misprision of treason for these reasons, 1. Because misprision of treason is not any substantive crime of itself, but relative to that, which is, or is made treason, and a kind of necessary consequent and result from it, as the shadow follows the substance. 2. And hence it is, that tho the statute of 25 *E.* 3. does not by express words enact misprision of treason, to be an offense, yet treasons being settled by that act, the statute of 1 *Mar.* *cap.* 1. enacts there shall be no misprision of treason but what is enacted by the statute of 25 *E.* 3. for tho that act speaks not of misprision of treason, yet settling those things that are treason, it doth virtually and consequentially make the concealing of any of them misprision of treason; but yet farther, when the act of 1 & 2 *P. & M.* *cap.* 10. enacts divers new treasons, tho it enacts nothing to make the concealment thereof misprision, yet in the proviso abovementioned it takes notice, that concealment of any of these

(b) *New Edit.* *cap.* 141. *p.* 460.

(c) *New Edit.* *cap.* 140. *p.* 452. This last book says it is misprision of treason, but the other two only say it is a misprision.

(d) In the case of *Richard Oliver*, *Rel.* 33.

treasons would be at least misprision of treason, and therefore provides that the concealment thereof shall not be adjudged [374] treason, but only misprision of treason, any thing above-mentioned to the contrary thereof notwithstanding; and the like clause is in the abovementioned statute of 5 & 6 E. 6. cap. 11. Again, my lord Coke, *P. C. cap. 65. p. 139. says, As in case of high treason, whether the treason be by the common law or statute, the concealment of it is misprision of treason; so in case of felony, whether the felony be by the common law or by statute, the concealment of it is misprision of felony*; so that certainly, if a felony or a treason be enacted by a new law, the concealment of the former falls under the crime of misprision of felony, and the latter under the crime of misprision of treason, as a consequent of it without any special words enacting it to be so.

All treason is misprision of treason and more, and therefore, he that is assisting to a treason, may be indicted of misprision of treason, if the king please. *Stamf. P. C. 37. b. Co. P. C. 36. 2 R. 3. 10 b.*

Altho the statute of 1 & 2 P. & M. cap. 10. hath as to treasons repealed the statute of 33 H. 8. cap. 23. for trying treasons in one county committed in another, yet it hath not repealed the same statute as to the trial of murder and misprision of treason, which may yet be tried according to the statute of 33 H. 8. cap. 23.

In case of misprision of treason and misprision of felony, as well as in case of treason or felony, or accessory thereunto a peer of this kingdom shall be tried by peers, but the indictment is to be by a common grand inquest. *2 Co. Inst. 49.*

The judgment in case of misprision of treason is loss of the profits of his lands during his life, forfeiture of goods, and imprisonment during life.

By what hath been said touching misprision of treason we may easily collect what is the crime of misprision of felony, namely, that it is the concealing of a felony which a man knows, but never consented to, for if he consented, he is either principal or accessory in the felony, and consequently guilty of misprision of felony and more.

The judgment in case of misprision of felony in case the concealer be an officer, as sheriff or bailiff, &c. is by the statute of [375] *Westminst. 1 cap. 9.(e)* imprisonment for a year and ransom at the king's pleasure; if by a common person, it is only fine and imprisonment.

And note once for all, that all those acts of parliament, that speak of fines or ransoms at the king's pleasure, are always interpreted of the king's justices: *vide Co. Magna Carta super stat. Westminst. 1 cap. 4. in fine(f) & sæpius alibi. 2 R. 3. 11. a. voluntas regis in curia, not in camera.*

And it seems, that misprision of petit treason is not subject to the judgment of misprision of high treason, but only is punishable by fine and imprisonment, as in case of misprision of felony.

II. I come to misprisions of treason so enacted by acts of parliament since 1 *Mar. cap.* 1. for, as before is observed, by that act all misprisions, that by any statute made after 25 *E.* 3. are either expressly or consequentially made misprisions of treason, are repealed and set aside.

All acts of parliament, that after 1 *Mar.* enacted any thing to be high treason, do consequentially make the concealment thereof to be misprision of treason, tho it do not in express words enact the concealment thereof to be misprision of treason, as hath been before shewn, and the like in case of felony.

And consequently those acts of parliament, which enacted temporary treasons, as the statute of 1 & 2 *P. & M. cap.* 10, the act of 1 *Eliz. cap.* 5. &c. so far forth as they are temporary, the misprisions of such treasons are also temporary, and expire with the act, and where the acts of treason are perpetual, or being but temporary are made perpetual by some other act of parliament, the misprision of such treasons remains such, as long as the act of parliament making such treason continues, or is continued, as upon the statutes of 5 *Eliz.* and 18 *Eliz.* 1 *Mar.* touching counterfeiting of foreign coin made current by proclamation, or clipping or washing coin.

And the like is to be said in all respects of misprision of felony made so by act of parliament.

But besides these crimes, that are consequentially misprision of treason, some offenses are made misprision of treason, as a kind of substantive offense, and not consequential upon the making of treason, but particularly enacted. [376]

Those of that kind, that are perpetual and have continuance, are as follow :

14 *Eliz. cap.* 3. "They that counterfeit foreign coin of gold or silver not permitted to be current in this kingdom, their procurers, aiders, and abettors shall suffer, as in case of misprision of treason.

And note, that in that act (*aiders*) are intended of aiders in the fact, not aiders of their persons, as receivers and comforters, for, as hath been observed *p.* 236. in some acts of parliament *aiders* being joined with procurers, counsellors and abettors are intended of those, that are aiding to the fact; but in other acts of parliament, where the word *aiders* is joined with maintainers and comforters, it is intended of those, that are aiders *ex post facto* to their persons; see this difference in the penning of several acts of parliament, for the first part 5 *Eliz. cap.* 11. 18 *Eliz. cap.* 1. 1 *Mar. sess.* 2. *cap.* 6. touching coin, and for the second part this express distinction observed 13 *Eliz. cap.* 2. touching publishing of bulls of absolution, where the former kind are enacted to be traitors; the second incur a *præmunire*; the like 23 *Eliz. cap.* 1.

13 *Eliz. cap.* 2. "If any bull or absolution, or instrument of reconciliation to the see of *Rome* be offered to any person, or if any person be moved or perswaded to be reconciled, if he conceal the said offer, motion or perswasion and doth not discover or signify it by writing or otherwise within six weeks to some of the privy

council, &c. he shall incur the penalty and forfeiture of misprision of treason, and that no person shall be impeached for misprision of treason or any offense made treason by this act, other than such as are before declared to be in case of misprision of treason:" *nota*, had it not been for this cause the concealment generally of any treason within this act had been misprision of treason.[1]

23 *Eliz. cap. 1.* "All persons, that shall put in practice to [377] absolve or withdraw the subjects of the queen from their obedience, or to that end perswade them from the religion here established, or if any person shall be so absolved, every such person, and their counsellors and procurers thereunto, shall be adjudged guilty of high treason.

"And all persons, that shall wittingly be aiders and maintainers of such person so offending, or any of them, knowing the same, or which shall conceal any offense aforesaid, and not reveal it within twenty days after his knowledge thereof to some justice of peace, or other higher officer, he shall suffer and forfeit, as in misprision of treason.[2]

CHAPTER XXIX.

CONCERNING PETIT TREASON.

As at common law there was great uncertainty in high treason, so there was in petit treason.

It is true, that all the petit treasons declared in this statute(a) were petit treasons at common law, as for a servant to kill his master or mistress, 12 *Ass. 30.* a woman to kill her husband, as appears 15 *E. 2. Corone 383.* and the judgment was the same at common law in such cases, as now, and the lands of him, that was attaint of petit treason, escheted to the mesne lord, of whom they were held, 22 *Ass. 49.* so that as to these things the act of 25 *E. 3.* was but an affirmance of the common law.

But yet there were certain offences, that were petit treason at com-

(a) *viz. 25 Edw. 3.*

[1] See 1 *East, P. C. 139.* 4 *Bl. Com. 120.*

[2] It has been enacted by Sect. 2. of the act of Congress of April 30, 1790, that if any person or persons having knowledge of the commission of any of the treasons defined by that act, shall conceal and not as soon as may be disclose and make known the same to the President of the *United States*, or some one of the Judges thereof, or to the President or Governor of a particular State, or some one of the Judges or Justices thereof, such person or persons on conviction shall be adjudged guilty of misprision of treason, and shall be imprisoned not exceeding seven years, and fined not exceeding one thousand dollars. *Weidle's case*, 2 *Dall. 88.* was an indictment for misprision of treason for speaking certain words tending to excite resistance to the government of the commonwealth of *Pennsylvania*. No instance of this offence has occurred against the government of the *United States*.

mon law, that are restrained and abrogated by this statute from being petit treason.

15 *E. 2. Corone* 389. A woman intending to kill her husband beat him so, that she left him for dead, but yet he [378] recovered, for this attempt the wife had judgment to be burned.

Fleta, Lib. I. cap. 22. Britton, cap. 8. If the homager or servant falsify the seal of his lord, or had committed adultery with the lord's wife or daughter, (b) it was petit treason.

But these are taken away by this act of 25 *E. 3.* and are reduced only to these three ranks:

1. The servant killing his master or mistress. 2. The wife killing her husband. 3. The clergyman killing his prelate or superior, to whom he owes faith and obedience.

All petit treason comes under the name of felony, and a pardon of all felonies, where petit treason is not excepted, at common law pardoned petit treason, and so at this day doth a pardon of murder.

A man or woman, that commits petit treason, may be indicted of murder, but if all felonies, &c. are pardoned by act of parliament, wherein there is an exception of murder, it seems that a murder, which is a petit treason also, is discharged and not within the exception, *M. 6 & 7 Eliz. Dyer. 235.(c)*

The killing of a master or husband is not petit treason, unless it be such a killing, as in case of another person would be murder, and therefore upon an indictment of petit treason for a servant killing his master, if upon the circumstances of the case it appears to be a sudden falling out, and the servant upon a sudden provocation kills his master, which, in case it had been between other persons, had been only manslaughter, the jury may acquit him of petit treason, and find him guilty of manslaughter; and thus it was once done before me at *Dorehester* assizes, and another time before justice *Windham* at *Coventry* assizes, tho the indictment were for petit treason.

If a wife conspire to kill her husband, or a servant to kill his master, and this is done by a stranger in pursuance of that conspiracy, it is not petit treason in the servant or wife, because [379] the principal is only murder, and the being only accessory, where the principal is but murder, cannot be petit treason; but if the wife and a servant conspire the death of the husband, being his master, and the servant effect it in the absence of the wife, it is petit treason in the servant, and she is accessory before to the petit treason, and shall accordingly be indicted and burnt *P. 16. Eliz. Dy. 332. a. 40 Ass. 25.*

If the servant and a stranger, or the wife and a stranger conspire to rob the husband or master, and the servant or wife be present and

● (b) *Britton* adds, or the nurses of his children.

(c) The reason of this is, because petit treason is an offense of another species, 6 *Co. Rep. 13. b.* but then by the same reason a pardon of murder does not include a pardon of petit treason, nor can one guilty of petit treason be indicted of murder. See *Rex versus Cripe, State Tri. Vol. VI. p. 224, 225.*

hold the candle, [while the husband or master is *killed*,*] the stranger is guilty of murder, and the wife or servant guilty of petit treason as principal, because present. 2 & 3 P. & M. Dy. 128. a.

So that the statute of 25 E. 3, doth not only extend to the party, that actually commits the offense, but also to those that were procurers, aiders or abettors, *scilicet*, if they be present, they are guilty of petit treason as principals, if absent, yet if the offense in the principal be petit treason, the offense in the accessory *before* is petit treason, as accessory, as in *Brown's case*, Dy. 332. a.

If a wife or a servant intending to poison or kill a stranger, and missing the blow the wife by mistake kills or poisons her husband, or the servant his master, this, that would have been murder, if it had taken effect against the stranger, becomes petit treason in the death of the husband or master. *Plowd. Com. 475. b. Crumpt. de pace regis 20. b.* and *Dalt. cap. 91. (d)* so if he shoot at J. S. and missing him kills his master. *Ibid.*

If the wife or servant conspire with a stranger to kill the husband or master, if the wife or servant be in the same house, where the fact is done, tho not in the same room, it is petit treason in them, and they are principals in law, because in law adjudged to be present, when in the same house; but if they had been absent, then [380] they had been only accessories before the fact to murder. *Crumpt. de pace regis 21. a. Blechenden's case.*

If the wife or servant command one to beat the husband or master, and he beat him, whereof he dies, if the wife or servant be in the same house, it is petit treason in the wife or servant as principals, but murder in the stranger. *Crumpt. 20. b. Plowd. Com. 475. b.*

For whatsoever will make a man guilty of murder will make a woman guilty of petit treason, if committed upon the husband, or the servant, if committed upon the master.

Eadem lex mutatis mutandis for an inferior clergyman in relation to his superior.

But now to descend to particulars.

I. A servant killing his master.

Who shall be said *a servant* or *a master*.

If the servant kills his mistress or his master's wife, this is petit treason within this act. 19 H. 6. 47. *Plowd. Com. 86. b. Co. P. C. 20. 12 Ass. 30.*

If a servant, being gone from his master, kills him upon a grudge, that he conceived against his master, while he was in his service, which he attempted while his servant, but was disappointed, it is petit treason. 33 Ass. 7. *Plowd. Com. 260. a. Co. P. C. 20.*

If a child live with his father as a servant, as if he receive wages from him, or meat and drink for his service, or be bound apprentice to him, and kills his father or mother, this is petit treason at this day. (f)

* These words are not in the MS. but they are in the case cited from *Dyer*, and the sense plainly requires them.

(d) *New Edit. cap. 142. p. 462.*

(f) 1 Mar. *Dalison* 14.

But if he receives no wages, nor meat and drink for his service, or be not bound apprentice to him, but only is his son and not his servant, and kills his father, this was petit treason at common law. 21 E. 3. 17. b. *per Thorp*; (g) but the better opinion is, that it is not petit treason at this day, because this statute of 25 E. 3. shall not in this case be extended by equity: *quod vide Co. P. C. 20. Lambart Justic. 248. Crompt 19. b.*

II. The wife killing her husband.

If the husband kill the wife it is murder, not petit treason, [381] because there is subjection due from the wife to the husband, but not *è converso*.

If the wife be divorced from the husband *causâ adulterii vel sævitie*, she is yet a wife within this law, because this dissolves not the *vinculum matrimonii* by our law, for they may cohabit again, but otherwise it is, if they be divorced *causâ consanguinitatis* or *præcontractus*, for then the *vinculum* is dissolved, they are no more husband and wife.

If *A.* be married to *B.* and during that intermarriage, *A.* marries *C.* tho *C.* be, as to some purposes, a wife *de facto*, yet she is not a wife within this law, for the second marriage was merely void, tho perchance she may, upon circumstances, be a servant within the former clause, if she cohabit with *A.* and he finds her necessaries for her subsistence; *tamen quære.*

III. The clergyman killing his prelate, &c.

If a clergyman living and beneficed in the diocese of *A.* kills the bishop of *that* diocese, it is petit treason; but if he kills the bishop of the diocese of *B.* it is only murder.

If a clergyman hath a benefice in the diocese of *A.* and after, by dispensation takes a benefice in the diocese of *B.* if he kills the bishop of one diocese or the other, it is petit treason, for he owes and swears upon his institution canonical obedience to the bishop of each diocese.

If a clergyman beneficed in the diocese of *A.* within the province of *C.* kills his metropolitan, it seems it is petit treason, tho he be not his immediate superior.

If a clergyman be ordained by the bishop of *A.* *in ordinem diaconi, sive presbyteri sine titulo*, yet it seems if he kills the bishop it is petit treason, for he professeth canonical obedience upon his ordination.

Concerning proceedings in petit treasons.

In high treason all are principals, but in petit treason there are principals and accessaries, as well *before*, as *after*.

If the principal be only murder, as being committed by a stranger, the accessory cannot be petit treason, tho she be a wife or servant.

Dy. 332. *Brown's case ubi supra.*

(g) The book says, he was indicted for killing his *mere* (his mother) but Coke P. C. p. 20. says it is misprinted, and that it should be read *maistre*, (his master) for *mere* being abbreviated, (as perhaps it was in the MS. of the year books) may be read either way, tho the last seems the most probable.

But if the principal be petit treason, as being committed by a wife upon her husband, or by a servant upon his master or mistress, if the accessory be of the same relation, viz. a servant or wife, the judgment shall be given against the accessory, as in petit treason; but if the accessory, whether before or after, be a stranger, tho such stranger be an accessory to petit treason, yet the judgment shall be as in a case of felony against the accessory, viz. *quod suspendatur*, for tho he be an accessory to petit treason, which is the principal, yet such accessory being a stranger is not, nor can be guilty of petit treason, because a stranger to the party killed, and neither wife nor servant.

At common law, and by the statute of 25 E. 3. cap. 4. clergy was allowable in case of petit treason, but not in case of high treason; but now by the statute of 23 H. 8. cap. 1. 1 E. 6. cap. 12. clergy is excluded from petit treason, as well as murder, and in the same kind.

If a person arraigned of high treason stands wilfully mute, he shall be convicted as hath been formerly shewn;[1] but if arraigned of petit treason, he stand mute, he shall have judgment of (*) *peine fort & dure*. *Crompt. 19. b. Co. P. C. 217.*

The judgment of a woman convict of petit treason is to be burnt,(h)[2] but (by *Stamf. P. C. fol. 182. b.*) in high treason to be drawn and burnt, unless it be in case of coin, and then only to be burnt, as in case of petit treason.

But the judgment against a man convict of petit treason is to be drawn and hanged, *trahatur & suspendatur per collum*.

Stamford in *P. C. 182.* tells us, that the execution of drawing is to be upon a hurdle, but 33 Ass. 7. *Shard* justice commanded, that nothing should be brought, whereupon he should be drawn, *mes que sans cley ou autre chose a desouth lui soit tray de chivaux hors de la sale, ou il avoit judgement, tanque a les furc, &c.* but that severity is disused: he is in such cases drawn upon a hurdle to the place of execution.

And thus far touching petit treason.[3]

(*) [*Peine fort and dure*] but now see the Stat. 12. Geo. 3. ch. 20. as to a person, arraigned on any indictment, standing mute. And 3 Barn. Ediz. 1776. p. 211.

(h) The judgment of a woman convict of petit treason (or in case of coin) is all one as in high treason, viz. to be drawn and burnt. *Co. P. C. p. 211.* and so is the constant practice.

[1] *Ante*, p. 224.

[2] Altered by the 30 Geo. 3. c. 48, to hanging.

[3] By the 9 Geo. 4. c. 31. s. 2, "every offence which before the commencement of this act would have amounted to petit treason, shall be deemed to be murder only, and no greater offence; and all persons guilty in respect thereof, whether as principals or as accessories, shall be dealt with, indicted, tried, and punished as principals and accessories in murder." The crime of petit treason seems to be unknown to the jurisprudence of the United States; the offender would in such case be tried as for any other kind of murder. *Davis' Virg. C. L. 109.*

CHAPTER XXX.

CONCERNING HERESY AND APOSTACY, AND THE PUNISHMENT THEREOF.

UNDER the general name of *heresy* there hath been in ordinary speech comprehended three sorts of crimes: 1. *Apostacy*, when a christian did apostatize to *Paganism* or to *Judaism*, and the punishment hereof, as well by the law of this kingdom, as by the imperial laws, seems to have been by death, namely burning. *Bract. Lib. III. de coronā, cap. 9.* (a) by the imperial law he was subject to loss of goods, *Cod. de apostatis, tit. 7. lege 1.* but it appears not, whether he were to suffer death, *Ibid. l. 6.* unless he solicited others to apostacy. (b) 2. *Witchcraft, Sortilegium* was by the antient laws of *England* of ecclesiastical cognizance, and upon conviction thereof without abjuration, or relapse after abjuration, was punishable with death by writ *de hæretico comburendo, vide Co. P. C. cap. 6. & libros ibi, Extr. de hæreticis, cap. 8. §. 5. n. 6.* 3. *Formal heresy*; the old popish canonists define an heretic to be such, *qui male sentit vel docet de fide, de corpore Christi, de baptismo, peccatorum confessione, matrimonio, vel aliis sacramentis ecclesiæ, & generaliter, qui de aliquo prædictorum vel de articulis fidei aliter prædicat, sentit vel doceat, quam docet sancta mater ecclesia*; and whereas the antient councils and imperial constitutions grounded thereupon kept the business of heresy within certain bounds and descriptions, as the *Manichees, Nestorians, Eutychians, &c. quod vide in Codice, Lib. I. tit. 5. de hæreticis, l. 5.* in the edict of *Theodosius* and *Valentinian*; the papal canonists have by ample and general terms extended heresy so far, and left so much in the discretion of the ordinary to determine it, that there is scarce any the smallest deviation from them, but it may be reduced to heresy according to the great generality, latitude, and extent of their definitions and [384] descriptions, whereof see the gloss of *Lindwood in titulo de Hæreticis, cap. 1. Reverendissimæ ad verbum declarentur*: the definition of *Grostead*, tho somewhat general, is much more reasonable as we have it given by Mr. *Fox, Acts & Mon. part. 1. p. 420. Est sententia humano sensu electa, palam docta, pertinaciter defensa*; but of this more hereafter.

In this business of heresy, and the punishment thereof, I shall, as near as I can, use this method: 1. I will consider in general who is the judge of heresy according to the common and imperial law. 2. Who shall be said an heretic according to those laws. 3. What the punishment of an heretic is according to those laws: then I shall consider more specially, *viz.* 1. What was the method of the conviction of heresy according to the antient law used in *England*

(a) p. 123. b.

(b) Then it was capital, *Lib. I. Cod. tit. 7. l. 5.*

before the time of *Richard II.* and *Henry IV.* And 2. What was the usual punishment of heresy here in *England* before the time of *Richard II.* and *Henry IV.* 3. I shall give an account touching the proceeding against heretics from the beginning of *Richard II.* to the twenty-fifth year of king *Henry VIII.* 4. What is the method of proceeding, and how the law touching heresy, heretics, and their punishment from 25 *H. 8.* until the first year of queen *Elizabeth.* 5. How the law stood from 1 *Eliz.* to this day touching this matter.

I. According to the common and imperial law, and generally by other laws in kingdoms and states, where the canon law obtained, the ecclesiastical judge was the judge of heresies, and hereby they obtained a large jurisdiction touching it, so that there was scarce any thing, wherein a man dissented from the doctrine or practice of the *Roman* church, but they took the liberty to determine heretical, qui a recto tramite, & judicio ecclesiæ catholicæ detectus fuerit deviare, & is qui dubitat de fide catholicâ, *gea even*, qui despicit & negligit servare ea, que *Romana* ecclesia statuit vel servare decreverat: vide *Lindwood* de hæreticis in cap. Reverendissimæ *ad verbum* declarentur, which left an excessive arbitrary latitude in the ecclesiastical judge, and a great servitude and uncertainty upon men subject to their censures: the ecclesiastical judge was either

[385] extraordinary, viz. certain inquisitors thereunto deputed by the pope, or ordinary, which was the bishop of the diocese, as appears by *Lindwood de hæreticis, cap. finaliter verb. ordinarius in glossa*; (*) only for the more solemnity of the business of degradation, which accompanied the sentence of heresy upon one in orders before the offender was left to the secular power, there were six, but afterwards three bishops to be present in degradation à *sacris ordinibus*, viz. the episcopal, *Presbyteratus, Diaconatus & subdiaconatus*, but in *minoribus ordinibus* there was only required the bishop and his chapter, *canonici sive clerici*; 6 *decretal, cap. 2.* afterward the business of degradation was reduced to one bishop, viz. the ordinary of the place, so far at least as the same respected the *ordo Presbyteratus* and inferior orders.

But I do not find, that by the canon or civil law the declaratory sentence of heresy was necessary in a provincial synod, tho in great cases, especially where a priest was to be degraded, it was most commonly done in a provincial synod, partly for the greater solemnity of the business, and partly because in such synods more bishops and others of the clergy were present; but how the use was in *England* we shall hereafter see.

II. As to the second, touching heretics and their discriminations according to the canon law, they may be distinguished into three ranks: 1. *Simplex hæreticus.* 2. *Hæreticus contumax.* 3. *Hæreticus relapsus.*

1. A simple heretic was such, as held an heretical opinion, but being conveyed before the ordinary, and the opinion being substan-

(*) See also *Lindwood de hæreticis, cap. item quia verb. ordinarius*.

tially declared heretical, and the party convicted thereof, declares his penitence and abjures his opinion, in this case he was dismissed without farther punishment, and this abjuration might be required by the ordinary, and was of two kinds, viz. a special abjuration, whereby he abjured that single heretical opinion, for which he was condemned, or a general abjuration, whereby he renounced all heretical opinions; *vide Lindwood de hæreticis, cap. Reverendissimæ verb. nisi resipiscant & abjuraverint in forma ecclesiæ consueta*: and this abjuration might be required not only of those, that were de- [386] tected and convicted of heresy, but even of those, that were *graviter suspecti*; and if they refused it, they proceeded to sentence them as convict: *Extr' de Hæreticis, cap. ad abolendam*.

2. A contumacious heretic was among them of two kinds: 1. Such as refused to appear before the ordinary, being accused of heresy, and thereupon were duly excommunicate and so continued excommunicate for one year, *tum velut hæreticus condemnatur*, and was thereupon delivered or left to the secular power, *de hæreticis, cap. 7. cum contumaciâ in 6to, &c.* 2. Where the party accused of heresy was convict by testimony of his own confession, and refused to repent and abjure, such a one might thereupon be sentenced as an heretic, and delivered over to the secular power, but yet he had this favour or privilege, if even after such sentence he willingly repented and abjured, the ordinary ought to accept thereof, and not deliver him over to the secular power, but he was spared. *Lindwood de Hæreticis, cap. Reverendissimæ verb. resipiscant, & Extr' de Hæreticis, cap. ad abolend. verb. sponte recurrere*; but then the ordinary might detain him in prison: *vide accordant 1 Mar. Br. Heresy*.

3. A relapsed heretic: and herein they distinguish between *fictè relapsus*, & *verè relapsus*: *Lindwood de hæreticis cap. item quia, verb. relapse*: 1. The former is where a man is accused of heresy, and is under a great suspicion thereof, but not convicted, only the ordinary puts him to abjure, which accordingly he doth, and afterwards doth entertain, visit, or comfort heretics, such a person by the canon law may be sentenced as an heretic relapsed, and delivered over to the secular power, but yet the ordinary may, as before, detain him in prison without actual delivering of him over to the secular judge to be executed. *Lindwood ubi supra, & in 6to decretal. cap. 8. Accusat' de hæreticis.* 2. *Verè relapsus* is, when a man being convicted of heresy, and abjuring again falls into heresy, if he be thereupon convicted and sentenced, there can be no suspension of the sentence by the ordinary, tho the party repent and conform, but he must be delivered over to the secular power, and the sentence ought to be given, and is not by any means to be suspended from [387] execution: *6to de Hæreticis, cap. 4.*

But this relapsing is of two kinds according to the quality of his abjuration: if the abjuration be general of all heresies, if he after fall into any heresy, either *that* whereof he was formerly accused and convicted, or any other, he is to be sentenced as a relapsed heretic; but if the abjuration be only special of *that* heresy whereof he is accused, then he is not to be sentenced, as a relapsed heretic, unless

he after fall again into the same heresy, which he so specially abjured; but herein there is some difference among the doctors, for some think even after a special abjuration of one particular heresy, if he falls into another heresy, *censetur relapsus: vide Extr. de Hæreticis, cap. Accusat. § 2. Eum vero in 6to. & Lindwood de hæreticis, cap.* Item quia *verbo simpliciter in glossa:* but the ordinary may put this out of question, for it seems by the canon law he may at his pleasure in cases of heresy require a general abjuration, *viz. de hæresi generaliter & simpliciter.*

III. Now as to the punishment itself of heresy, especially of those that are either *contumaces* or *relapsi*: 1. By the civil law; it is true, that the conviction and sentencing of heretics is as well thereby, as by the canon law, left to the ecclesiastical judge, so that without a declaration or sentence of the ecclesiastical judge the civil jurisdiction cannot proceed to inflict any punishment. *Lindwood de hæreticis, cap. Reverendissimæ verb. confiscata in glosse* the confiscation of goods of the heretic followed upon his conviction, *necessaria tamen est sententia declarativa judicis super ipsâ confiscatione, & hæc sententia fieri solummodò debet per judicem ecclesiasticum, & non per judicem sæcularem: vide in 6to de hæreticis, cap. secundum leges.*

But tho the decision and judicial sentence of heresy was belonging only to the ecclesiastical judge, yet the civil constitutions of emperors and princes did institute and enact several penalties, as consequential upon such sentence, such as were confiscation of goods, disherison of heirs, and in some cases death, as we shall see hereafter: *quod vide in Codice, Lib. I. tit. 5. de hæreticis per totam.*

As to the penalty of death *ultimum supplicium*: it [388] should seem the antient imperial constitutions made a difference between heresies in relation to that punishment: it appears by the edict of *Theodosius Codice, cap. 4.* the *Manichees* and *Donatists* were punished with death; and possibly so were the *Nestorians, ibidem cap. 6.* and generally all heretics, that seduced the orthodox to rebaptization, *ibid. cap. 23.* many other heretics were under milder sentences, some were punished with exile, some with extermination from the city, some with pecuniary mulcts, and some with confiscation, which, it seems, was the most usual punishment: but it seems that by the constitution of the emperor *Frederic*, (which yet is not extant) *Hodie indistincte illi, qui per judicem ecclesiasticum sunt damnati de hæresi, quales sunt pertinaces & relapsi, qui non petunt misericordiam ante sententiam, sunt damnandi ad mortem per sæculares potestates, & per eas debent comburi seu igne cremari. Lindwood de hæreticis, cap. Reverendissimæ verb. pœnas;* and from this constitution of *Frederic* the course of burning generally all heretics indistinctly, if pertinacious or relapsed, took its rise.

Now as to the penalties by the canon law, it is true they go no farther than ecclesiastical censures, injunction of penance, excommunication, and deprivation of ecclesiastical benefices; but yet they made bold by some of their constitutions to proceed farther, and

indeed farther than they had authority; such were among others imprisonment by the ordinary, and confiscation of goods,^(c) but whether they adventured hereupon only in subservience to civil constitutions, or whether by their own pretended power, may be doubtful; but howsoever, it is so decreed in their canons and constitutions: *vide Lindwood de hæreticis, cap. Reverendissimæ verb. confiscata, & ibidem Item quia verb. sententialiter.*

But indeed as to the inflicting of death upon heretics, their canons go not so far as that; neither indeed need they, for emperors and princes being induced by them to enact such severe constitutions they did in effect the business by sentencing the heretic, and then leaving him to the secular power, so that the secular [389] power was only in nature of their executioner; and altho they direct in some cases of treason an intercession to be made to the secular power to spare the life of the offender thus committed over to the secular power, *Extr. de verborum significatione cap. Novimus*, yet we find no such curtesy for heretics, but the princes, that do not effectually proceed according to the utmost of their power to eradicate them, are threatned with excommunication, and accordingly they are required to take an oath to perform it, *Extr. de hæreticis, cap. Ad abolendam*.^(*)

Therefore as to the punishment of heretics with death, of an heretic so declared by the bishop, it was left to the secular power with this difference, if the person convicted were a layman, he was immediately after his sentence to be delivered to the secular power to be burnt; but if he were a clergyman within the greater or lesser orders, he was first solemnly degraded, beginning with the chiefest order he had, as that of priesthood, and so to the lowest, *damnati per ecclesiam judici sæculari relinquuntur animadversione debita puniendi, clericis a suis ordinibus primo degradatis. Extr. de hæreticis, cap. excommunicamus*;^(†) the solemnity whereof see at large in *6to decretal de pœnis cap. Degradatio, Fox's acts and monuments part 1. p. 674. the degradation of William Sawtre.*

This degradation by the latter canons might be by one bishop, tho formerly it required more.

When the sentence was given by the ordinary, and the offender thus left to the secular power, he was delivered over to the lay-officer, and then a mandate or writ issued from the chief magistrate to execute the offender according to the secular law; but of this more particularly hereafter.

I have been the longer in these particulars, that we thereby may observe these two things: 1. How miserable the servitude of christians was under the papal hierarchy, who used so arbitrary and unlimited a power to determine what they pleased to be heresy, and

^(c) For in England before the statute of 2 H. 5. cap. 7. neither lands nor goods were forfeited by a conviction for heresy. 3 Co. Instit. 43.

^(*) Vide Constit. Frederici, § 6.

^(†) Vide Lindwood de hæreticis, cap. Finaliter verb. sententialiter.

then *omni appellatione postposita* subjecting men's lives to their sentence.* 2. How finely they made the secular power their vassals in execution of this odious piece of drudgery, as it was managed and practised by them.

I come now to a closer consideration of heresy, and its punishment according to the usage received in *England*, and the laws relating thereunto, according to the method above propounded.

I. Therefore how the usage and law obtained concerning this matter in *England* before the time of *Richard II.*

As the romish religion was generally received here in *England* in this period, so the manner of proceeding touching heresy was much according to the papal decretals and constitutions, whereof a large account is above given.

The jurisdiction, wherein heresy was proceeded against, was at the common law of two kinds: 1. The convocation of a provincial synod. 2. The diocesan or bishop of the diocese, where the heresy was published, and the heretic resided.

1. As to the former it is without question, that in a convocation of the clergy or provincial synod they might and frequently did here in *England* proceed to the sentencing of heretics, and when convicted, left them to the secular power, whereupon the writ of *Hæretico comburendo* might issue, (thus it was done in the case of the apostate Jew, *Bract de Coronâ, Lib. III., (d)* and the case of *Sawtre, (e) 2 H. 4.* who was convict in the convocation of *London*,) and then the archbishop, who was *præces concilii*, pronounced the sentence, degraded the offender, if in orders, and signified the conviction into chancery, whereupon the writ *de hæretico comburendo* issued.

2. As to the power of the bishop or diocesan alone there hath been diversity of opinions; some have thought, that the bishop of the diocese might proceed against heresy by ecclesiastical [391] censures, but as to the loss of life the conviction ought to be at least in a provincial council, without which the heretic ought not to undergo death by the writ *de hæretico comburendo*.

1. For that in the case mentioned by *Bracton, Lib. III. de Coronâ*, the conviction of that heresy, or rather apostacy, whereupon the offender was burnt, was in the provincial council at *Oxford*. 2. The writ *de hæretico comburendo* in the register, and *F. N. B.* recites the conviction to be in a provincial council, and according to it is the opinion of *Fitzherbert, ibidem fol. 269.* and the statute of *2 H. 4.* (hereafter mentioned) giving power to the ordinary finally to sentence an heretic, so that death should ensue thereupon, was *novæ jurisdictionis in hac parte introductæ*. Again my lord *Coke*,

(*) *Godfridus Coloniensis anno 1234.* speaking of the severity of the pope and the emperor *Frederic*, (the author of the constitution afore-mentioned for burning heretics) says, *Eodem die, quo quis accusatus est seu justè, seu injustè, nullius appellationis, nullius defensionis refugio proficiente, damnatur, & flammæ crudeliter injicitur.* See also *Mat. Paris, p. 429.*

(d) *Lib. III. cap. 9. fol. 124. a.*

(e) *State Tr. Vol. VI. Append. p. 2. Fox's Acts and Mon. Vol. I. p. 586. Rymer's Fed. Vol. VIII. p. 173.*

12 *Rep.* p. 56, 57. recites this to be the opinion of all the judges in 2 *Mar.* and in effect agreed unto 43 *Eliz.* by Sir John Popham, and others, 5 *Rep.* *Cawdrie's* case, p. 23. *a. accordant*, and *Brooke* seems to accord. 1 *Mar.* *Br. Heresy*.

On the other side others have holden, that the diocesan alone by the canon law might convict of heresy, and that thereupon this writ may be issued: 1. This is consonant to the old decretals, and likewise to the provincial constitutions of *Arundel*, *Courtney* and others, that the diocesan alone without the assistance of a provincial council might convict of heresy, and deliver over the offender to the secular power. 2. Again, the statute of 2 *H. 4. cap. 15.* recites and admits the power of the diocesan in this case, but that by reason of the offender's going from diocese to diocese, and refusing to appear before the ordinary, he was interrupted in his proceeding, and thereupon the statute gives farther remedy. 3. That accordingly it was practised in the time of queen *Elizabeth*, when all former statutes concerning heresy were repealed, and the case stood as it was at common law. 4. That it was accordingly resolved by *Fleming*, *Tanfield*, *Williams* and *Croke*, in 9 *Jac.*, (f) when *Legate* was burnt for heresy; and accordingly my lord *Coke*, *P. C. cap. 5. p. 40.* seems to be of the same opinion, (g) and so [392] seems to retract what he had before delivered in his 12th report.

This business will be further considered in the sequel of this chapter, for the present I shall only say thus much.

1. That the diocesan, as to ecclesiastical censures, may doubtless proceed to sentence heresy.

2. I think that at common law, and so at this day, (all former statutes being now repealed by 1 *Eliz. cap. 1.*) if the diocesan convicts a man of heresy, and either upon his refusal to abjure, or upon a relapse decree him to be delivered over to the secular power, and this be signified under the seal of the ordinary into the chancery, the king might thereupon by special warrant command a writ *de hæretico comburendo* (h) to issue, tho this were a matter that lay in his discretion to grant, suspend, or refuse, as the case might be circumstantiated.

And what is here said of the diocesan or bishop of the diocese is

(f) 12 *Co. Rep.* 92.

(g) Lord *Coke* does not intimate as if he was of this opinion, or had retracted what he had said in his 12th report, and had been solemnly resolved in *Cawdrie's* case; he says indeed, that from the statute of 2 *H. 4.* may be gathered this conclusion, that the diocesan hath jurisdiction of heresy, and accordingly it was resolved in *Legate's* case, and that upon a conviction before the ordinary of heresy, the writ *de hæretico comburendo* doth lie; this he mentions as also resolved in *Legate's* case, as in truth it was; but to this last resolution he doth not declare any assent, for it is the first only, which he says may be gathered from the act of 2 *H. 4.*

(h) Whether this writ lay at common law, or was introduced by the clergy about the time of *Henry IV.* hath been made matter of question: see *State Tr. Vol. II. p. 275.* if the common law gave such a writ; it will be difficult to reconcile it with what our author says a little below, that the usual penalty was confiscation and banishment, and that 5 *R. 2.* was the first temporal law against heresy, which yet went not so high as death, but only to imprisonment and ecclesiastical censure.

true also of the guardian of the spiritualities *sede vacante*, but 'till the statute of 2 H. 4. the vicar general, commissary, or official of the diocesan had no cognizance, unless by special commission as an inquisitor from the pope; and *Lindwood* gives the reason *de hæreticis cap.* Item quia turpis verb. ordinarii in glossa, *Est enim causa hæresis una de majoribus causis; quæ pertinent ad solos episcopos;* but the statutes of 2 H. 4. cap. 15. 2 H. 5. cap. 7. while they were in force, gave the cognizance of heresy, as well to the bishop's commissary, as the bishop.

3. But yet I never find before the time of *Richard II.* [393] that any man was put to death upon a bare conviction of heresy, tho after a relapse, unless he were sentenced in a provincial council: and the reason seems to me to be this, when the offender was convicted of heresy either thro pertinacity, or after a relapse, and so delivered over to the secular power, the ecclesiastical judge had done his business, and the rest that follows was to be the act of the temporal or civil power, who were never obliged nor thought themselves obliged here in *England* to take away the life of a person upon so slender an account, as the judgment of a single bishop, (i) nor indeed, unless it were a sentence by the weighty body of a provincial council: *vide Bracton, ubi supra.*

For as this kingdom was never obliged by the canons or decretals of popes or of provincial councils, further, than they were admitted, so neither were they bound by the imperial constitutions of the emperor *Frederic* or others, who by their edicts inflict death upon all persons censured by the diocesan to be relapsed or contumacious heretics; but herein they did as the laws and usages of the kingdom, and their own prudence, and the circumstances of the case required or directed.

But yet I take it, that the conviction before the diocesan alone was a good conviction, and the party might thereupon be left to the secular power, and so burnt by a writ *de hæretico comburendo*, if the king and his council thought fit, tho *de facto* it was not at all, or at least not usually so done, till the time of *Henry IV.* unless the conviction and sentence were in a provincial council, for the reason before given.

Fitzherbert therefore was herein mistaken, and also when he saith, it was to issue only in case of relapse; for a relapse could not be without conviction, and if the party were thereby convicted of the heresy, whereof he was accused, and persisted in it 'till after sentence, and refused to abjure, such a *contumax* or *pertinax hæreticus* might be proceeded against as a relapsed heretic, and a writ *de hæretico comburendo* might thereupon issue, as it seems, for the writ in

[394] the register being formed upon a relapsed heretic, pursues the case as it finds it, but is not exclusive of the other case of a contumacious heretic, that persists therein before and after the sentence; *de quo vide supra; vide accordant 1 Mar. Br. Heresy, 1. and 25 H. 8. cap. 14.*

Touching the penalty of convicts of heresy here in *England*, I find very rarely death inflicted; before the reign of *Richard II.* the usual penalty was confiscation, and seizure of goods; *quod vide Claus. 20. H. 3. m. 11. dors.* touching *Ernald de Peregard*, who was convict of heresy, and his goods seized to the king's use; the like, *Claus. 26 H. 3. m. 15. pro Stephano Peliter*, and as to corporal punishment of such convicts, it was usually in antient time banishment and stigmatizing, as appears by *Ralph de Diceto, sub anno 1166.* in the time of *Henry II.* and *Brompton H. 2. sub anno 1159.*(*) but their conviction was in a provincial council held at *Oxon præsentè rege, & præsentibus episcopis.*

But *quo jure* the forfeiture of goods was then practised, is considerable: *vide Co. P. C. cap. 5.* the forfeiture of goods was introduced by *2 H. 5.* and that statute being repealed, ceaseth.

And in the first temporal law, or *pretended law*(†) made against such offenders, *viz. 5 R. 2. cap. 5.* where, upon certificate by the prelates into the chancery, commissions shall issue to the sheriffs to apprehend and imprison the offender, it is only until they will justify themselves according to the law and reason of holy church, so that it seems the punishment did not hitherto *de facto* exceed imprisonment and ecclesiastical censures; and yet it seems that *Swinderly* and others in the time of *Richard II.* before the statute of *2 H. 4.* were ordered to be executed for heresy: *vide Fox part 1. p. 580, 618.* but none by name appear to be executed, *ibidem p. 659.* but of this hereafter.(†)

As touching the writ *de hæretico comburendo* it was no writ of course, nor issued by the chancellor, but by special warrant [395] from the king upon the certificate of the conviction and sentence made to the king under the seal of the archbishop, if it were in a provincial council.

And thus far what I find concerning heresy at common law before the time of *Richard II.*

II. As to the times of *Richard II. Henry IV. Henry V.* and so to *25 Henry VIII.*

The first temporal law, or pretended law against heretics in this kingdom, was *5 R. 2. cap. 5.* which did not go so high as death, but only to imprisonment and ecclesiastical censure, as appears by the printed statute; but this was in truth no act of parliament, for the commons never assented; and accordingly *Rot. Parl. 6 R. 2. n. 52.* the same is declared by the king and parliament, which it is true,

* See also *Mat. Paris, p. 105.*

(†) Our author here calls it a *pretended law*, and lord Coke calls it a *supposed act*, because the commons never consented to it, for which reason in the next session of parliament it was annulled, altho by the prelates means it hath been continually printed, and the act, which annulled the same, hath been from time to time kept from the print. *12 Co. Rep. p. 57.*

(†) It does not appear, that any were ordered to be executed for heresy in this reign, and as to *Swinderby*, Mr. Fox says, he was declared an heretic, but suffered no great harm during the life of king *Richard II.* and if he was burnt, it was not till after the statute of *2 H. 4.* See *Fox's Acts and Mon. p. 620.*

was never printed among the statutes; but is at large recited by Mr. *Fox*, *part* 1. *p.* 576. and therefore we find no other punishment during this king's time, but imprisonment and ecclesiastical censures.

But in the time of *Henry IV.* the power of the diocesan was enlarged, *viz.* by the statute of 2 *H.* 4. *cap.* 15. (l.) *viz.* the diocesan hath power given him to arrest and imprison persons suspect of heresy, till purgation or abjuration, and hath also power to fine and imprison persons for those offenses, and estreat the fines; and if a person be convict of heresy before the diocesan and his commissaries, and do refuse to abjure, or having abjured fall into relapse, so that according to the canons he ought to be left to the secular court, whereupon credence shall be given to the diocesan or his commissaries, then the sheriff of the same county shall be personally present at the preferring of the same sentence, when required by the diocesan, and shall receive the person sentenced, and cause him before the people in an high place to be burnt.

This statute gave in effect the whole power to the diocesan, and upon this account *William Sawtre*(m) after sentence and degradation in the provincial synod of *London* was burnt in the beginning of *Henry IV.*'s usurpation; the whole process and history of whereof is delivered by Mr. *Fox* in his acts and monuments, *part* 1. *p.* 674, 675. and yet it is observable, this was not done barely by the order of the diocesan,(n) but a special writ *de hæretica comburendo* issued to the mayor and sheriffs of *London* to perform the same, which writ is there mentioned *verbatim*, and is the very same, which is recited by *F. N. B.* fol. 269. and was the warrant for the burning of *William Sawtre*.

Now touching this matter we are to observe, that the parliament of 2. *H.* 4. began the 20th day of *January in octabis Hilarii*, it continued till the 10th of *March* following, *William Sawtre*, having the year before been convicted for heresy before the bishop of *Norwich*, was upon the 22d and 24th of *Febr.* 2 *H.* 4. (which was sitting the parliament) in the provincial council held in *St. Paul's, London*, convicted and sentenced, as a relapsed heretic, and an heretic to be punished; this was done in the provincial council before *Thomas Arundel*, archbishop of *Canterbury*, as appears by the acts of the registry of *Canterbury* collected by Mr. *Fox*, *part* 1. *p.* 673, 674, 675. upon the 26th of *Febr.* the writ *de hæretico comburendo* was formed and

(l) This statute was afterwards repeal'd by 25 *H.* 8. *cap.* 14.

(m) He was a parish-priest, first of *St. Margaret* of *Lynn* in the county of *Norfolk*, and afterwards of *St. Sythe's* church in *Sythe-lane, London*, and was the first, who appears to have been executed for formal heresy in *England*.

(n) Nor could it be so done, because he was not sentenced by virtue of the act of *H.* 4. which extended only to convictions before the diocesan or his commissary, whereas *Sawtre* was convicted before the convocation; and even on a conviction before the diocesan the sheriff had no power to burn the party convict without a writ, unless he was present at the pronouncing the sentence, see *State Tr. Vol. VI. Append. p.* 1. besides, as our author observes below, this act did not pass till after *Sawtre* was sentenced, so that how it can be said, that it was upon account of this act that *Sawtre* was burnt, I know not, except it be with regard to the encouragement the clergy might take from the prospect of its passing for anticipating the exercise of such a cruel (tho to them desirable) power.

made by the advice of the lords temporal in parliament, which writ bears *teste 26 Febr. 2 H. 4. per ipsum regem & consilium in parlamento*, and is entered *verbatim* in the parliament-roll 2 H. 4. n. 29. and is the very same with that in *Fitzh. N. B.* [397] before-mentioned, and agrees *verbatim* with it; and upon this writ *Salvete* was burnt, being first solemnly degraded.

This conviction, sentence, and writ, tho after the commencement of the the parliament, was before the end of that parliament, and consequently before the statute of 2 H. 4. cap. 15. passed, which passed not till the last day of the parliament, *viz.* 10 Martii; so that at that time the offender could not be executed but by a writ *de hæretico comburendo*, for the diocesan had not power by his own immediate warrant to command execution, till that passed, which passed not, till after the definitive sentence.

In this parliament there was a petition of the clergy against heretics which was the foundation of the statute of 2 H. 4. cap. 15. and was granted by the king *de consensu magnatum & aliorum procerum regni in præsentì parlamento existentium*, with some additional clauses, which were also drawn up into the act of 2 H. 4. cap. 15. but in that answer no consent of the commons appears, and yet the act was drawn up, and proclaimed, and, as it is now printed, is recited to be at the petition of the prelates, clergy and commons of the realm in parliament, and the enacting clause is by the king by the assent of the states and other discreet men of the realm being in the said parliament: this is observed by Mr. Fox in his *Acts and Monuments*, part 1. p. 773. whereupon he concludes, that this was no act of parliament, but an act of the king and clergy like that of 5 R. 2. before-mentioned, which was declared void, because the commons never assented, as is before observed.

But the truth is, the commons did assent to this act, tho their assent be not expressed in the parliament-roll as it is entered, as appears in the speech of the speaker of the commons to the king the last day of the parliament, *Rot. Parl. 2 H. 4. n. 47.* where they thank the king for the remedy he had ordained in destruction of the heretical doctrine of the sects; and besides in the same parliament-roll, n. 81. “*Inter petitiones communitatis, Item prient les communes, qe quant, ascun home ou feme, de quel estate ou condition qil soit, soit prise & imprisone per Lollardie, qe maintenant soit mesq [398] en respons, et eit tiel judgement, come il ad deservy en exemple dautres de tiel male sect per ligierment cesser lour malveys predications, & lour tenir al a foy christian. Ro. le Roy le voet.*

It is true this was never drawn up into a distinct act, for the provision by the statute of 2 H. 4. cap. 15. had a full and effectual provision for it; but this petition of the commons with the king's assent was the principal basis, upon which the statute of 2 H. 4. cap. 15. was built, and the statute was drawn up upon both petitions, as well that of the commons, as that of the clergy both put together, as was usual in those times, and so warrants the recital of the preamble of the printed statute of 2 H. 4. of the petition both of the clergy and

commons,*) and every man knows, that in the time of *Henry IV.* and afterwards the true professors of the christian religion, (that yet for the same were sentenced as heretics,) came under the reproachful title of *Lollards*.

This act of 2 *H.* 4. doth not determine what is heresy or what not, but leaves it to the decision of the diocesan; which wild and unbounded jurisdiction they had and used, till 25 *H.* 8. this therefore was their power at common law, and the temporal judge or power was to give credence herein to their sentence, but yet the consequence thereof being but to be left to the secular power, the secular power might exercise his own discretion, and grant a writ *de hæretico comburendo*, if he were satisfied of the justice of the sentence, or forbear the granting it, if he were not satisfied, that the thing charged was a real heresy, or that the ecclesiastical judge had proceeded fairly in the case.†

But there were some points of power introduced by this [399] act, and given to the diocesan, which he had not at the common law, viz.

1. Power to arrest and imprison persons suspect of heresy, for altho the pope's decretals had before this pretended to give power of imprisonment to the diocesan, *Extr. de pœnis, cap. 3. in. 6to*, yet that power never obtained in *England*, till this act of 2 *H.* 4.

2. Power to set, and estreat fines upon the offender.

3. Power to deliver over immediately to the temporal officer a relapsed or contumacious heretic to be burnt without expecting the king's writ *de hæretico comburendo*, with this notable advantageous clause *whereupon credence shall be given to the diocesan or his commissary*.

And accordingly the bishops after this act put the same in ure by their own immediate warrant or order delivering the party to the sheriff to be executed; but yet the conclusion of their sentence ran most commonly as formerly, viz. appointing him to be left to the secular power, and so leaves him, but sometimes, as in the definitive sentence against the lord *Cobham*, *Fox, part 1. p. 734.* committing him from henceforth to the secular power, and judgment to do him thereupon to death.

Now it is true, that upon the sentence of the diocesan the sheriff or officer, or any other were not to dispute, whether the same were truly heresy or not. 1. Because it was an act within their cogni-

(*) This petition of the commons amounts to no more, than that the *Lollards* should be cald to an account and punished according to their deserts, but contains nothing in it, which can be a warrant for such severe penalties, as are provided by that act, these proceeded from the petition of the clergy.

(†) But by the papal constitutions this liberty is not allowed to the secular power, for by those constitutions it is provided, That the punishment of heretics must not be relaxed or delayed. *Constit. Innoc. IV. cap. 24 and 32. Clem. IV. Constit. XIII.* and "That all magistrates under the penalty of excommunication must execute the penalties by the inquisitors imposed on heretics without revising the justice of them, for hereay is a crime merely ecclesiastical." *Constit. X. Bull. Rom. Tom. I, p. 453.*

zance and jurisdiction. 2. Because it is by 2. *H.* 4. enacted, that credence herein shall be given to the diocesan or his commissary.

But yet as to the first point of the statute, the imprisoning of persons suspect of heresy, the temporal judge had cognizance and power to determine, whether *that* for which the party was imprisoned by the diocesan were heresy or not; and if it appeared to the temporal judge not to be heresy, tho the diocesan had certified it to be heresy, the temporal judge might deliver the party imprisoned upon an *Habeas Corpus*, as was done *M.* 5 *E.* 4. *Rot.* 143. *B. R.* in *Keyser's* case. (o) and the party detaining him is punishable in an action of false imprisonment, as was done in *Warner's* [400] case, (p) *M.* 11 *H.* 7. *Rot.* 327. both which cases are at large reported, *Co. P. C. cap.* 5. *p.* 42. and therefore in cases of such return upon an *Habeas Corpus*, or justification by this act in false imprisonment, the particular heresy must be set forth, what it is, that the temporal judge may judge, whether it be heresy or no.

By this statute it appears, 1. That the diocesan might convict of heresy, and thereupon the party convict be left to the secular power, which settles the doubt raised by *Fitzh. N. B.* 269. 2. That he might convict an heretic, so as to subject him to the punishment of death not only in case of relapse after abjuration, but also in case of refusal to abjure. 3. The power of convicting an heretic is not limited to the diocesan only, but also to his commissary in order to his execution by the secular power.

After this ensued the statute of 2 *H.* 5. *cap.* 7. against heretics and *Lollards*, and thereby it is enacted.

1. "That all temporal officers be sworn to destroy all heresies and errors, commonly called *Lollardy*, and that they be assisting to the ordinary, when required, at the ordinary's charge.

2. "That when persons are convict of heresy, and left to the secular power by the ordinaries or their commissaries, their lands in fee-simple shall after their death be forfeit to the king or lords, of whom they are held, others than the ordinaries and commissaries themselves; and all their goods.

3. "That the justices of the king's bench, of the peace, and assize, shall have power to inquire of such errors and heresies called *Lollardy*, and their abettors, &c. and make out process of *Capias* against them.

4. "That such *Lollards* and their indictments be delivered over by indenture to the ordinaries or their commis- [401] saries, who thereupon are to proceed to their acquittal or conviction, but the indictment to be only as an information, not as evidence against the offender, but the ordinaries to commence their process against them, as if there were no indictment.

(o) *Keyser's* heresy was, that being excommunicated by the archbishop of Canterbury; he said, that notwithstanding that, he was not excommunicated before God, for his corn yielded as well, as any of his neighbours, 10. *H.* 7. 17.

(p) *Warner's* heresy was, that he said he was not bound to pay tithes to the curate of the parish, where he dwelt. 1 *Rot. Rep.* 110. 3 *Co. Inst.* 42.

5. "Punishment for escapes is by forfeiture of goods and seizure of lands till he returns;" and some other provisions.

This is the first law, that gave forfeiture of lands in fee-simple of an heretic convict, and executed, and the first law, that settled the forfeiture of their goods, tho forfeiture of goods were *de facto* used before. (q)

Tho in some respects it enlarged the ordinary's power, yet it may seem some kind of curb upon them to have an indictment previons, yet I find them not restrained from proceeding, tho there were no such previous indictment.

Hitherto there was no limitation or restraint, what should be or what should not be heresy, whereupon death might be inflicted, but the ordinary's power was left arbitrary and unlimited therein.

By the statute of 25 *H. 8. cap. 14.* there was a great alteration made as to the point of heresy.

1. The ordinaries were not to proceed against any for heresy without presentment or indictment thereof before the king's justices, or an accusation by two lawful witnesses at the least, and that before any citation or process by the ordinary.

2. That persons convict by the ordinary of heresy, and refusing to abjure, or having abjured relapsing, shall be burnt by the king's writ *de hæretico comburendo* first had and obtained for the same.

3. Tho it do not positively limit what only shall be heresy, yet it enacts what shall not be accounted heresy. 1. Speaking against the authority of the pope. 2. Speaking against spiritual laws made by the authority of the see of *Rome* repugnant to the laws of this realm, or the king's prerogative, and indeed it was time to make [402] this provision, the papal authority being now in a great measure taken away by act of parliament.

4. Persons accused of heresy shall and may be letten to bail either by the ordinary, or in their default by two justices of the peace.

IV. By the statute of 31 *H. 8. cap. 14.* a farther alteration was made touching heresy.

1. Six articles are declared and enacted, 1. That in the sacrament of the altar after consecration there remains no substance of bread and wine, but the substance of Christ.

2. That communion in both kinds is not necessary *ad salutem*.

3. That priests may not marry by the law of God. 4. That vows of chastity ought to be kept by the law of God. 5. That private mass is necessary to be continued. 6. That auricular confession is necessary to be retained and used.

2. That to preach or to declare, or hold opinion against the first article touching transubstantiation shall be adjudged heresy, and the persons convict thereof, their aiders, &c. convicted thereof in the form underwritten shall be adjudged heretics, and suffer death by burning without any benefit of abjuration, sanctuary, or clergy, and shall forfeit his lands to the king, as in case of high treason.

3. That if any openly preach against the last five articles, and be thereof convict or attain by the laws underwritten, every such offender shall suffer death as a felon without benefit of clergy or sanctuary.

4. That if any person publish or declare his opinion against the five articles last mentioned, he shall for the first offense forfeit his goods, the profits of his lands during his life, and ecclesiastical promotions, and be imprisoned at the king's will, and upon the second conviction shall suffer as a felon without benefit of clergy.

5. The king is empowered to issue commissions directed to the archbishop or bishop of the diocese, and the chancellor and others, or three of them, whereof the archbishop or bishop, or chancellor to be one, to take information by oath of twelve men, or the testimony of two lawful persons of all heresies, &c.

6. The ordinaries within their several jurisdictions to take information of heresies, and justices of peace, &c. to take [403] inquisitions touching heresies; these informations and inquisitions to be certified to the commissioners above-mentioned.

7. The commissioners or any three of them to make process against the offenders into all the shires of *England* and *Wales*, as in case of felony, and upon their appearance shall have full power and authority to hear and determine the said offenses according the laws of this realm and this statute.

8. Commissioners or two of them have power to bail persons, accused, till trial.

9. No challenge to be admitted but for malice or enmity, trial of foreign pleas by the commissioners, no eschetes to the lords, with some other clauses.

This act, tho it doth not, in express terms, repeal the statute of 2 *H. 5.* yet it doth, in a great measure, alter it. 1. In point of jurisdiction; for, here the proceeding to judgment is to be by commissioners under the great seal, and not by the ordinary or ecclesiastical jurisdiction. 2. The offense of heresy now in a great measure is made a secular offense, especially in the five last articles which are made felony. 3. Tho the commissioners have power to proceed upon accusations, as well as indictment, yet the trial of the offender was to be by jury, and the words *hear* and *determine*, &c. import the same.

Thus the law stood until 1 *E. 6.* with some small variations in 34 & 35 *H. 8. cap. 1.* but by the statute of 1 *E. 6. cap. 12.* all the before-mentioned statutes, viz. 5 *R. 2.* 2 *H. 4.* 2 *H. 5.* 25 *H. 8.* 31 *H. 8.* 35 *H. 8.* and all other statutes made in the time of *Henry VIII.* concerning religion are repealed. (r)

(r) So that the punishment of heresy then stood as it was at common law before any statute made against it, notwithstanding which there were some examples in this reign of persons burnt for heresy, viz. *Joan Bocher* and *George van Parre*, who were put to death much against the will of that good king by the over-persuasion of archbishop *Cramer*, for which reason (as bishop *Burnet* remarks) what that archbishop afterwards suffered in the succeeding reign was thought a just retaliation on him. *Burnet's Hist. of Reformation, Vol. II. p. 112.*

By the statute of 1 & 2 *P. & M. cap. 6.* the statutes of 5 *R. 2.* 2 *H. 4.* and 2 *H. 5.* are revived: but the statutes in *Henry VIII.*'s time, and repealed by 1 *E. 6.* stood still repealed, and thus [404] they continued till 1 *Eliz.* and if there had needed any farther repeal of the statutes of 25 and 31 *H. 8.* besides what was done by 1 *E. 6.* yet the statute of 1 & 2 *P. & M. cap. 8.* in *fine* hath this clause, that was never repealed by the statute of 1 *Eliz.* nor any other statute since made, *viz.* "That the ecclesiastical jurisdiction of archbishops, bishops and ordinaries be in the same state for process of suits, punishments of crimes, and execution of censures of the church, with knowledge of causes belonging to the same, and as large in these points as the said jurisdiction was in the 20th year of *Henry VIII.*" which doubtless repealed all acts made between 20 *H. 8.* and 1 & 2 *P. & M.* in derogation or alteration of the ecclesiastical jurisdiction, or the styles or forms of their proceeding by *Henry VIII.* or *Edward VI.*

V. I come now to the time of queen *Elizabeth.*

By the act of 1 *Eliz. cap. 1.* there are these alterations: 1. The statutes of 1 & 2 *P. & M. cap. 6.* 5 *R. 2.* 2 *H. 4.* 2 *H. 5.* are repealed, so that now the whole jurisdiction touching heresy stands as it did at common law, with such farther additions as are made by that statute of 1 *Eliz. 2.* The queen, her heirs and successors to have power to issue commissions under the great seal to exercise all jurisdictions spiritual and ecclesiastical within this kingdom, and to visit, reform, redress, order, correct, and amend all errors, heresies, schisms, &c. which by any spiritual or ecclesiastical power can or may be lawfully reformed. 3. That such commissioners shall not have power to determine any matter to be heresy, but only such as have been heretofore determined to be heresy: 1. By the authority of the canonical scriptures. 2. Or by any of the first four general councils, or any other general council, wherein the same was declared heresy by the express and plain words of the said canonical scriptures. 3. Or such as shall hereafter be determined heresy by parliament with the assent of the clergy in their convocation.

Upon this statute these things are observable:

1. By this statute the ancient common law was revived for the conviction of heretics, and delivering them over to the secular power, which might at common law be done either in a provincial [405] council, or by the diocesan alone, and accordingly, it is said *Co. P. C. cap. 5.(s)* the conviction of heretics was practised in the queen's time, but I find no particular instance thereof in the queen's time, *(t)* but in the case of *Legat*, 9 *Jac.* it was so resolved by four judges, and accordingly put in ure, and upon such a conviction before the diocesan a writ *de hæretico comburendo* might and did issue in the cases of *Legat* and *Wightman* convict of *Arianism*

(s) p. 40.

(t) That is of a conviction in a provincial council, or before the diocesan alone, for of convictions before the commissioners some instances are here mentioned by our author.

before the diocesan and left to the secular power, who were accordingly burnt: (u) *vide Baker's Chronicle*, p. 446.

2. There was another method of conviction of heresy, and thereupon delivering over to the secular power, and execution of the offender by writ *de hæretico comburendo*, namely by sentence of the commissioners for ecclesiastical causes instituted by the statute of 1 *Eliz.* but this takes not away the conviction of heresy by the diocesan or in a provincial council, but these remain as they did at common law, and thus it was done 17 *Eliz.* upon *John Peters* and *Henry Dirwert*, (x) *Flemings*, convict of heresy before the commissioners for *Anabaptism*, and thereupon a writ *de hæretico comburendo* issued.

3. That this act restored the issuing of a writ *de hæretico comburendo* (y) according to the course of the common law against a man convict of heresy, and refusing to abjure, or having abjured relapsed, and thereupon delivered to the secular power.

And *note*, that this writ is no writ of course, nor can the chancellor or keeper issue this writ upon a *significavit* by the commissioners or diocesan without a special warrant, for that the king may see cause to suspend the issuing thereof, or wholly supersede it, or pardon the sentence, for it may so fall out, that the diocesan hath adjudged a thing to be heresy, or a party to be an heretic, which in truth and reality is not so, or it may be the [406] party may retract, and so be capable of mercy.

But the course was for the diocesan alone, if the conviction were singly before him, or for the diocesan with the consent of the commissioners, if the conviction were before them, by *significavit* under the seal of the diocesan to return the conviction into the chancery, and then the same is brought before the king and his council; and after deliberation by the king with his council, a special warrant issues from the king by the advice of his council, to the chancellor or keeper, together with the tenor of the writ *de hæretico comburendo* expressed in the warrant, and commanding the chancellor or keeper to issue it under the great seal, which warrant is filed for the keeper's indemnity: this was the form which was used 17 *Eliz.* in the case of the *Anabaptists* above-named; and *note*, altho the conviction were before the commissioners, yet the diocesan was one of the commissioners, and his seal to the *significavit*, so that there were the junctures of both authorities, *viz.* the authority of the diocesan according to the course of the common law, and of the commissioners according to the power given by the statute of 1 *Eliz.* and we have reason to believe, that the subsequent convictions in

(u) But yet ought not to have been so by law, according to the opinion of lord *Coke*, for that the statute of 2 *H. 4.* cap. 15. which gave the writ *de hæretico comburendo* was repealed, and at common law no such writ lay upon a conviction by the ordinary, 5 *Co. Rep.* 23. a. 12 *Co. Rep.* 56. 92.

(x) Their names were *John Wielmacker* and *Hendrick Ter Woort*.

(y) The act says nothing about this writ one way or other, but only repeals the several statutes relating to heresy, and so leaves the matter, as it was at common law.

the queen's time pursued this form, and possibly that of *Legat's* in 9 *Jac.* might be in the same nature, tho the resolution of the judges, upon which it seems the process was formed, takes notice only of the diocesan.

4. That the forfeiture of goods or lands by conviction of heresy is by this act repealed.

5. Here is the first boundary, that was set to the extent of heresy as to the matter thereof, what only shall be adjudged heresy; (z) and altho this clause refers expressly only to the commissioners, yet it is to be the measure and rule for diocesans, and the convictions in their proceedings against heretics.

But it is true, it is not so particular and certain, as might [407] have been wished, for according to the inclination of the judge possibly some would determine *that* to be heresy by the canonical scriptures, which possibly is not at all heresy, nor contrary to the canonical scriptures but howsoever it brought heresy to a greater certainty than before.

Upon this statute of 1 *Eliz.* these things seem to me to be true: 1. That the *significavit* of the conviction of heresy ought to contain, even at common law, the particular heresy, whereof the party was convict, and without such particular *significavit* no writ *de hæretico comburendo* ought to issue; and the reasons are, 1. Because it concerns the highest temporal interest that any man can have, namely his life, and for this reason even in smaller temporal concerns a general cause or return of heresy or criminousness is not sufficient; it is not a sufficient cause of refusal or non-admission of a clerk to allege, that he is *criminosus & non idoneus*, or that he is *schismaticus inveteratus* 5 *Co. Rep.* 58 *a. Specot's* case, and the reason is very well given, coment que nappent al court la roynne a determiner schismes ou heresies, uncore l'original cause del suit esteant matter, dont le court le roy ad conusance, le cause del schisme ou heresie, purque le presentee est refuse, covient estre alledge en certain al entent le court le roy poit consult ove divines a scaver, si ceo soit schisme ou nemy; and upon the same reason it is, that in *Keyser's* case upon an *Habeas Corpus*, and *Warner's* case upon a false imprisonment, that altho the statute of 2 *H.* 4. enable the ordinary to arrest for heresy, it is not a sufficient return or justification to say the party was an heretic, or suspect of heresy, but he must return the particular heresy, for which he was so arrested, that the court may judge upon it; and tho the temporal court hath no original cognizance of heresy, yet it being incident to a temporal interest, namely the liberty of a man's person, the temporal court shall judge, whether it be heresy or no; (*) and accordingly in

(z) And great cause there was for this limitation, as appears from the fore-mentioned cases of *Keyser* and *Warner*, and others, 12 *Co. Rep.* 58. altho, as our author says, there still is too great a latitude left, since it is unavoidable, but different interpretations will in many cases be put even upon scripture, so long as the use of reason and liberty of thought continues.

(*) This is certainly agreeable to the law of the land, 2 *Co. Instit.* 615, 623. altho it

those cases they did adjudge that to be no heresy, which the bishop returned as an heresy, and in one case the prisoner was discharged, and in the other case recovered by an action of false imprisonment. *Co. P. C. cap. 5. 2.* Altho heresy be a case of ecclesiastical cognizance and jurisdiction, and as long as it only concerns ecclesiastical censures, and (so far forth only) faith is to be given to them, 'till reversed by appeal, yea altho it should in the sentence itself most evidently appear, that it was not heresy, yet as to the inflicting of death at common law they had no power, but all they could do was to commit him to the secular power, their business was then at an end; but now begins the concern of the secular power, and herein they were not, as lacqueys, only to follow what the ecclesiastical judge had done, for now the life of a subject was concerned either to be taken away or not, and that merely by the secular power, and herein the secular power had a judgment of discretion of their own, which they are to exercise, but yet cannot do it, unless the special matter of the heresy be certified to them.

2. Admit a general certificate without shewing the particular cause of heresy were good at common law, yet since the statute of 1 *Eliz.* it must be particular, because an act of parliament, which belongs to the interpretation of the common law, directs what shall be heresy and what not, and the king and his council are to give the warrant for issuing the writ, and therefore must be ascertained, whether it be an heresy within the description of this act, and the chancellor or keeper of the great seal is to affix the seal and issue the writ, and therefore ought to be satisfied by the *significavit*, that it is an heresy within that act, and if he be not, he is not to seal it, for it concerns the life of a subject; these are not bare ministerial acts by the king and his council or chancellor in subservience to the eccle- [409.] siastical jurisdiction, but they are acts judicial, where they are to exercise both a legal and well warranted discretionary judgment, and therefore must have the cause before them upon the *significavit*, and not by a bare general story of a conviction of heresy, and therefore if upon the return of the *significavit*, whereby the party is convict and sentenced either as an obstinate or relapsed heretic, it shall, by the particularity of the return, appear, that it is not heresy, there ought no warrant to be granted for the issuing of the writ, and

be what the clergy have always disrelished, who never liked to submit their proceedings to the judgment of the king's courts, or of any authority but what was ecclesiastical, accordingly we find a decree of *Boniface V.* "Whereby all powers, lords temporal, and rectors with their officers are forbidd to judge or take cognizance of heresy, it being merely ecclesiastical, or to refuse to execute the punishments enjoined by them, or any way directly or indirectly to hinder their process or sentence under the pain of excommunication, which if they obstinately lie under for a year, they are to be condemned as heretics;" *Sext. decretal. l. 5 tit. 2 cap.* Inquisitionis negotium: this decree is confirmed by the general council of *Constance*, sess. 45. See the constitutions of archbishop *Boniface*, *cap. de impetrantibus prohibitiones*, &c. *cap. de malitia iudicis secularis*, &c. & *cap. de pena impediendum*, &c. See also archbishop *Bancroft's* objections, 2 *Co. Instit.* 601, 609, &c. *Codex Leg. Ecclesiast. Anglic.* p. 1066. *Pref. to Codex.* p. 19.

if granted, yet the writ ought not to be sealed, and therefore the certificate or *significavit* must be special and certain. (*)

Again, this definition or circumscription of heresy is by an act of parliament, and tho the matter of it, viz. *Heresy*, be of ecclesiastical cognizance, yet the interpretation of the act of parliament is of a temporal cognizance, especially where a temporal interest, and the greatest temporal interest in the world, namely life, is concerned: we have many acts of parliament, that concern matters of ecclesiastical cognizance, as touching clergy and purgation, touching matrimony and the prohibited degrees, yet when these acts of parliament come to be expounded, the temporal judge hath the cognizance of them.

The statute of 2 H. 4. hath two notable clauses, one whereby the ordinary hath power to arrest for heresy, there is in that clause no express provision, that credence shall be given to the ordinary and therefore if he arrest for that, which is not heresy, the arrest is unlawful, and as an incident to an interest at common law, viz. the liberty of the subject, the temporal court hath power to determine, whether it be heresy or not, as is above-shewn: the other clause is a power committed to the ordinary to deliver over the party convict to the sheriff to be executed without any writ *de hæretico comburendo*. This was introductory of a new law, and therefore the sheriff or officer might possibly scruple not only whether there were [410] such a sentence, (a) but whether the thing, for which the party was condemned as an heretic, were really heresy; but to avoid all difficulties of this kind this unusual clause is added, *that herein credence shall be given to the diocesan or his commissary*.

We are here in the case of an act of parliament, an act that introduceth a new circumscription of heresy, an act that concerns the life of the subject, in a business, which after the ordinary hath passed his sentence, is now wholly left to the king, who, tho he be supreme in matters ecclesiastical as well as temporal, yet in the issuing of his writ *de hæretico comburendo* is looked upon by the ecclesiastical judge, as acting by his secular power, for that is the conclusion of the sentence, viz. *that he be left to the secular power*, in this he acts not ministerially but judicially; and therefore upon all accounts must have a certain return of the cause of the heresy, and if it shall appear to him, or to the chancellor, that is to seal the writ, that the return contains not any certainty of the heresy, or that which is returned as an heresy, be not such as is described by the statute of 1 Eliz. no writ *de hæretico comburendo* ought to issue, whether the conviction be by the high commission, or diocesan, or convocation. (b)

Black. Com. Lib. iv. ch. 4. p. 43, 44. &c. 1 Hawk. P. C. ch. 23.

(*) The same reasoning holds in granting the writ *de excommunicato capiendò*, for that, affecting the liberty of a man's person, concerns a temporal interest.

(a) There could be no room for this scruple, because, unless the sheriff was present at pronouncing the sentence, the ordinary had no power by 2 H. 4. to deliver the heretic to the sheriff, nor could the sheriff proceed to execute him without a writ.

(b) Since our author wrote, altho no alteration has been made in the definition of heresy, which still subsists upon the foot of the statute of 1 Eliz. yet the severer part of the punishment is taken away, and the doubt removed, whether the party be liable to a writ

CHAPTER XXXI.

CONCERNING HOMICIDE AND FIRST OF SELF-KILLING OR FELONY DE SE.

HAVING gone thro the pleas of the crown touching high treason, misprision of treason, and petit treason, the order that I have proposed leads me to consider of felony, &c. and these are of two kinds, felonies by the common law, and felonies made such by act of parliament.

Felonies by common law are such, as either concern the taking away of life, or concern the taking away of goods, or concern the habitation, or concern the obstruction of the execution of justice in criminal and capital causes, as escapes, rescues, &c.

In the first place therefore come to be considered those felonies or offenses, that relate to life or the taking away thereof without due process of law; and this again is either that, which concerns the loss of life happening to a man's self, or happening to another.

As to the first of these, namely the consideration of that offense or crime, that concerns a man's own life, where there is no other offender but the sufferer, this falls under these two heads or divisions.

I. *Homicidium sui-ipsius*, or felony of a man's self.

II. *Infortunium*, or pure accident, or at least, where no other reasonable creature is concerned in the effecting of it.

Of the former of these in this chapter.

Felo de se or *suicide* is, where a man of the age of discretion, and *compos mentis*, voluntarily kills himself by stabbing, poison, or any other way.

No man hath the absolute interest of himself, but 1. God almighty hath an interest and propriety in him, and therefore self-murder is a sin against God. 2. The king hath an interest [412] in him; and therefore the inquisition in case of self-murder is *felonice & voluntarie seipsum interfecit & murderavit contra pacem domini regis*.

Co. Litt. § 194. *fol.* 127. *a.* *M.* 11. *Jac. Wright's* case, a man to the intent to make himself impotent, and thereby to have the more colour to beg, caused another to strike off his hand, for this they were both indicted, fined and ransomed.

de heretico comburendo, for by 29 *Car.* 2. *cap.* 9. this writ and all proceedings thereon, and all capital punishments in pursuance of ecclesiastical censures are utterly abolished and taken away, so that heresy is now punishable only with excommunication, (except in the case of a clergyman, who is also to be deprived and degraded;) the civil effects of which are, that the party communicated is disabled from making a will. *Swinb. of Wills*, *part.* 2. § 22. or from suing for any debt or legacy, *Ibid.* *part.* 5. § 6. or doing any legal act, *Co. Litt.* 133. *b.* and if the party do not submit within forty days after publication, upon a *significavit* into Chancery, there issues a writ *de excommunicate capiendo*, by virtue of which he may be arrested and detained in prison, till he do submit; so that there seems now to be no material difference between a simple heretic and a relapsed heretic, for excommunication not being a definitive sentence, but only a process for contempt to enforce obedience to the sentence, whenever the party complies with it by retracting, doing penance, &c. altho a relapsed heretic, he is to be absolved.

A man or woman as to capital offenses is of the age of discretion at fourteen years old: *vide quæ supra dicta sunt cap. 3.*

Compos mentis.

If he lose his memory by sickness, infirmity, or accident, and kills himself he is not *felo de se*, neither can he be said to commit murder upon himself or any other.

If a man gives himself a mortal stroke, while he is *non compos*, and recovers his understanding, and then dies, he is not *felo de se*, for tho the death complete the homicide, the act must be *that*, which makes the offense.

P. 22 E. 3. Coron. 244. Co. P. C. 54. vide supra cap. 4. who shall be said *non compos*.

It is not every melancholy or hypochondriacal distemper, that denominates a man *non compos*, for there are few, who commit this offense, but are under such infirmities, but it must be such an alienation of mind, that renders them to be madmen or frantie, or destitute of the use of reason: a lunatic killing himself in the fit of lunacy is not *felo de se*, otherwise it is, if it be at another time.

What a voluntary killing.

If a man voluntarily give himself a mortal wound, and die within a year and a day of that wound, he is *felo de se*, and he cannot purge the crime, nor the forfeiture inflicted by the law, by his repenting of what he had done. *8 E. 4. 4.*

It must be simply voluntary, and with an intent to kill himself.

If *A.* with an intent to prevent a gangrene beginning in his hand doth without any advice cut off his hand, by which he dies, [413] he is not thereby *felo de se* for tho it was a voluntary act, yet it was not with an intent to kill himself.

It is said *Co. P. C. p. 54.* and by Mr. Dalton, *cap. 92.*, (a) that if *A.* gives *B.* a stroke, that he falls to the ground, *B.* draws his knife and holds it up for his own defense, *A.* in haste falling upon *B.* to kill him falls upon the knife, whereby he is wounded to death, *A.* is *felo de se*, and for that they cite *44 E. 3. 44. 44 Ass. 17.* where indeed it is adjudged, and that rightly, that *B.* is not guilty, and shall not forfeit his goods, and that it is not barely *se defendendo*, for he did not strike, only held up his knife, and so is simply not guilty; and all that *Knivett* says is, *Est trove, que le mort occise lui mesme*, and adjudged that *B.* is not guilty, nor his goods forfeit: but *Knivett* says not, that *A.* is *felo de se*, neither indeed is he, but it is only *per infortunium*.

But if *A.* had stricken at *B.* with a knife intending to kill him, and missing *B.* had stricken himself, and killed himself, there he had been *felo de se*, because that act, whereby he intended to murder *B.* shall have the same construction, if it kill himself or any other person, as it should have done, if it had taken its effect upon *B.* *de quo infra.*

Touching the forfeiture of *Felo de se*.

He doth not forfeit his lands nor his wife's dower.

But he doth forfeit his goods and chattels.

As to the relation of the forfeiture.

Baron and feme joint purchasers of a term for years, the husband drowns himself, the lease is forfeited, and the wife surviving shall not hold it against the king or almoner, *Plowd. Com.* 260. *b.* *Dy.* 108. Dame *Hale's* case, in which all the judges agreed, but seem to intimate different reasons: *Weston* held the relation was only to the death, but the title of the king and a common person coming together, the king's title shall be preferred, but yet they concluded, that the forfeiture relates to the first act, whereby the felony was committed, namely the throwing himself into the water, and so the king's title commenced in the life of the husband, and [414] amounted to a forfeiture in his life-time, when by law it was in his power, either by his disposal or forfeiture, as by outlawry, to bind the interest of the wife, and therefore they say, that if a villain give himself a mortal wound, and the lord seize the goods, and then the villain die of the wound, the king shall have the goods against the lord, and with this agrees *Littleton*, 8 *E.* 4. 4.

That the law was well resolved in that case I do not doubt, but I am not satisfied, that the relation of the forfeiture is to the time of the stroke to all purposes, no more than in case of another felony, for suppose a man should give himself a mortal stroke and live eleven months after, how shall he support himself and his family?

But whereas in other cases of other felonies the forfeiture as to goods relates neither to the stroke, nor to the death, but to the conviction, here the forfeiture relates not barely to the presentment or inquisition, but to the death in case of a *felo de se*, for being his own executioner he prevents any formal conviction, as in other felonies.

But yet in order to this forfeiture it is necessary, that there should be a record to entitle the king, *viz.* an inquisition.

Inquisitions therefore in this case are of two kinds, *viz.* if the body cannot be seen, then it is inquisible before the justices of *oyer* and *terminer*, yea or before the justices of peace of the county, for it is a felony, and within the extent of their commission, *H.* 37 *Eliz.* *B. R. Laughton's* case, *Co. P. C.* p. 55. (b) and accordingly adjudged *M.* 1656. in *Greeve's* case.

And so if an indictment of felony be before commissioners of *oyer* and *terminer* or goal-delivery, &c. and a *fugam fecit* be presented, if process be made against those, that have the goods, the flight may be traversed, for it is but an inquest of office, and shall not conclude. 47 *E.* 3. 26.

But it is there held, that if an inquisition be taken before the coroner *super visum corporis*, that a man is *felo de se*, that inquisition shall be conclusive, and is not traversable by the executors or administrators of the deceased, *Co. P. C.* p. 55. and the like seems to be held by *Stumford*, *P. C.* p. 183. *b.* where a [415] *fugam fecit* is presented before the coroner *super visum*

corporis, where it is found, that a murder was committed, and the murderer fled; and yet the offender himself shall be received to plead not guilty to the indictment or inquisition before the coroner, as by daily experience it appears, tho *Stamford* makes it there a question whether the *fugam fecit* be traversable.

And therefore I remember in the king's bench in the case of *Barclay* it was ruled, that in case of an inquest before the coroner *super visum corporis*, wherein the party was found *felo de se*, the inquisition was quashed in the king's bench, because upon examination it appeared, that the coroner refused to let the jury hear witness on the part of him that was dead, to prove that he was not *felo de se*, for the coroner ought to hear evidence on both sides, partly because it was doubted, that the inquisition in this case was conclusive, and a conviction, and not traversable, and the court of king's bench, who are the sovereign coroner, did set aside that inquisition, and order the coroner to inquire *de novo super visum corporis*, because the body was yet to be viewed. *H. 1658. B. R. Barclay's case.*(c)

If an inquisition be taken before the coroner *super visum corporis*, whereby the party dead is found to have died *per infortunium*, if it is suggested on the part of the king or almoner, that he was *felo de se*, and in the king's bench a writ of *melius inquirendum* is prayed to the sheriff, it seems it ought not to be granted, because the coroner is the proper officer, and accordingly it was denied in *Pasch. 24 Car. 2.* and if granted, and an inquisition taken, it hath been held void(d) by the statute of 28 *E. 3. cap 9.* tho many precedents of such writs are extant. *H. 37 Eliz. B. R. Croke, n. 13. Harleston's case, F. N. B. 144, 250.*(e)

But it seems, if the coroner's inquisition omit the finding of the goods of the *felo de se*, that may be supplied by a writ of *melius inquirendum* directed to the sheriff, for that is not within the statute of 28 *E. 3.*

But whensoever any inquisition is taken by the sheriff by [416] a writ or commission of *melius inquirendum*, without question that inquisition is traversable.

If an inquisition be taken before the coroner *super visum corporis de villis A. B. C. and D.* and says not *de quatuor villatis proxime adjacent'*, according to the statute of 4 *E. 1. de coronatoribus*,(f) yet it hath been held the inquisition is good, because the statute is only directory. *H. 1658. B. R. Barclay's case.*(g)

But altho an inquisition taken before the coroner *super visum corporis* in the point of *felo de se* is of great authority and a sufficient record, whereupon process may be made against those that detain the goods found in the inquisition, yet it seems to me, that it is traversable in the very point so found, for it is but an inquest of office, and whereupon the party grieved thereby can have no attain, but

(c) 2 Sid. 90. 101.

(d) 2 Ander. 204.

(e) Edit. 1718. p. 322, 554.

(f) This statute was but an affirmance of the common law, Brit. 7. c.

(g) 2 Sid. 144. See also the *King versus Crosser*, &c. 1 Sid. 204.

otherwise it is of a presentment of a *fugam fecit* before the coroner.
8 E. 4. 4.

The coroner hath power *super visum corporis* to inquire touching the murder or interfection of the party that is dead, and also of all accessaries before, and of their flight, but not of accessaries after the fact. 4 H. 7. 18. b.(k), yet the party presented before the coroner to be principal or accessory before is not convict by such presentment, but shall be arraigned and plead to the felony, and I know no difference between that and this; and it seems unreasonable, that by an inquest taken against a dead person, whereby he is found *felo de se*, that the executors, administrators, legatees, and children of the deceased should be concluded, and lose the goods of the deceased without an answer, by an inquisition which may be taken by the coroner behind their backs, and I find no book express [417] in it, but the opinion of my lord Coke, P. C. 55.,(i) for the doubt of Mr. Stamford, P. C. 183. is only upon a *fugam fecit*, and in the case of *Barclay* 1658, the Court of King's Bench were not satisfied, that it was conclusive.

P. 45 E. 3. *inter communia scaccarii* there was a presentment (before the coroner, as it seems, but it is not so expressed in the record) that *Walter Page felonice se submersit, & sic felo de se devenit*, and thereupon a writ issued out of the Exchequer to inquire what debts were due to *Walter Page*; the sheriffs of *London* took an inquisition, whereby it was found that *Simon Long* of *Essex* was indebted to *Walter Page* at the time of his death in 46l. by bill, thereupon process issued against *Simon Long* to answer the debt, who came in and confessed he owed the debt to *Walter Page*, dicit tamen, quod domino regi reddere non debet, quia qualitercunque præsentatum fuit, quod dictus *Walterus Page* nequiter and felonice se submersit, ut prædicitur, idem *Walterus Page* interfectus fuit per emulos suos, & per ipsos in quodam fossato in loco vocato the wilds in com. *Surrey* projectus, absque hoc, quod ipse aliqualiter se submersit; and thereupon issue was joined, and by a jury of *Surrey* found, quod dictus *Walterus Page* fuit interfectus per emulos suos, & in fossato projectus, absque hoc, quod ipse aliqualiter se submersit.

There a traverse was taken to the presentment, which must needs be before the coroner by the whole circumstance of the case, tho the coroner be not mentioned in the record.

And with this agrees the book of 8 E. 4. 4. that the finding of one to be *felo de se* is traversable, tho found before the coroner; but

(k) This case says nothing directly of the coroner's power to inquire of accessaries, yet by resolving, that in case of an accessory before the fact presented before the coroner, if it was found he fled, he should forfeit his goods, but not so in case of an accessory after the fact, it seems strongly to imply, that the coroner had jurisdiction in the one case, but not in the other; and *Stamford* says, that the judges in that case of 4 H. 7. abridged the coroner of a power, which he would have usurped in inquiring of those, who were accessaries after the murder. See to this purpose *Dalison* 32.

(i) See also to the same purpose *Hob.* 317.

indeed it holds, that a *fugam fecit* presented before the coroner is not traversable, *quia auntient ley de corone.*(k)

If there be two coroners in a county, the outlawry must be given by both, *ullagatus est per judicium coronatorum*, yet one of them may take an inquisition *super visum corporis*, M. 6 & 7 Eliz. C. B. (l)

By the statute of 3 H. 7. cap. 1. the coroner ought to re-
[418] turn and certify the inquisition taken by him to the next goal-delivery, or into the king's bench.

And thus far touching *felo de se* and his forfeiture.

There is another kind of death of a man, which may be considerable in this place, namely the death of a man *per infortunium*, and this is of two kinds, *viz.*

1. Where one man is the cause of another man's death without any ill-intent, and by misfortune: of this I shall treat under the distribution of homicide.

2. When a man comes to an untimely end, where no other reasonable creature concurs to it, and this is properly *per infortunium*.

As where a man falls from an horse, or house, or boat, or into a pit, or a tree or tile fall upon him and kill him, or is killed by a beast, in this case the coroner ought to take an inquiry *super visum corporis*, and also of the manner and means, how he came by his death, and of the thing, whereby it happened, and of the value thereof, because in many cases there is a forfeit belonging to the king as a deodand, whereof in the next chapter.[1]

(k) See *Stamf. Prærog.* 46. b.

(l) See *Heb.* 70.

[1] By 4 Geo. IV. c. 52, s. I, it shall not be lawful for any coroner, or other officer having authority to hold inquests, to issue any warrant or other process directing the interment of the remains of persons against whom a finding of *felo de se* shall be had, in any public-highway; but such coroner or other officer shall give directions for the private interment of the remains of such person *felo de se*, without any stake being driven through the body of such person, in the church-yard, or other burial-ground of the parish or place in which the remains of such person might, by the laws or customs of England, be interred, if the verdict of *felo de se* had not been found against such person, such interment to be made within twenty-four hours from the finding of the inquisition, and to take place between the hours of nine and twelve at night. Proviso not to authorize the performing of any of the rites of Christian burial on the interment of the remains of any such person, nor to alter the laws or usages relating to the burial of such person, except so far as relates to the interment of such remains in such church-yard or burial-ground at such time and in such manner.

By self-murder all the chattels, real and personal, which the *felo de se* has in his own right are forfeited, and also all chattels real whereof he is possessed either jointly with his wife or in her right, and also all bonds and other personal things in action belonging solely to himself, and also all personal things in action, and, as some say, entire chattels in possession to which he was entitled jointly with another, on any account except that of merchandise. But it is said that he shall forfeit a moiety only of such joint chattels as may be severed, and nothing at all of what he was possessed of as executor or administrator. His lands of inheritance are not forfeited, nor his wife barred of dower. No part of his personal estate vests in the king before the self-murder is found by some inquisition. But after inquisition it is forfeited from the time the act done. 4 Bl. Com. 190. n. 22. *Stephens, C. L.* 145-7. See post, ch. 32, note.

Suicide consists in a man's deliberately putting an end to his own existence, or committing any unlawful malicious act, the consequence of which is his own death—as if

attempting to kill another he runs upon his antagonist's sword, or shooting at another the gun bursts and kills himself. 4 Bl. Com. 189.

But the act must be strictly his own, for if a man desire another to kill him, who complies, the person killed is not *felo de se*, though the killer is a murderer. 1 Hawk. c. 27, s. 6. 1 Russell, 424, 426.

So he must be of years of discretion, and in his senses. 4 Bl. C. 189.

There may be an accessory before the fact to self-murder, for if a man persuades another to kill himself, and he does so, the adviser is guilty of murder, as an accessory before the fact. 4 Bl. C. 189. Keilw. 136. Rex v. Russell, R. & M. C. C. R. 356. Vaux's Case, 4 Rep. 44. b.

Where two persons agree to die together, and one of them, at the persuasion of the other, buys poison and mixes it in a potion, and both drink of it, and he who bought and made the potion survives by using proper remedies, and the other dies; it is said to be the better opinion, that he who dies shall be adjudged a *felo de se*, because all that happened was originally owing to his own wicked purpose, and the other only put it in his power to execute it in that particular manner. 1 Hawk. P. O. c. 27, s. 6. Keilw. 136. Moor, 754.

If a man, intending to shoot at another, mortally wound himself by the bursting of the gun, he is *felo de se*; his own death being the consequence of an unlawful, malicious act towards another. It has also been said, that if A. strike B. to the ground, and B. draw a knife and hold it up for his own defence, and A. in haste falling upon B. to kill him, fall upon the knife and be thereby killed, A. is *felo de se*; 3 Inst. 54. Dalt. c. 144; but this has been doubted. 1 Hawkins, P. C. c. 27, s. 4.

A husband and wife being in extreme poverty and great distress of mind, the husband said, "I am weary of life, and will destroy myself;" upon which the wife replied, "If you do, I will too." The man bought some poison, mixed it with some drink, and they both partook of it. The husband died; but the wife, by drinking salad-oil, which caused sickness, recovered, and was tried for the murder of her husband, and acquitted; but solely on the ground that, being the wife of the deceased, she was under his control; and inasmuch as the proposal to commit suicide had been first suggested by him, it was considered that she was not a free agent, and therefore the jury, under the direction of the judge who tried the case, pronounced a verdict of not guilty. Anonymous referred to in Reg. v. Allison, 8 C. & P. 418. Moore, 754. 1 Russ. on C. 508.

Hawkins speaks with some warmth against an unaccountable notion; which he says prevailed even in his time, that every one who kills himself must be *non compos* of course; because it is said to be impossible that a man in his senses should do a thing so contrary to nature and all sense and reason. But he argues, that if this doctrine were allowable, it might be applied in excuse of many other crimes as well as this; as, for instance, that of a mother murdering her child, which is also against nature and reason; and this consideration, instead of being the highest aggravation of a crime, would make it no crime at all; for it is certain a person *non compos mentis* can be guilty of no crime. 1 Hawk. c. 27, s. 3.

If one encourages another to commit suicide, and is present abetting him while he does so, such person is guilty of murder as a principal; and if two encourage each other to murder themselves, and one does so, the other being present, but failing in the attempt on himself, the latter is a principal in the murder of the first; but if it be uncertain whether the deceased really killed himself, or whether he came to his death by accident before the moment when he meant to destroy himself, it will not be murder in either. R. v. Dyson, R. & R. C. C. 523. R. v. Allison, 8 C. & P. 418. See Post, Chap. 34, Note.

CHAPTER XXXII.

OF DEODANDS.

REGULARLY that moveable good, that brings a man to an untimely death, is forfeit to the king, and it is usually granted by the king to his almoner to distribute in charitable uses.

But they are not forfeit till the death be found, which is regularly by the coroner, and may be before the commissioners of goal-delivery, *oyer and terminer*, or of the peace, if omitted by the coroner, and hence it is, that these goods, as neither the goods of felons of themselves, felons and other outlawed persons, cannot be claimed by prescription, because there must appear a title to them by matter of record, before they are forfeited.

Upon the death of a man by misadventure, &c. the inquisition ought to inquire of the goods, that occasioned the death, and the value of them, and the *Villata*, where the mischance happened, shall be charged with process for the said goods or their value, tho they were not delivered to them, (a) 8 E. 3. Cor. 298.

And this is the reason, that in every indictment of murder, manslaughter, &c. the indictment finding, that he was killed with a sword, staff, &c. ought to find also the price, *viz.* 5 *solidorum*, because the king is entitled to that instrument, whereby the party was killed, or the value thereof, and that altho it were the sword of another man, and not his, that gave the stroke, *Co. P. C.* 57, 58. tho this doth not vitiate the indictment as to the offense itself, tho the price be omitted.

Deodands are of two natures: 1. Such, as do *movere ad* [420] *mortem*. 2. Such as, tho they are *quiescentia*, yet occasion the party's death: *vide* statute 4 E. 1. *de officio coronatoris*:

1. Things moving to death: as if a beast kill a man, 8 E. 2. *Coron.* 403, if a man be cutting of a tree, and the tree fall upon another tree and break down a limb, which falls upon a man and kills him, both the limb, and the tree that fell, are deodands. 8 E. 2. *Coron.* 398.

If a man be driving of a cart, and the cart fall and kill a man, the cart and horses are a deodand. 8 E. 2. *Coron.* 388. and so if a cart run over a man and kill him, the cart and horses are forfeit, 8 E. 2. *Coron.* 403. 3 E. 3. *Coron.* 326, 342. (b) so if the timber that haugs a bell, fall and kill a man, the timber and bell are both forfeit. (c)

(a) This case is cited from an *Her.* by *Fitzherbert*, who adds at the end of it, *quod mirum*.

(b) A cart met a waggon loaded upon the road, and the cart endeavouring to pass by the waggon, was driven upon an high bank and over-turned, and threw a person, that was in the cart, just before the wheels of the waggon, and the waggon ran over him and kild him; it was resolved in this case in the home circuit by *Pollexfen* and *Gregory*, that the cart, waggon, loading, and all the horses were deodands, because they all moved *ad mortem*. 1 *Salk.* 220.

(c) 8 E. 2. *Corone* 405. *vide contra Rex versus Crosse*, &c. 1 *Sid.* 207.

If a man in watering his horse is drowned, the horse is a deodand. 8 E. 2. Coron. 401.

If a man fall into the water, and the water carry him under the wheel of a mill, whereby he is killed, the wheel is forfeited, but not the mill. 8 E. 2. Coron. 389.

If a weight of earth fall upon a worker in a mine and kill him, the weight of earth is forfeit, not the whole mine. 12 R. 2. Forfeiture 20.

A man falls from his horse against a trunk, whereof he dies, the horse is forfeit as a deodand, but not the trunk. 3 E. 3. Coron. 341.

And yet I find strong authority, that in that case the horse is not forfeited, unless he throw his rider.

Claus. 5. E. 3. part 2. m. 9. It was found by inquisition, "*Quod Willielmus Daventriæ in parochiâ beatæ Mariæ Stroud in com. Middlesex, cum ad-aquavit quendam equum magistri sui, dictusque Willielmus redeundo de eodem equo per infortunium cecidit, & cum eodem equo per amicos suos semivivus deductus fuit ad hospitium prædicti magistri sui apud Fleetstreet in suburbio London, & ibidem languidus vixit usque occasum solis, quo tempore [421] obiit ex casu prædicto; & quod prædictus equus tempore casûs prædicti per aliquem vel aliquam non fuit perterritus, per quod habuit occasionem recalcitrandi.*

This inquisition being removed into the chancery by *Certiorari*, thereupon it was adjudged *coram rege & concilio, quod equus prædictus tanquam deodand' regi in hoc casu non debet adjudicari*, and thereupon a writ issues to the sheriffs and coroners of London reciting the inquisition: "*Jamque dictâ certificatione coram nobis & concilio nostro inspecta & plenius examinata, nobis & dicto concilio nostro videtur, quod equus prædictus tanquam deodand' nobis in hoc casu non debet adjudicari,*" commands the sheriff and coroners, "*quod exactionem, quam Johanni Bleburgh (the master of the horse) vel plegiis, vel manucaptoribus suis in hac parte pro equo prædicto vel ejus pretio nobis tanquam deodand' reddend' fecistis, supersedeatis omnino & districtionem in hac parte factam sine dilatione relaxetis.*" *T. R. apud Guildford 18 Novemb.*

Which judgment is of greater weight, than any above cited, and may be a great guide in cases of this nature, and therefore I have cited it at large: 1. It is a resolution subsequent to all those judgments, that are above-mentioned, for the last of them is the 3 E. 3. and this is 5 E. 3. Again, 2. It is a solemn judgment given in Chancery *coram rege & concilio* upon great examination, and the whole case stated in the inquisition, and every man knows, that understands any thing of records of those times, that *coram rege & concilio* was the king's legal council, namely the Chancellor, Treasurer, Keeper of the Privy Seal, justices of the one bench and the other, chancellor and barons of the *Exchequer*: these usually met in chancery upon such occasions under the style of *concilium*.

3. It is a judgment given by the king and council *against* the forfeiture, the whole case appearing upon the inquisition, which is of

greater moment, than a judgment given for the king, because given by himself and his officers against his own interest.

2. Now touching deodands of things not moveable,

[422] If a man be drowned in a pit, tho the pit cannot be forfeited, the coroner may charge the township to stop the pit, and make entry thereof in his rolls; and if it be not done before the next *eyre* or goal-delivery, the township shall be amerced. 8 E. 2. Coron. 416.

If a man falls from a hay-rick, whereby he dies, it is said (*nota*; not adjudged) that it shall be forfeit. 3 E. 3. Coron. 348.

If a man be getting up a cart by the wheel to gather plums, and neither the cart nor horses moving, the man falls and dies, neither the cart nor horses are forfeit, but only the wheel. 8 E. 2. Coron. 409.

It seems, that if a man be under the age of fourteen years, and falls from a cart or horse, it shall not be a deodand, because he was not of discretion to look to himself; but if a horse, bull, or the like kill him, or if a cart run over him, there it shall be a deodand 8 E. 2. Coron. 389. *Stamford's P. Cor.* 21. *a. Co. P. C.* p. 57. for there it shall be imputed to the neglect of the keeper of the goods, that did the mischief, and so it is, if a tree fall upon one within the age of discretion, it is a deodand.

Touching deodands in ships or boats, these things are observable:

1. If a ship or boat be laden with merchandize, tho it fall out that a man be killed by the motion of the ship or boat, yet the merchandize are no deodand, tho it be in the fresh water; but if any particular merchandize fall upon a party, whereby he dies, that particular merchandize shall be a deodand, and not the ship. *Britton, cap. 1. de office de coroner*, § 13 & 14.

2. If a ship or vessel be sailing upon the sea, and a person falls out of the ship and is drowned, the ship is no deodand.

By the antient constitutions of the admiralty it seems, that if a man were drowned upon the sea by falling off from the ship under sail, there was no deodand due, nor if he died by the fall of a mast or sail-yard, or otherwise; but indeed in the articles of inquiry in the court of admiralty, mentiond in the black book of the admiralty, one of the articles is to inquire of them, that take any deodands,

[423] besides the admiral of any gold, silver or jewels found upon any man slain upon the sea, drowned in the sea, or slain with a mast in the ship, or with the yard of the ship, or with any other thing, which is the cause of the death of any man, that in such case appurtient al admiral per prendre and administre per l'alme, ce quest mort, le moiety, & l'autre moiety a doner al feme celui, quest mort, ses infans, freres au soers, sil ad aucunes: but certainly this never obtaind, for without question the goods of the deceased were no deodands, but only the goods that moved to his death.

Rot. Par. 51 E. 3. n. 73. The commons pray, Que come il ad un custome use parmy cest realme, que si ascun home ou garson eschie hors de ascun niefte, batelle, ou autre vessel en le mere, haven, ou autre ewe, & soit perisse, le dit vessel ad estre forfeite au roy, ou

autres seigneurs de franchises, to the great prejudice of mariners and shipping, and therefore pray, que nul neise, batell, ne autre vessel soit forfeitable desormes pur le cause avant dit.

Resp. En le mere ne doit pes deodand estre ajugge, mes quant al ewe fresh le roy ent ferra sa grace, ou lui pleyst.

The like petitions were renewed *Rot. Par.* 1 *H.* 4. n. 154. 1 *H.* 5. n. 35. 14 *H.* 6. n. 26. but they obtained no other answer, than that the law be observed.

Yet that answer in 51 *E.* 3. is a sufficient declaration, that no deodand is to be upon such a death happening upon the sea, and with this difference touching the forfeiture of a ship or other thing, as deodands *in mari & in aquâ dulci*, agrees *Bract. Lib.* III. *cap.* 5. p. 122, and *cap.* 17. p. 136. *in fine*, viz. that de submersis in aquâ dulci batelli, de quibus tales submersi fuerunt, apprecientur, sed non in mari, nec sunt deodanda ex infortunio in mari.

And with the same agrees *Fleta. Lib.* I. *cap.* 25. §. 9. de submersis, si de molendino ceciderit vel carecta vel de batello, quamvis carcatis, dum tamen in aquâ dulci, secus quam in falsâ, and goes farther, but too far, viz. that the vessel with its lading, and the cart with its lading, and the mill, with all that is moveable in it, are deodands.

But now, what shall be said the sea or salt water?

My lord *Coke, ubi supra*, viz. p. 58. saith, and that truly, [424] the arm of the sea is included herein; and by the book of 22 *Assize*, pl. 93. so far as the sea flows and reflows is an arm of the sea.

And thus far of deodands.

I shall only add this one thing more relating to the coroner's office touching those that come to a violent death *de subito mortuis*: if the township bury the body before the coroner be sent for, the township shall be amerced; and if the coroner come not to make his inquiry upon notice given, he shall be fined in *eyre*, or in the king's bench, or before the justices of goat-delivery.[1]

[1] By *deodand*, is meant whatever personal chattel is the immediate occasion of the death of any reasonable creature; which is forfeited to the king to be applied to pious uses, and distributed in alms by his high almoner: though formerly destined to a more religious purpose. It seems to have been originally designed, in the days of Catholicity, as an expiation for the souls of such as were snatched away by sudden death, and for that purpose ought properly to have been given to the church; in the same manner as the apparel of a stranger, who was found dead, was applied to purchase masses for the good of his soul. And this may account for that rule of law, that no deodand is due where an infant under the age of discretion is killed by a fall from a cart, a horse, or the like, not being in motion; whereas if an adult person falls from thence, and is killed, the thing is certainly forfeited. For the reason given by Sir *Matthew Hale*, (*ante*, p. 422,) seems to be very inadequate, viz. because an infant is not able to take care of himself; for why should the owner save his forfeiture on account of the imbecility of the child, which ought to have made him more cautious to prevent any accident of mischief? The true ground of this rule seems rather to have been, that the child, by reason of its want of discretion, was presumed incapable of actual sin, and therefore needed no deodand to purchase propitiatory masses; but every adult, who died in actual sin, stood in need of such atonement, according to the humane belief of the founders of the

English law. 1 *Blac. Comm.* 390, 391. and note (21) in 21st *Lord. Ed.* 1844. 2 *Steph. Comm.* 565.

The origin of this law (of deodands) is traced back to the oldest periods of European religious faith, when the belief in the efficacy of masses for the souls of the dead to rescue them from the pains of purgatory, was as prevalent and as thoroughly rooted in the mind of all Christendom, as the disbelief of it is now in this country. It was in those days a general practice, naturally flowing from this belief, among the classes of society whose means would permit, for masses to be said for the souls of the dead, particularly of those who died on the field of battle, or otherwise came to sudden death, and were supposed, therefore, to pass from this world without due preparation, and without absolution; and to this practice is traced the law of deodand. Anciently, it seems, when any person came suddenly by his death by the accidental agency of any animate or inanimate chattel, the chattel was to be given to the church for masses for the soul of the deceased. Such a law was manifestly a wise and humane one, while it was the fervent belief of the people that saying of such masses was essential to the eternal welfare of the souls of deceased persons; for in all times, persons of the poorer sort are those who are most exposed to death by accidents, and this would be particularly the case in the times of which we speak, when the higher classes of society took care, by their continual state of warfare and mutual destruction, to allow little room for accidental death among themselves, so that but for the law which devoted to the procurement of masses the thing that caused accidental death, there could have been for the poor no provision for that species of spiritual aid, which was considered, both by rich and poor, as much an essential as decent burial is at this day. In process of time, however, the law appears to have been perverted from its original intention; and, while the ulterior object for which the forfeiture was inflicted, appears to have been gradually lost sight of, the forfeiture itself was retained, but in favour of the crown; and the fruits of it became and have continued, even down to this day, a mere source of revenue to the crown.

The notion upon which deodands have been principally levied in our own times, and which appears indeed, to have been always considered as, partly, the reason of the law, has been that they operate as a sort of penalty on carelessness, tending to make the owners of chattels of a dangerous character, more cautious in using them. This is simply an attempt to fasten some extraneous attribute of utility, upon a process in itself almost wholly denied of fitness and utility. As a law tending to enforce caution, it is manifestly one sided; for the forfeiture of the thing which is the cause of a man's death can, of course, operate only as an inducement to caution, (if indeed it does operate at all) upon the owner of the thing, whose caution or incaution has, in general, very little to do with the matter; while upon the persons who expose themselves to the injurious action of the thing, it can have no effect; yet it is the incaution of the latter class much more than of the former, that is the cause of accidental death. 9 *Lord. Jur.* 49, 50. P. II. See also 1 *Blac. Comm.* note (22) p. 302. 21st *Ed.*

In the Parliamentary Session of 1845, Lord Campbell introduced a "Bill to abolish Deodands," and Lord Lyttleton introduced another entitled "An Act for Compensating the Families of Persons killed by Accidents;"(*) neither of which however were passed; and the Law of Deodands in England still rests upon its ancient principles and foundations.(†)

(*) This Bill has now (April 1847) become a law, 9 & 10 Viet. c. 93. 26th August, 1846. The provisions of the law are as follow:

§ 1. An action to be maintainable against any person causing death through neglect, &c. notwithstanding the death of the person injured.

§ 2. Action to be for the benefit of certain relations, and shall be brought by and in the name of executor or administrator of the deceased.

§ 3. Only one action shall lie, and to be commenced within twelve calendar months.

§ 4. Plaintiff to deliver a full particular of the person for whom such damages shall be claimed.

§ 5. The mode of construing the words and expressions in the act.

§ 6. The act to take effect immediately after passing, and not to apply to Scotland.

§ 7. The act may be amended or repealed the present session of Parliament. See the Stat. at large in 10 *Lord. Jur.* 370. Pt. 2.

(†) When this note was written (July 1846) such was the law of England, but now, (April 1847) the learning of the law of deodands has yielded to the spirit of legal reform. The British Parliament passed "An Act to abolish Deodands," the 18th August, 1846. Whereas the law respecting the forfeiture of chattels which have moved to or caused the death of man, and respecting deodands, is unreasonable and inconvenient: be it enacted,

It was never introduced into this country, except in a very informal manner, and no such title as Deodand is to be found in the *United States Digests*.

The introduction of Lord Campbell's Bill, together with some recent cases has caused the learning of this branch of the law to be much investigated. However important such investigations may have been in *England*, they are here rather matters of curious antiquarian law, than of any daily practical utility. An edition of *Hale's Pleas of the Crown* would nevertheless be incomplete without a discussion of the subject, and hence, this note has been prepared.

"The principles upon which they (the doctrines of deodands) were established," observes the present Lord-Chief Justice of the Queen's Bench, in delivering a recent and important judgment, (*Reg. v. Polwart*, 1 Q. B. 824.) "are so entirely matter of conjecture, that we do not feel called upon or justified at the present day to extend their application, but rather to limit them strictly to the cases in which we find them established by practice and recognised by law."

It will be convenient to notice here the distinction which exists between the forfeiture of a weapon or other instrument with which a felony has been committed, and the value of which is for the purpose of such forfeiture always found by the jury, and that particular species of forfeiture which is designated as a deodand. To these two kinds of forfeiture the name of deodand is by some authors, and amongst others by Sir William Blackstone (vol. 1. p. 302.) indifferently applied, but according to the weight of authority, it is strictly applicable in those cases only where death has been caused *accidentally*, and without the intervention of human means. *Foster's Crown L.* 266. Indeed it is quite clear from the older cases, and has recently been expressly decided by the Court of Queen's Bench that the coroner's jury has no power to lay a deodand if the verdict returned be one of murder or manslaughter. In *Reg. v. Polwart*, 1 Q. B. 818. to which we here allude, the coroner's jury returned a verdict of manslaughter against one *Joseph Polwart*, for occasioning the death of one *Robert Mason*, by his improper and negligent navigation of a steamboat; and the inquisition further found that "the said steamboat was moving to the death of the said *Robert Mason*, and is of the value of £800, and the property of and in the possession of *J. W. D.*" The late Sir William Follett in support of the rule for quashing the inquisition, contended that, a deodand could not be given in a case of felony, and that consequently so much of the inquisition as related to the deodand ought to be quashed, as was done in *Ex Parte Carruthers*, 2 Man. & Ry. 397. A deodand, observed the learned counsel, is only where death happens by misadventure. The instrument of death may indeed be forfeited to the king in cases of felony, but that is not an instance of deodand properly speaking; and he cited *Staund. Pleas del Cor. Lib. I. c. 12. fol. 20. a.* 3 *Inst. c. 9. p. 57.* *Foxley's case*, 3 Rep. 109, 110. *Fost. Cr. Law*, 265. *Rex v. Rope*, 2 *Barnardiston*, R. 82. 111. *Com. Dig. Waife, E. I.* which certainly fully support this view of the question. Judgment was accordingly given that so much of the inquisition, as related to the deodand therein mentioned should be quashed. "All the authorities in our law books, said the lord Ch. Justice, treat deodands as being due where the death is by misadventure; and no one instance has been adduced or can be found, where a deodand has been laid, where a verdict of murder or manslaughter has been found." The same learned judge, amongst other authorities referred to the following passage from lord Coke, (3 *Inst. c. 9. p. 57.*) cited by Sir William in his argument p. 820, which is apposite for our present purpose; "deodands" he describes as being laid when "any moveable thing inanimate, or beast animate, do move to or cause the untimely death of any reasonable creature by mischance in any county of the realm, (and not upon the sea or upon any salt water,) without the will, offence or fault of himself or of any person." The rule of law as finally established in this case in 1 Q. B. 818, will be found very material in guiding us to a correct conclusion as to the utility of the power at present possessed by a coroner's jury of imposing deodands. This power, it will be observed, ceases to exist whenever the degree of negligence which has occasioned death comes within the definition of legal guilt; and in order to place this matter in the clear-

etc. that from and after the first of September, 1846, there shall be no forfeiture of any chattel for or in respect of the same having moved to or caused the death of man; and no coroner's jury sworn to inquire, upon the sight of any dead body, how the deceased came by his death, shall find any forfeiture of any chattel which may have moved to or caused the death of the deceased, or any deodand whatsoever, and it shall not be necessary in any indictment or inquisition for homicide, to allege the value of the instrument which caused the death of the deceased, or to allege that the same was of no value. 10 *Lond. Jur. p.*

est point of view, we shall divide cases of violent death into three classes: 1st. where the death is purely accidental, in which case only a nominal deodand or none at all ought of course to be imposed; 2d. where death has resulted from negligence and misconduct, not amounting in contemplation of law to manslaughter, in which class of cases the power of awarding deodands may undoubtedly be used for the purpose of punishing the guilty party; and 3d. where death has resulted from manslaughter where, as we have just seen, no deodand can be laid. 5 *Lond. Law. Mag.* 191-193. The same learned writer in the 5th vol. of the *Lond. Law. Mag.* investigates the origin and history of deodands; (see p. 194-198.) and gives abstracts of both lord Campbell's and lord Lyttleton's Bills, (see p. 199-203.) See *Hansard's Parl. Deb.* vol. 78. p. 947. *Id.* vol. 79. p. 1053, for discussions upon the respective bills before referred to.

A few modern cases in which the law of deodands is investigated have been adjudicated and are here cited. *Reg. v. Brownlow*, 11 *Ad. & El. R.* 119. *Reg. v. The Grand Junction Railway*, *Id.* 128, and note. (s) *Reg. v. Polwart*, 1 *Q. B.* 818. *Reg. v. The Great Western Railway Company*, 3 *Id.* 341. *Ex parte Caruthers*, 2 *Man. & Ry. Rep.* 397. *Attorney Gen'l v. The Eastern Counties Railway Company*, 3 *Railw. Cas.* 145.

CHAPTER XXXIII.

OF HOMICIDE, AND ITS SEVERAL KINDS, AND FIRST OF THOSE CONSIDERATIONS THAT ARE APPLICABLE, AS WELL TO MURDER AS MANSLAUGHTER.

HAVING dispatched the business of *suicidium* or self-murder, and *per infortunium simplex*, I come now to consider of homicide, as it relates to others.

And this is of three kinds: Purely voluntary, *viz.* murder and manslaughter. Purely involuntary, as that other kind of homicide *per infortunium*. 3. Mixt, partly voluntary, and partly involuntary, or in a kind necessary, and this again of two kinds, *viz.* inducing a forfeiture, as *se defendendo*, or not inducing a forfeiture, as, 1. In defense of a man's house. 2. Defense of his person against [425] an assault *in viâ regiâ*. 3. In advancement or execution of justice, and according to this distribution I shall proceed.

I shall begin with those matters considerable, which are applicable as well to homicide, as to murder.

Murder is a killing of a man *ex malitiâ præcogitatâ*; [2] *homicide* is killing a man without forethought malice. [1]

[1] It will be perceived that the word homicide is here used not in the present general sense of killing, but as the term manslaughter is now used.

[2] *Coke's* definition of murder, (3 *Inst.* 47,) as modified by *Blackstone*, is so accurate, comprehensive and elegant that it has been universally recognized wherever *English* law prevails. "Murder (says *Blackstone*, 4 *Comm.* 198) is when a person of sound memory and discretion unlawfully killeth any reasonable creature in being and under the king's peace, with malice aforethought, either express or implied."

This is substantially the definition of this crime as known for several hundred years in *England*, and as now understood in the *United States*. *Wilkins's Laws of the Anglo-Saxons*, 480; *Glan. L.* 14, c. 3; *Horne's Mirror*, 46; *Dalt. c.* 145; *St.* 52, *H.* 3; 25; *Bracton*, *L.* 3, c. 4, s. 1; *Britt. c.* 6, s. 1; *Fleta*, *L.* 1, c. 30; *Kelham's Norman Dict.* "Murder;" *Cowell's Dict.* "Murder;" *Blount's Law Dict.* "Murder;" *Staund. b.* 1, c. 10; 1 *Hawk. c.* 31, s. 3; *Vin. Abr.* "Murder," s. 1; 2 *McNally*, 553; *Foster*, 256; 1 *East*, *P. C.* 215;

It is a mistake in those, that think, that before the statute of *Marlebridge, cap. 26.* all killing of a man, tho *per infortunium* or *se defendendo*, was murder, for the statute saith, that *murdrum de cætero non adjudicetur coram justiciariis, ubi infortunium tantummodo adjudicatur, sed locum habet murdrum de intersectis per feloniam tantum, & non aliter*, and therefore they thought that before this statute a man should be hanged for killing another in his own defense. 21 E. 3. 17. b.(a)

But the truth is, *murdrum* in this case was but an amercement, that was antiently imposed upon a township, where the death of a man happened; (b) and this appears by many hundred old charters of the kings of *England*, especially to bishops and monasteries, whereby it was granted, that they and their possessions should be quit *de murdro & latrocinio* among divers other immunities, whereby we must not think that they had power granted them to commit murder or theft, but they were thereby acquitted of those common amercements, usually in those antient times imposed in *eyre* upon villis for murder and theft committed there.

To make up the crime of homicide or murder there must be these three concurring circumstances.

I. The party must be killed, antiently indeed a barbarous assault with an intent to murder, so that the party was left for dead, but yet recovered again, was adjudged murder and petit treason, 15 E. 2. Coron. 383. but that holds not now, for the stroke [426] without the death of the party stricken, nor the death without the stroke or other violence makes not the homicide or murder, for the death consummates the crime.

It remains therefore to be considered, to what intents the offense of murder or manslaughter relates to the stroke or other cause of the death, and to what purposes it relates to the death only.

(a) See also 2 Co. Instit. p. 148, who is of that opinion.

(b) This is so plain, that it is matter of surprize, that any should mistake it; the word *murdrum* usually signifying a *secret* killing of another, so that the murderer was not known, for if the murderer was known, it was not, in this sense murder; as if the murderer was taken, & *judicium sustinuerit, nullum erit murdrum, quia convincitur felonia*, or if the murdered person lived for some time after his wounds, it was no murder because he might discover the murderers, the meaning of which is not, that the offender would not in those cases be liable to be indicted and punished for murder, but that the vill or township would not in such cases be liable to any amercement. Bract. Lib. III. de corona, cap. 15. p. 135. a. Wilk. Leg. Anglo-Sax. p. 280. vide supra p. 39. in notis, vide postea cap. 35. See also Kelynge, 121.

Bac. Abr. "Murder," A.; Jacob's Law Dict., "Murder;" 2 Ld. Raym. 1487; Kelynge, 121-127; 3 Chitty, 723; 3 Starkie, 513; 1 Russell, 421; Archbold, 818; 2 Deacon, 396; Roscoe, 562; Davis, Cr. L. 92; C. J. Parsons's def. (Selfridge's Tr. 3.) Brockenborough, J. in 6 Randolph's Va. R. 723; 6 Mass. R. 139; 7 Dane, Abr. c. 212; State v. Zeller, 2 Halsted's R. N. Jersey, 242; Comm. v. Drew, 4 Mass. 391; The People v. Enoch, 13 Wend. 159; Respublica v. Mulatto Bob. 4 Dallas, 149; Commonwealth v. Horman, 4 Barr.; Commonwealth v. Mosler, 4 Barr.; U. S. v. McGill, 1 Wash. C. C. R. 463.

Some of the authorities above quoted are from "A Report of the Penal Code of Massachusetts, prepared under a resolution of the Legislature," Boston, 1844. To the authors of this very able and comprehensive work, Messrs. JAMES C. ALVORD, LUTHER S. CUSHING, WILLARD PHILLIPS, and SAMUEL B. WALCOTT, the editors, are largely indebted for the notes to this and some of the immediately succeeding chapters.

If a man gives another a mortal stroke, and he lives a month, two or three, or more, and die within the year and day, the title of the lord by eschete to avoid mesne incumbrances relates to the stroke given, and not only to the death. *Plowd. Com.* 263. *Dame Hale's case*. [3]

If a man give another a mortal stroke, and he dies thereof within a year and a day, but mesne between the stroke and the death there comes a general pardon, whereby all misdemeanors are pardoned, this doth pardon the felony consequentially, because the act, that is the offense, is pardoned, tho it be not a felony till the party die. *Ibid.* 401. *Cole's case*.

If a mortal stroke be given on the high sea, and the party comes to land in *England* and die, the admiral shall not have jurisdiction in this case to try the felon, because the death that consummated the felony, happened upon the land, nor the common law shall not try him, because the stroke, that made the offense, was not *infra corpus comitatus*, 5 *Co. Rep.* 106. b. *Sir Henry Constable's case*, 2 *Co. Rep.* 93. a. *Bingham's case*, *Co. P. C.* p. 48. and *Lacie's case*, 25 *Eliz.* cited there to that purpose; *de quo alibi*; see 9. *Geo.* IV. c. 31, s. 7, &c.

At common law, if a man had been stricken in one county and died in another, it was doubtful whether he were indictable or triable in either, but the more common opinion was, that he might be indicted where the stroke was given, for the death is but a consequent, and might be found tho in another county, 9 *E.* 4. 48. 7 *H.* 7. 8. and if the party died in another county, the body was removed into the county, where the stroke was given, for the coroner to take an inquest. *super visum corporis*, 6 *H.* 7. 10. but now by the statute of 2 & 3 *E.* 6. cap. 24. the justices or coroners [427] of the county, where the party died, shall inquire and proceed, as if the stroke had been in the same county, where the party died.

On the other side, as to some respects, the law regards the death as the consummation of the crime, and not merely the stroke.

If a party be kild in one county, the coroner *super visum corporis* might at common law inquire of all accessaries or procurers before the fact, tho the procurement were in another county, 20 *H.* 7. *Kelw.* 67. b. *per omnes justiciarios Angliæ*; but now by the statute of 2 & 3 *E.* 6. cap. 24. the indictment and trial of the accessaries shall be in the county, where they were accessory, *viz.* procuring, abetting or receiving.

If a party be mortally wounded, and the offender taken and in the custody of the constable, and he suffers him to escape before the

[3] The death must ensue within a year and a day after the stroke received or cause of death administered, in the computation of which the whole day upon which the hurt was done shall be reckoned the first. 3 *Inst.* 153; 1 *Hawk.* c. 31, s. 9; 1 *East. P. C.* 343-344; 1 *Russell*, 428; 4 *Bl. Com.* 197; 3 *Chitty*, 726. See *Nicholas' case*, *Foster*, 64, where it is doubted whether *Cole's case* warrants the rule in the latitude here laid down.

wounded person die, it is not felony in the constable, tho he die after within the year. 11 *H.* 4. 12. *Plow. Com.* 401. *Cole's case.*

If a stroke be given the 1st of *January*, and the party die the 1st of *March* following, the year and day to bring an appeal is to be accounted from the death, and not from the stroke, contrary to the opinion of *Stamford P. C.* 63. *a. quod vide Co. P. C. p. 53. & sur statute de Glouc. cap. 9. (c) 4 Co. Rep. 42. b. Haydon's case, Statut. 3 H. 7. cap. 1.*

If *A.* give a mortal stroke the 1st of *January*, and the party lives till the 1st of *February*, and then dies of the stroke, the conclusion of the indictment is best, *Et sic præfatus A. &c. modo & formâ prædictâ interfecit & murtheravit*, because it applies to the whole case. 2. But if it be, *Et sic præfatus A. prædicto 1 Januarii ipsam, &c. interfecit & murtheravit*, it is naught, because it is no murder till the party dies, 4 *Co. Rep.* 42. *Haydon's case, vide ibidem Katharine Hume's case.* 3. But if it conclude, *Et sic præfatus A. ipsum, &c. prædicto 1 Februarii interfecit & murtheravit*, it is good, because then the murder is complete, 4 *Co. Rep.* 47. *a. Wigge's case*, tho in such a case of a stroke at one day or one place, and a death at another day or place, the best conclusion, and that which [428] is in common use at this day is, *Et sic prædictus A. ipsum, &c. modo & forma prædictis interfecit & murtheravit.*

And thus far touching the relation to the stroke or death.

Now what shall be said a killing and death within the year and day.

If a man give another a stroke, which it may be, is not in itself so mortal, but that with good care he might be cured, yet if he die of this wound within the year and day, it is homicide or murder, as the case is, and so it hath been always ruled. 3 *Inst.* 47.

But if the wound or hurt be not mortal, but with ill applications by the party, or those about him, of unwholesome salves or medicines the party dies; if it can clearly appear, that this medicine, and not the wound, was the cause of his death, it seems it is not homicide, but then that must appear clearly and certainly to be so.

But if a man receives a wound, which is not in itself mortal, but either for want of helpful applications, or neglect thereof, it turns to a gangrene, or a fever, and that gangrene or fever be the immediate cause of his death, yet, this is murder or manslaughter in him that gave the stroke or wound, for that wound, tho it were not the immediate cause of his death, yet, if it were the mediate cause thereof, and the fever or gangrene was the immediate cause of his death, yet the wound was the cause of the gangrene or fever, and so consequently is *causa causati*.

If a man be sick of some such disease, which possibly by course of nature would end his life in half a year, and another gives him a wound or hurt, which hastens his end by irritating and provoking the disease to operate more violently or speedily, this hastening of his death

sooner than it would have been, is homicide or murder, as the case happens, in him, that gives the wound or hurt, for he doth not die simply *ex visitatione Dei*, but the hurt that he receives hastens it, and an offender of such a nature shall not apportion his own wrong, and thus I have often heard that learned and wise judge Justice Rolle frequently direct.[4]

If a man either by working upon the fancy of another, or [429] possibly by harsh or unkind usage puts another into such passion of grief or fear, that the party either dies suddenly, or contracts some disease, whereof he dies, tho, as the circumstances of the case may be, this may be murder or manslaughter in the sight of God, yet *in foro humano* it cannot come under the judgment of felony, because no external act of violence was offered, whereof the common law can take notice, and secret things belong to God; and hence it was, that before the statute of 1 Jac. cap. 12. witchcraft or fascination was not felony, because it wanted a trial, tho some constitutions of the civil law make it penal.[5]

If a physician gives a person a potion without any intent of doing him any bodily hurt, but with an intent to cure or prevent a disease, and contrary to the expectation of the physician it kills him, this is no homicide, and the like of a chirurgion, 3 E. 3. Coron. 163. And

[4] *Martin's case*, 5 C. & P. 128. 1 Russell, 429. Archbold, 319. Roscoe, 544-6. 575, 576. *Johnson's case before Halleck, B. Nisi Prius, York Assizes, 1827.* (*Lewin's Crown Cases*, 164.) seems to conflict with the text. The prisoner was indicted for killing the deceased while in a state of intoxication by a blow, which the physician testified might not have produced death if the party had been sober. Halleck, B. directed an acquittal, observing that "where the death was occasioned partly by a blow and partly by a predisposing cause, it was impossible to apportion the operation of the several causes, so as to be able to say with certainty that the death was immediately occasioned by any one of them in particular." It seems that the doctrine thus laid down and applied to the case then on trial, cannot be the law. It is entirely at variance with the principle established by previous authorities, and stated in the text; for it would be as applicable to any other predisposing cause, the infirmity of age and sickness, for instance, as that of intoxication. Roscoe questions the correctness of the decision. See also, 1 Hawk. c. 31. s. 10. 1 East, P. C. 344. 3 Chitty, 726. 1 Russell, 428. Archbold, 319, *Commonwealth v. Green*, 1 Ashmead, 289.

[5] The distinction between destroying life by mechanical means or bodily injury, and by operating upon the fears or passions, appears not to be derived from any difference in the criminal nature of the acts, for the latter in many cases may show the deeper design and darker malignity, but from the difficulty in the latter, of the proof connecting the act with the result, and the dangerous latitude of the opposite principle. 1 East, P. C. 226. 3 Chitty, 726. 1 Russell, 425. 2 Starkie's Ev. 514. Roscoe, 570. 2 P. & F. Med. Juris. 110, n. (a.) *Report on the Penal Code of Massachusetts*. 4 Bl. Com. 197. Chitty's note and cases there cited.

If, however, a person being attacked should from an apprehension of immediate violence, an apprehension which must be well grounded and justified by the circumstances, throw himself for escape into the river, and be drowned, the person attacking him is guilty of murder. *Reg v. Pitts*, 1 Car. & Mars. 284.

Or if words or signs are used to induce an act resulting in death, it is a killing by the person inducing the act; as if a blind man be directed to a precipice, or a deadly drug be recommended, and death ensue in consequence, it is a killing. *Davis' Cr. L.* 94. *Liv. P. C.* 437. *Evans' case*, O. B. Sep. 1812. *M. S. Bayley, J.* in 1 Russell, 425. *Freeman's Case*, 4 Mason, 505. So also if one counsels or assists another to commit suicide. *Vane's Case*, 4 Rep. 44 b. 1 Russell, 424-29. 4 Bl. Com. 188. 3 Chitty, 726. *Dyson's Case*, R. & R. 523. *Bowens' Case*, 13 Mass. 356. *Mass. Com. Rep.* p. 12.

I hold their opinion to be erroneous, that think, if he be no licensed chirurgeon or physician, that occasioneth this mischance, that then it is felony, for physic and salves were before licensed physicians and chirurgeons; and therefore if they be not licensed according to the statute of 3 *H. 8. cap. 11.* or 14 *H. 8. cap. 5.* they are subject to the penalties in the statutes; but God forbid that any mischance of this kind should make any person not licensed guilty of murder or manslaughter.

These opinions therefore may serve to caution ignorant people not to be too busy in this kind with tampering with physic, but are no safe rule for a judge or jury to go by: we see the statute of 34 & 35 *H. 8. cap. 8.* dispenseth with the penalty of those former statutes, as to outward applications and medicines for agues, stone, or strangury, which may be administered by any person, and the preamble of the statute tells us, that if none but licensed chirurgeons should be used in many cases, many of the king's subjects were like to perish for want of help.[6]

[6] Later authorities agree with *Hale* in these points. If a person, whether he be a regular practitioner or not, honestly and *bona fide* perform an operation which causes the patient's death, he is not guilty of manslaughter. *Rex v. Van Butchell*, 3 C. & P. 629. But if he be guilty of criminal misconduct, arising from gross ignorance or criminal inattention, then he will be guilty of manslaughter. *Rex v. Williamson*, 3 C. & P. 635. *Rex v. Spiller*, 5 C. & P. 333.

When the defendant, not a regular physician, killed a woman by an application, and the jury found he entertained a criminal disregard of human life, he was convicted of and punished for manslaughter. *Rex v. Long*, 4. C. & P. 423. *Rex v. Senior*, R. & M. C. C. 346. In *Rex v. Webb*, 1 M. & Rob. 410. Lord *Lyndhurst* laid down the following rule:—"In these cases there is no difference between a licensed physician or surgeon and a person acting as physician or surgeon, without license. In either case, if a party having a competent degree of skill and knowledge makes an accidental mistake in his treatment of a patient, through which mistake death ensues, he is not thereby guilty of manslaughter; but if, where proper medical assistance can be had, a person totally ignorant of the science of medicine, takes on himself to administer a violent and dangerous remedy to one labouring under disease, and death ensues in consequence of that dangerous remedy having been so administered, then he is guilty of manslaughter. If I entertained the least doubt of this position, I might fortify it by referring to the opinion of Lord *Ellenborough* in *R. v. Williamson*. I shall leave it to the jury to say—first, whether death was occasioned or accelerated by the medicines administered; and if they think it was, then I shall tell them, secondly, that the prisoner is guilty of manslaughter, if they think that in so administering the medicine he acted with a criminal intention or from very gross negligence." In the case of *R. v. Nancy Simpson*, (reported in *Willcock* on the Law relating to the Medical Profession, Append. 227,) the prisoner was indicted for manslaughter. It appeared that the deceased, a sailor, had been discharged from the Liverpool Infirmary as cured after undergoing salivation, and that he was recommended by another patient to go to the prisoner for an emetic, to get the mercury out of his bones. The prisoner was an old woman, who resided at Liverpool, and occasionally dealt in medicines; she gave him a solution of white vitriol, or corrosive sublimate, one dose of which caused his death; and she said she had received the mixture from a person who came from Ireland, and had gone back again. And in that case Mr. Justice *Bayley* said, "I take it to be quite clear that if a person, not of medical education, in case where professional aid might be obtained, undertakes to administer medicine which may have a dangerous effect, and thereby occasions death, such person is guilty of manslaughter. He may have no evil intention, and may have a good one, but he has no right to hazard the consequences in a case where assistance may be obtained. If he does so, it is at his peril. It is immaterial whether the person administering the medicine prepares it or gets it from another." The prisoner was convicted. If a chemist's apprentice be guilty of negligence in delivering medicine, and death ensue in consequence, he is guilty of

But if a woman be with child, and any gives her a potion to destroy the child within her, and she takes it; and it works so strongly, that it kills her, this is murder, for it was not given to cure [430] her of a disease, but unlawfully to destroy her child within her, and therefore he that gives a potion to this end, must take the hazard, and if it kill the mother, it is murder, and so ruled before me at the assizes at *Bury* in the year 1670.[7]

And certainly if that opinion should obtain, that if one not licensed a physician should be guilty of felony, if his patient miscarry, we should have many of the poorer sort of people, especially remote from *London*, die for want of help, lest their intended helpers might miscarry.

This doctrine, therefore, that if any die under the hand of an unlicensed physician, it is felony, is apocryphal, and fitted, I fear, to gratify and flatter doctors and licentiates in physic, tho it may, as I said, have its use to make people cautious and wary, how they take upon them too much in this dangerous employment.

If a man have a beast, as a bull, cow, horse or dog, used to hurt people, if the owner know not his quality, he is not punishable, but if the owner be acquainted with his quality, and keep him not up from doing hurt, and the beast kill a man, by the antient *Jewish* law(*) the owner was to die for it, *Exod. xxi. 29.* and with this seems to agree the book of 3 *E. 3. Coron. 311. Stamf. P. C. 17. a.* wherein these things seem to be agreeable to law.

1. If the owner have notice of the quality of his beast, and it doth any body hurt, he is chargeable with an action for it.

2. Tho he have no particular notice, that he did any such thing before, yet if it be a beast, that is *feræ naturæ*, as a lion, a bear, a wolf, yea an ape or monkey, if he get loose and do harm to any person, the owner is liable to an action for the damage, and so I knew it adjudged in *Andrew Baker's* case, whose child was bit by a monkey, that broke his chain and got loose. See *May v. Burdette*, 10 *Lond. Jur.*

3. And therefore in case of such a wild beast, or in case of a bull or cow, that doth damage, where the owner knows of it, he must at

(*) *Vide supra*, p. 3. in notis.

manslaughter. (*Tessymond's Case*, 1 *Lew. 169.*) See *Regina v. Spilling*, 2 *M. & Rob. 107.* *Rex v. Simpson*, 1 *Lewin. C. C. 172.* *Rex v. Ferguson*, 1 *Lewin. C. C. 181.* *Comm. v. Chauncey*, 2 *Ashmead*, 227.

In *Massachusetts*, if one assuming to be a physician, however ignorant of the medical art, administers to his patient remedies which result in his death, he is not guilty of manslaughter, unless he has so much knowledge or probable information of the fatal tendency of his prescriptions, as to raise a presumption of obstinate, wilful rashness. *Comm. v. Thompson*, 6 *Mass. 134.* When however, such person has opportunity to know of the injurious effects of his remedies, and then administers them, it would be competent for the jury to find him guilty of manslaughter, even though he might not have intended any bodily harm to his patient. *Ibid.*

[7] If a woman take poison with intent to procure a miscarriage and dies of it, she is guilty of self-murder, whether she was quick with child or not: and a person who furnished her with the poison for that purpose, will if absent, be an accessory before the fact. *Rex v. Russell*, 1 *M. C. C. R. 356.*

his peril keep him up safe from doing hurt, for tho he use his diligence to keep him up, if he escape and do harm, the owner is liable to answer damages.

4. But as to the point of felony, if the owner have notice of the quality of the ox, &c. and use all due diligence to [431] keep him up, yet the ox breaks loose and kills a man, this is no felony in the owner, but the ox is a deodand.

5. But if he did not use that due diligence, but thro negligence the beast goes abroad after warning or notice of his condition, and kills a man, I think it is manslaughter in the owner.

6. But if he did purposely let him loose, or wander abroad with design to do mischief, nay tho it were with design only to fright people and make sport, and it kill a man, it is murder in the owner, and I have heard, that long since at the assizes held at *St. Albans* for *Hertfordshire* it was so ruled, and the owner hanged for it, but this is but an hearsay. [8]

If a man lay poison to kill rats, and a man casually take it, whereby he is poisoned, this is no felony, but if a man lay poison to the intent that *B.* should take it, to be poisoned therewith, and *C.* by mistake take it, and is poisoned to death, this is murder, tho it were not intended for him. *Dalt. cap. 93. (d) 9 Co. Rep. 81. b. Agnes Gore's case, Plowd. Com. 474. Sander's case.*

And altho the party take the poison himself by the persuasion of another in the absence of the persuader, yet it is a killing by the persuader, and he is principal in it, tho absent at the taking of it. *4 Co. Rep. 44. b. Vaux's case.*

If *A.* gives poison to *B.* intending to poison him, and *B.* ignorant of it, gives it to *C.* a child, or other near relation of *A.* against whom he never meant harm, and *C.* takes it and dies, this is murder in *A.* and a poisoning by him, *Plowd. Com. 474. a. Dalt. cap 93.* but *B.* because ignorant, is not guilty.

If *A.* gives purging comfits to *B.* to make sport, and not to hurt him, and *B.* dies thereof, it is a killing by *A.* but not murder, but manslaughter. *Dalt. cap. 93. [9]*

There are several ways of killing, 1. By exposing a sick or weak person or infant unto the cold to the intent to destroy him, *2 E. 3. 18. b. whereof he dieth.* 2. By laying an impotent person abroad, so that he may be exposed to and receive mortal harm, as laying an infant in an orchard, and covering it with leaves, [432] whereby a kite strikes it, and kills it. *6 Eliz. Crompt. de Pace*

(d) *New Edit. 1727. cap. 145. p. 471.*

[8] *4 Bl. Com. 197. 3 C. & P. 320. Palm. 554. 1 Russell, 622. Roscoe 571.*

[9] If *A.* give a poisoned apple to *B.* intending to poison her, and *B.* ignorantly give it to a child who eats it and dies, this is murder in *A.* but no offence in *B.* and this though *A.* being present at the time endeavoured to dissuade *B.* from giving it to the child. *2 Plowden Com. 473, edition Dublin, 1792, and authorities there collected. S. P. Crompt. Jus. 23. pl. 24. Lamb. Just. lib. 2. cap. 7. fol. 242: Dalt. Just. cap. 145. s. 8. 3 Inst. 51. 1 Hawk. P. C. 79. 2 Hawk. P. C. 316. Lane, 47. Jenk. 290. 1 Finch, 63. 3 Bacon's Abr. 663. 670.* The notes to the case in *2d Plowden*, at great length, refer to all the ancient law.

24. *Dalt. cap. 93.(e)* 3. By imprisoning a man so strictly that he dies, and therefore where any dies in gaol, the coroner ought to be sent for to inquire the manner of his death. 4. By starving or famine. 5. By wounding or blows. 6. By poisoning. 7. By laying noisome and poisonous filth at a man's door, to the intent by a poisonous air to poison him, Mr. *Dalton, cap. 93.* out of Mr. *Cook's* reading. 8. By strangling or suffocation.[10]

(e) *New Edit. cap. 145. p. 469.*

[10] Killing is causing the extinction of life by means of some bodily injury. *Livingston's Penal Code, 4. 2 Starkie Ev. 513.* It may be effected by violence immediately directed against the person, or constructive and consequent on the act of the accused.

1. By striking. *Thompson's case, Moody, 139. Kelley's case, ibid. 113. White's case, 6 Binney, 181. Mosler's case, 4 Barr.*

2. By stabbing. *Thurston's case, 1 Lev. 91. 1 Keble, 454, 455. Edward's case, 6 C. & P. 401. Rex v. Hayward, 6 C. & P. 157.*

3. By shooting. *Hughes' case, 5 C. & P. 126. Toole's case, 3 Price, 145. Selfridge's case, Boston, 1806. Pamphlet. Daily's case, 4th Penn. Law Journal, 150.*

4. By drowning. *Dyson's case, R. & R. 523. Green's case, 2 St. Trials, 214. Hargrave's edition. Harman's case, 4 Barr.*

5. By suffocation. *Rex v. Tye, 1 Russell, 470. R. & R. C. C. 435. Rex v. Waters, 7 Car. & P. 250. Rex v. Caulkin, 5 Car. & P. 121.*

6. By strangling. *Tye's case, R. & R. 345. Huggins' case, 3 C. & P. 414. Caulkin's case, 5 C. & P. 121. Rex v. Shaw, 6 C. & P. 372.*

7. By crushing. *Hale's Sum. MS., 53.*

8. By bruising. *Hale's Sum. MS., 53.*

9. By poisoning. *Saunders' case, Plowd. 474. Gove's case, 9 Rep. 81. Anon. Kely. 52. Vaux's case, 4 Rep. 44. a. Reg. v. Sandys, 1 Car. & M. 345.*

From the secrecy, malice and deliberation attendant on killing by poison, it has always been esteemed homicide of the highest nature. The laws of most countries affix to it peculiar guilt. The statute 22 Hen. VIII. c. 9. made it high treason, and punished it by boiling to death. The statute 1 Ed. VI. c. 12. repealed this act. In most of the United States, killing by poison is declared by statute to be murder of the first degree. See notes to chap. 36.

10. Giving one excessive quantities of spirits to drink, whereby death is occasioned. *R. v. Packard et al. 1 C. & M. 236.*

11. By starving. *Beale's case, 1 Leon. 327. Squire's case, 1 Russel, 426.*

12. By corrupting the air. 2 *Paris & Fonblanque's Medical Jurisprudence*, question as to whether death can be produced in this way. However this may be as to the external atmosphere, it is undoubtedly true that death may be caused by noxious gases under many circumstances. To confine a person in a close room filled with the fumes of charcoal; to compel or induce the respiration of air deprived of the qualities necessary to support life, or impregnated with noxious qualities, might cause death, and the party would be criminally responsible. In *Paris* many such cases have occurred.

13. By communicating infection. See post, 432.

14. By putting one to death at his request, or advising it. *Rex v. Sawyer, 1 Russ. 424. Rex v. Dyson, R. & R. C. C. 523. Reg. v. Allison, 8 C. & P. 418. Comm. v. Bowen, 13 Mass. 359.*

15. By laying a trap or pitfall. 4 *Bl. Com. 35. 1 Russell, 617.*

16. By letting loose a dangerous animal. *Palmer, 545. 4 Bl. Com. 197. 1 Russell, 622. Roscoe, 571. ante, p. 430.*

17. Compelling one to do an act likely to cause, and which does cause death. 1 *Russell, 425-6. Archbold, 319. Roscoe, 571. Rex v. Evans, 1 Russ. 426.*

18. The like, the compulsion being by threats only. *Evans Case, O. B. Sep. 1812. M. S. Bayley, J. 1 Russell, 425.*

19. Death in obedience to the command of one having authority. In *Freeman's case, 4 Mason, 505*, the prisoner, being the master of a ship, compelled a sailor in a state of great exhaustion and debility, known to the master, to go aloft, and the seaman fell from the mast and was drowned. The prisoner was convicted of manslaughter.

20. By pretended medical treatment. *Com. v. Thompson, 6 Mass. 134. Com. v.*

Moriendi mille figuræ.

A man infected with the plague, having a plague-sore running upon him, goes abroad, this is made felony by the statute of 1 *Jac. cap. 31*, but is now discontinued; (*f*) but what if such person goes

(*f*) It was made at first to continue no longer, than until the end of the first session of the next parliament.

Charney, 2 *Ashmead*, 227. *Rex v. Van Butchell*, 3 *C. & P.* 629. *Rex v. Williamson*, 3 *C. & P.* 635. *Rex v. Spiller*, 5 *C. & P.* 333. *Rex v. Long*, 4 *C. & P.* 423. *Rex v. Senior*, *R. & M. C. C.* 346. *Rex v. Webb*, 4 *M. & Rob.* 410. *Regina v. Spilling*, 2 *M. & Rob.* 207. *Rex v. Simpson*, 1 *Lewin, C. C.* 172. *Rex v. Ferguson*, 1 *Lewin, C. C.* 181.

21. By attempt to procure abortion or destroy an unborn child. See *ante*, note 7, p. 430. *Rex v. Russell*, 1 *M. C. C. R.* 356.

22. By exposure or neglect of, or cruelty towards one incapable of self-protection. When a parent, guardian, master or other person, having the custody of a child, apprentice or servant of tender years, or of a sick man, insane man or idiot or other person, exposes him to a situation of manifest danger to life, or is guilty of gross neglect or cruelty towards him, and death ensue in consequence, it is a killing by such parent, guardian, master or person having custody. 3 *Inst.* 53. 1 *Russell*, 426. *Archbold*, 319.

The following cases illustrate this division of the modes of killing. When a parent places a helpless infant in a hog-stye, where it is devoured, 1 *East, P. C.* 225. or exposes it on a rock at sea, from which it is washed away, *Helen Wilson's case*, 1 *Hume*, 279. or leaves it in a remote field, where it is destroyed by wild beasts or trodden upon by cattle, 1 *Hawk. c. 31, s. 5.* or exposes it where it may perish with cold or famine or want of care, *Beale's case*, 1 *Leon.* 327. *Margaret Smith's case*, 1 *Hume*, 279. or a parent, master or guardian refuses to furnish a child or apprentice of tender years or infirm health, to whom he owes support, with sufficient or proper sustenance, or lodging or clothing, *Squire's case*, 1 *Russell*, 426, note. *Self's case*, 1 *Leach*, 137. *Gould's case*, *Salkeld*, 381. *Ridley's case*, 2 *Camp.* 650. *Elizabeth Key's case*, 1 *Hume*, 279. or when municipal officers, to avoid a charge, shift a child from town to town, without sufficient food, or clothing, or other care, *Palmer*, 545. *Holloway's case*, 1 *Russell*, 425. or one carries his sick father, against his will, abroad in an inclement season, 1 *Hawk. c. 31, s. 5.* or where a jailor confines a prisoner in the same cell with an outrageous madman unbound, or with a person dying with a malignant or contagious disease; or thrusts him into a loathsome and pestilential dungeon, knowing the danger, and death follows in consequence, it is killing by the jailor; or if one procures an idiot or lunatic to kill another, it is a killing by the person so procuring the idiot or lunatic to do the homicide. In all these cases, or others of like nature, if the duty violated be plain and the danger apparent, and death ensue in consequence of the act or neglect, it is a criminal killing. *Mass. Com. Rep.* 9, 10, 11, refers to *Britt. c. 11, s. 9.* *Stamf.* 36. 3 *Inst.* 52. *Palmer*, 548. 1 *Hawk. c. 31, sec. 10.* (note.) *Foster*, 322. *Huggin's case*, 2 *Ld. Raymond*, 1574. 2 *Strange*, 882. *Castell v. Bambridge*, 2 *Strange*, 856. 1 *East, P. C.* 226-331. 1 *Russell*, 459. *Bacon's Abridgment*, *MURPHY A.* See cases of *Huggins*, *Bambridge*, and *Atkins*, *State Trials*, (*Hargrave*) vol. 17. quarto, 310-452. et seq. (folio) vol. 9. 107. 146. 182. et seq. *Regina v. Walters*, 1 *Car. & M.* 164. *Regina v. Pitts*, 1 *Car. & M.* 284. *Rex v. Squires*, 1 *Russ. C. & M.* 426. *Rex v. Chessman*, 7 *C. & P.* 454. *Regina v. Marryatt*, 8 *C. & P.* 425. *Rex v. Self*, 1 *Leach, C. C.* 137.

The early writers laid down the law to be, that it was a killing to take away the life of another by swearing deliberately, falsely in a capital trial. (*Mirror*, c. 1, s. 9; *Britt. c. 5, s. 2*; *Bract. B. 3, c. 4*, and see 1 *Hawk. c. 31, s. 10*.) But lord *Coke* says, (3 *Inst.* 48,) "It is not holden for murder at this day;" and such seems now to be the weight of authority. The latest case on this point is that of *McDaniel* and others, reported in *Foster*, 132, and 1 *Leach*, 44. The defendants were convicted, but judgment was repited, in order that the question of law might be fully considered. But the attorney general declined to prosecute the case further, and the prisoners were discharged from the indictment. The opinion of Sir *Michael Foster* was against the indictment. Sir *William Blackstone*, however, says, (4 *Com.* 196,) that the attorney general did not press the point on account of prudential reasons, and not from any apprehension that it was not maintainable; and in 1 *East's P. C.* 333, it is added, that lord *Mansfield* had said,

abroad, to the intent to infect another, and another is thereby infected and dies? whether this be not murder by the common law might be a question, but if no such intention evidently appear, tho *de facto* by his conversation another be infected, it is no felony by the common law, tho it be a great misdemeanor, and the reasons are,

1. Because it is hard to discern, whether the infection arise from the party, or from the contagion of the air, it is God's arrow, and

2. Nature prompts every man, in what condition soever, to preserve himself, which cannot be well without mutual conversation.

3. Contagious diseases, as plague, pestilential fevers, small pox, &c. are common among mankind by the visitation of God, and the extension of capital punishments in cases of this nature would multiply severe punishments too far, and give too great latitude and loose to severe punishments.[11]

II. the second consideration, that is common both to murder and manslaughter, is, who shall be said a person, the killing of whom shall be said murder or manslaughter.

If a woman be quick or great with child, if she take, [433] or another give her any potion to make an abortion, or if a man strike her, whereby the child within her is *killed*, it is not murder nor manslaughter by the law of *England*, because it is not yet *in rerum natura*, tho it be a great crime, and by the judicial law of *Moses*(g) was punishable with death, nor can it legally be made known, whether it were killed or not, 22 *E. 3. Coron.* 269. so it is, if after such child were born alive, and baptized, and after die of the stroke given to the mother, this is not homicide. 1 *E. 3.* 23. *b. Coron.* 146.[12]

(g) *Exod.* xxi. 22.

that the opinions of several judges, including himself, were strongly in favour of the indictment. Most of the more recent writers, however, seem to incline to the opinion that a person cannot be indicted for murder in procuring another to be executed by falsely charging him with a crime of which he was innocent. 1 *East*, P. C. 333. See 4 *Bl. Com.* 196-7. *Chitty's note*. 1 *Russell*, 427. 3 *Chitty*, 726. *Archbold*, 319. *Roscoe*, 573, 10 *Am. Jurist*, 261. The Gothic laws punished this offence with death, (4 *Bl. Com.* 196, quotes *Steirnh. de jure Goth.* L. 3, c. 3. See also *D.* 48, 8, 1; and *Pothier's Pandects*, 48, 8, No. 3, by which it would seem that, in the Roman law, the judge also, if he were bribed, and, under the influence of the bribe, improperly condemned a man who suffered death in consequence, was guilty of murder.

[11] *Castell's case*, *Stra.* 856. *Huggin's case*, *Stra.* 882. *Bantridge's case*, 9 *Har. State Trials*, folio 17. quarto 452. 2 *Paris & Fon. Med. Jur.* 115. See ante, p. 432, note.

[12] The person killed must be "a reasonable creature in being, and under the king's peace" at the time of the killing. Therefore to kill an alien, a Jew, or an outlaw, who are all under the king's peace and protection, is as much murder as to kill the most regular born Englishman, except he be an alien enemy in time of war. To kill a child in its mother's womb is now no murder. 4 *Bl. Com.* 197, 198. 3 *Inst.* 50.

Although to kill a child in its mother's womb is no murder, yet if the child be born alive, and die by reason of the potion or bruises it received in the womb, it is murder in the person who administered or gave them. 3 *Inst.* 50. 1 *Hawk. c.* 31. s. 16. so if a mortal wound be given to a child whilst in the act of being born, for instance, upon the head as soon as the head appears, and before the child has breathed, it may be murder, if the child is afterwards born alive and dies thereof. *Rex v. Senior*, 1 *Moody*, C. C. 346.

To justify a conviction on an indictment charging a woman with the wilful murder of

But if a man procure a woman with child to destroy her infant, when born, and the child is born, and the woman in pursuance of that procurement kill the infant, this is murder in the mother, and the procurer is accessory to murder, if absent, and this, whether the child were baptized or not. 7 Co. Rep. 9. *Dyer* 186. [13]

The killing of a man attaint of felony, otherwise than in execution of the sentence by a lawful officer lawfully appointed, is murder

a child of which she was delivered, and which was born alive, the jury must be satisfied, affirmatively, that the whole body was brought alive into the world; and it is not sufficient that the child had breathed in the progress of the birth. *Rex v. Pawlton*, 5 Car. & P. 329.

If a child has breathed, before it is born, this is not sufficiently life to make the killing of the child murder. There must be an independent circulation in the child, or the child cannot be considered as alive, for this purpose. *Rex v. Enoch*, 5 Car. & P. 539.

If a child has been wholly produced from the body of its mother, and she wilfully, and of malice aforethought, strangle it, while it is alive, and has an independent circulation, this is murder, although the child be still attached to its mother by the umbilical cord. *Reg. v. Trillae*, 1 Car. & M. 650.

An unskilful practitioner of midwifery wounded the head of a child, before the child was perfectly born. The child was afterwards born alive, but subsequently died of this injury:—*Held*, manslaughter, although the child was in *ventre sa mère*, at the time when the wound was given. *Rex v. Senior*, 1 M. C. C. R. 344; 1 *Lewin*, C. C. 183. n.

A girl was indicted for the murder of her child, aged sixteen days. She was proceeding from *Bristol* to *Llandogo*, and was seen near *Tintern*, with the child in her arms, at 6 P. M. She arrived at *Llandogo* between 8 and 9 P. M. without the child. The body of a child was afterwards found in the river *Wye*, near *Tintern*, which appeared not to be the child of the prisoner:—*Held*, that the prisoner must be acquitted, and that she could not, by law, either be called upon to account for her child, or to say where it was, unless there was evidence to show that her child was actually dead. *Reg. v. Hopkins*, 8 Car. & P. 591.

A prisoner was charged with the murder of her new born child, by cutting off its head:—*Held*, that in order to justify a conviction for murder, the jury must be satisfied that the entire child was actually born into the world in a living state; and that the fact of its having breathed is not a decisive proof that it was born alive, as it may have breathed, and yet died before birth. *Rex v. Selkie*, 7 Car. & P. 850.

If a child was strangled intentionally, while it was connected with the mother by the umbilical cord, but after it was wholly produced into the world, *quære*, whether this would be murder? *Rex v. Croutchly*, 7 Car. & P. 814.

An indictment charged that the prisoner, being big with child, did bring forth the child alive, and afterwards strangle it:—*Held*, that the jury ought not to convict on this indictment, unless they were satisfied that the child was wholly born when it was strangled. *Ibid.*

The child must be actually wholly in the world in a living state, to be the subject of a charge of murder; but if it is wholly born and is alive, it is not essential that it should have breathed, but the jury must be satisfied that the child was wholly born into the world, at the time it was killed, or they ought not to convict the prisoner of murder. *Rex v. Bratn*, 6 Car. & P. 349.

If a child be killed after it has wholly come forth from the body of the mother, but is still connected with her by means of the umbilical cord, it seems that such killing will be murder. *Reg. v. Reives*, 9 Car. & P. 25.

On a charge of child murder, it appeared that the child must have died before it had an independent circulation:—*Held*, that as the child had never had an independent circulation, the charge of murder could not be sustained. *Reg. v. Wright*, 9 Car. & P. 754. 1 *Russ. on Crimes*, 485, 486, 487.

In this connexion it may be added, that it is a general rule, that no person should be found guilty of murder, unless the body of the deceased is found; but this rule must be taken rather as a caution than as a maxim never to be departed from. 3 *Chit. C. L.* 738.

[13] Where one counsels a woman to kill her child when it shall be born, who afterwards doth kill it in pursuance of such advice, he is an accessory to the murder. 1 *Hawk. c. 31. s. 17.*

or manslaughter, as the case happens, and tho there was some doubt, whether the killing of a person outlawed of felony were homicide or no, 2 *E.* 3. 6. yet it is homicide in both cases. 27 *Assiz.* 41. *Coron.* 203.

If a person be condemned to be hanged, and the sheriff behead him, this is murder, and the wife may have an appeal. 35 *H.* 6. 58.(h)

If a man be attaint in a *præmunire* whereby he is put out of the king's protection, the killing of him was held not homicide, 24 *H.* 8. *B. Coron.* 197. But the statute of 5 *Eliz. cap.* 1(i) hath now put that out of question, declaring it to be unlawful.(k)

If a man kill an alien enemy within this kingdom, yet it is felony, unless it be in the heat of war, and in the actual exercise thereof.[14]

[434] III. The third inquiry is, who shall be said a person killing.

An infant under the age of fourteen, years in presumption of law is supposed without discretion, and therefore *primâ facie* he cannot commit murder or manslaughter, but being indicted thereof, upon not guilty pleaded he ought to be found not guilty.

But if he be above that age, in presumption of law he is of discretion, and may be guilty.

But if he be under the age of fourteen, yet if upon circumstances it can appear, that he hath discretion, he may be convict of felony. 3 *H.* 7. 1. b. 12. a.(l) [15]

(h) See also *Co. P. C.* p. 52. *quære*, in case of treason, (where the sentence is, that the party shall be hanged, but not till he be dead, &c.) if the king remit all, but the hanging, whether it be not murder in the sheriff to hang him till he be dead?

(i) *In fine.*

(k) See *Coron.* 203, where it is declared felony to kill one outlawed for felony.

(l) *Vide supra*, p. 27.

[14] 4 *Bl. Com.* 178. *Bracton*, folio 120. 1 *Hawk. P. C.* 70. *Dalton*, c. 150. *Finch*, L. 31. 3 *Inst.* 52.

[15] Infants under the age of discretion ought not to be punished by any criminal prosecution whatever. 1 *Hawk. P. C.* 2. By the ancient *Saxon* law, the age of twelve years was established for the age of possible discretion, and the age of fourteen as that when he became completely liable as one arrived at years of discretion. 4 *Bl. Com.* 23. The presumption is as stated in the text; a presumption, however, which may be negatived either to involve those under, or to excuse those over that age: for the capacity of doing ill or contracting guilt, (says *Blackstone*, 4 *Com.* 23.) is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment. Under seven years of age, however, an infant cannot be guilty of felony, (*Mirror*, ch. 4. s. 16.) but at eight years he may, (*Dalt.* c. 147.) if it be shown that he had knowledge and understanding, and felonious intent. There are many cases in which infants under the age of fourteen have been capitally convicted. *Foster*, 72. In a comparatively late case in *England*, the ancient doctrines were reaffirmed: it was ruled that if a child more than seven, and under fourteen years of age, is indicted for felony, it will be left to the jury to say whether the prisoner at the time of the offence, had a guilty knowledge that he or she was doing wrong. The presumption of law being that a child of that age has not such guilty knowledge, unless the contrary be proved by the evidence. *Rex v. Owen*, 4 *Car. & P.* 236. A boy of the age of twelve years and five months may be convicted on his own confessions of the crime of murder and executed. The capacity to commit a crime, necessarily supposes the capacity to confess it. *State v. Guild*, 5 *Halst. N. J.* 163. See *ante*, p. 26, note.

If a man be *non compos mentis*, and kill a man, he is to plead not guilty, and shall be acquitted, and is not driven to purchase a pardon, tho antiently it was so used. *Stamford's P. C.* 16. b. & *libros ibi*.

And the same law it is of a lunatic, that kills a man in the time of his lunacy; but if it be in those intervals, when he hath his understanding, then he is a felon, *sed de his supra. p. 31.* [16]

If there be an actual forcing of a man, as if *A.* by force take the arm of *B.* and the weapon in his hand, and therewith stabs *C.* whereof he dies, this is murder in *A.* but *B.* is not guilty. *Dalt. cap. 93. p. 242.* (m) *Plowd. Com. 19. a.*

But if it be only a moral force, as by threatening, duress, or imprisonment, &c. this excuseth not. [17]

A *feme covert* is in law under the coercion of her husband, and therefore, if she commit larceny or burglary together with her husband, the husband is in law guilty, but regularly the wife is not guilty: *Stamf. 26. a. Coron. 160. Dalt. cap. 104. p. 267.* (n) [18]

But if she commit murder, or treason, or manslaughter, it is no

(m) *New Edit. cap. 145. p. 473.*

(n) *New Edit. cap. 157. p. 503.*

[16] Murder or manslaughter cannot be committed by an idiot, lunatic, or infant, unless, indeed, he show a consciousness of doing wrong, and of course a discretion, or discernment between good and evil. 4 *Black. Com.* 195. 1 *Hawk. c. 1.* But if any person procure an idiot, &c. to murder another, the procurer is guilty of murder. 1 *Hawk. c. 31, s. 7.* Or if he aid and abet him knowing that he entertains mischievous designs. *Reg v. Tyler, 8 C. & P. 616.* See *ante, p. 37, note.*

[17] A fear of death, well grounded, may excuse the doing of some acts which, under other circumstances, would be criminal; as joining rebels, or continuing with them; but an apprehension, however strong and well founded, of having property wasted or destroyed, or of suffering any other mischief not endangering the person, will afford no excuse. *Rex v. Gordon, 1 East, P. C. 71. Rex v. McGrowther, 1 East, P. C. 71.*

A., who was insane, collected a number of persons together, who armed themselves, having a common purpose of resisting the lawfully constituted authorities: *A.*, having declared that he would cut down any constable who came against him. *A.*, in the presence of *C.* and *D.*, two of the persons of his party, afterwards shot an assistant of a constable, who came to apprehend *A.* under a warrant: Lord *Denman* held, that *C.* and *D.* were guilty of murder, as principals in the first degree, and that any apprehension that *C.* and *D.* had of personal danger to themselves from *A.*, was no ground of defence for continuing with him after he had so declared his purpose; that it was no ground of defence that *A.* and his party had no distinct or particular object in view when they assembled together and armed themselves; and that the apprehension of personal danger does not furnish any excuse for assisting in doing any act which is illegal. *Reg v. Tyler, 8 Car. & P. 616.*

[18] Although a wife cannot commit larceny in the company of her husband, for it is deemed his coercion and not her voluntary act, yet, if she do it in his absence, and by his mere command, she is then punishable as if she were sole; and the husband, it is said, may be accessory to the wife. *Anon. 2 East, P. C. 559.* When a felony is committed by the wife in the presence of the husband, it is a presumption only and not a conclusion of law, that it is done under his coercion. *Rex v. Hughes, 2 Lewin, C. C. 229.* See *Conolly's case, 2 Lewin, C. C. 229. Rex v. Morris, R. & R. C. C. 270. 1 Russell, 18. Rex v. Dix, 1 Russell, 16. Rex v. Archer, R. & M. C. C. 143. Rex v. Morris, 2 Leach, C. C. 1096. Rex v. Atkinson, 1 Russell, 20. Rex v. Hassall, 2 Car. & P. 434. Reg v. Woodward, 8 Car. & P. 561. Rex v. Knight, 1 Car. & P. 116. Rex v. Price, 8 Car. & P. 19. Reg v. Cruse, 8 Car. & P. 541. 2 M. C. C. R. 53. 4 Bl. Com. 28. See ante, p. 45, note.*

plea to say she did it by coercion of her husband, but she is guilty, tho committed with her husband. *Dalt. Ibid.*[19]

[435]

CHAPTER XXXIV.

CONCERNING COMMANDING, COUNSELLING, OR ABETTING OF MURDER OR MANSLAUGHTER.

ALTHO this title may seem more proper under the title of *principal* and *accessaries*, yet because it relates to the inquiry, who shall be said a murderer or manslayer, and is common in some respects to both crimes, I shall take up the consideration thereof here.

He that counsels, commands, or directs the killing of any person, if he be absent, is an accessory to murder before the fact.

In case of poisoning, he that counsels another to give poison, if that other doth it, the counsellor, if absent, is but accessory *before Coke P. C. p. 49. Sir Thomas Overbury's case.*(a)

But he that actually gives or lays the poison to the intent to poison, tho he be absent, when it is taken by the party, yet he is principal, and this was *Weston's case*,(b) *Co. P. C. p. 49.* in *Sir Thomas Overbury's case*, and 4 *Co. Rep. 44. b. Vaux's case.*

In case of murder, he that counselled or commanded before the fact, if he be absent at the time of the fact committed, is accessory before the fact, and tho he be in justice equally guilty with him that commits it, yet in law he is but accessory before the fact, and not principal.

If *A.* commands *B.* to beat *C.* and he beats him so that he dies thereof, it is murder in *B.* and *A.* if present, is also guilty of the offense, if absent, he is accessory to murder. *Dalt. cap. 93.*(c) *Plowd. Com. 475. b. Co. P. C. p. 51. 3 E. 3. Coron. 314.*

If *A.* counsel *B.* to poison his wife, *B.* accordingly obtains [436] poison from *A.* and gives it to his wife in a roasted apple, the wife gives it to a child of *B.* not knowing it was poison, who eats it and dies, this is murder in *B.* tho he intended nothing to the child. *Plowd. Com. 474. Saunder's case*: and so it is, if an apothecary send a potion to the wife, and the husband mingle poison with it, and upon some dislike of the physic the apothecary is sent for, who to justify it to be wholesome voluntarily eats part of it, and

(a) See *State Tr. Vol. I. p. 331.*(c) *New Edit. cap. 145. p. 472.*(b) *State Tr. Vol. I. p. 313.*

[19] 4 *Bl. Com. 28, 1 Hawk. P. C. 3.* Wife not guilty of any breach of duty, in neglecting to provide an apprentice of her husband with sufficient food and necessaries, whereby he died, as she was only the servant of her husband. *Rex v. Squire, 1 Russell, 16.*

is poisoned and dies, this is murder in *B.* tho the apothecary was never intended to be hurt, but voluntarily took it. 9 *Co. Rep.* 81.

Agnes Gore's case.

But in this case, he who was absent, and counselled the poisoning of the wife, is not accessary to the murder, because as to him the command shall not be construed further, than as to the person intended by him. *Plowd. Com.* 474. *Saunder's case.* (d)

If *A.* counsel or commands *B.* to beat *C.* with a small wand or rod, which could not, in all human reason, cause death, if *B.* beats *C.* with a great club, or wound him with a sword, whereof he dies, it seems, that *A.* is not accessary, because there was no command of death, nor of any thing, that could probably cause death, and *B.* hath varied from the command in substance, and not in circumstance.

If *A.* command or counsel *B.* to kill *C.* and before the fact done *A.* repents, and comes to *B.* and expressly discharges him from the fact, and countermands it, if after this countermand *B.* doth it, it is murder in *B.* but *A.* is not accessary, but if *A.* repent of it, but before any discharge or countermand given to *B.* *B.* kills *C.* yet *A.* remains accessary notwithstanding his private repentance, for in as much as his express counsel or command occasions the fact, he must at his peril see, that he countermand *B.* and so remedy as much as in him lies the mischief, that his former command occasioned. [437] *Co. P. C.* p. 51. *Plowd. Com.* 476. a. *Saunder's case.*

In manslaughter there can be no accessaries before the fact, for it is presumed to be sudden, for if it were with advice, command, or deliberation, it is murder and not manslaughter, and the like of *se defendendo*.

And therefore in an indictment of manslaughter only, if others be indicted as accessaries before the fact, the indictment is void against them.

And if *A.* be indicted of murder, and *B.* as accessary before by procurement, &c. and *A.* is found guilty only of manslaughter, *B.* shall be discharged. 4 *Co. Rep.* 43. b. *Goffe versus Bibithe and Hoell David.*

And anciently, he that struck the stroke, whereof the party diēd. was only the principal, and those, that were present, aiding, and assisting, were but in the nature of accessaries, and should not be put upon their trial, till he that gave the stroke were attaind by outlawry or judgment. 40 *Ass.* 25. 40 *E.* 2. 42. a.

But at this day, and long since, the law hath been taken otherwise, and namely, that all that are present, aiding, and assisting, are equally

(d) But tho the judges were of opinion in this case, that he was not accessary, yet they thought it properest that he should be delivered rather by a pardon, than otherwise, and accordingly they kept him in prison from one session till another, till he procured a pardon; and master *Plowden*, the reporter, says, it was his opinion, that whoever counsels or commands an evil thing should be adjudged accessary to all which follows from that evil action, but not from any other distinct thing.

principal with him that gave the stroke, whereof the party died. 4 *H.* 7. 18. *a. per omnes justiciarios utriusque banci*, for tho one gave the stroke, yet in interpretation of law it is the stroke of every person, that was present, aiding, and assisting, and tho they are called principals in the second degree, yet they are principals, and the law was altered herein, *in tempore H. 4 Plowd. Com. 100. a.* and therefore, if there be an indictment of murder or manslaughter against *A.* that *A. felonice, &c. percussit B.* whereof he died, and that *C.* and *D.* were present, abetting, aiding, and assisting to *A. ad feloniam & murdrum &c. modo & formâ prædictâ faciendâ*, and *A.* appears not, but *B.* and *C.* appear, they shall be arraigned, and receive their judgment if convict, tho *A.* neither appear, nor be outlawed. *Plowd. Com. 97. and 100. Gytlin's case.*

If *A.* be indicted as having given the mortal stroke, and *B.* and *C.* as present, aiding, and assisting, and upon the evidence it [438] appear that *B.* gave the stroke, and *A.* and *C.* were only aiding and assisting, it maintains the indictment, and judgment shall be given against them all, for it is only a circumstantial variance, for in law it is the stroke of all that were present, aiding, and abetting. *Plowd. Com. 98. a. 9 Co. Rep. 67. b. Mackally's case.*

Yet the circumstances of the case may vary the degree of the offense in those that are in this kind parties to the homicide.

If *A.* have malice against *B.* and lies in wait to kill him, and *C.* the servant of *A.* being present, but not privy to the intent of his master, finds his master fighting with *B.* takes part with his master, and the servant or master kill *B.* this is murder in *A.* because he had malice forethought, but only homicide in *C.* *Plowd. Com. 100. b. Salisbury's case*, where it was also resolved, that where *A.* had malice against *D.* the master of *B.* but by mistake assaults and kills *B.* the servant, or having malice against *D.* the master, and *B.* his servant, comes in aid of his master, and *A.* kills him, it is murder in *A.* as much as if he had killed the master, for the malice shall be carried over to make the killing of *B.* murder.

Upon an indictment of murder, tho the party upon his trial be acquit of murder, and convict of manslaughter, he shall receive judgment, as if the indictment had been of manslaughter, for the offense in substance is the same.

And upon the same reason it is in case of malice implied, if *A. B.* and *C.* be in a tumult together, and *D.* the constable comes to appease the affray, and *A.* knowing him to be the constable, kill him, and *B.* and *C.* not knowing him to be the constable, come in, and finding *A.* and *D.* struggling, assist and abet *A.* in killing the constable, this is murder in *A.* but manslaughter in *B.* and *C.*

To make an abetter to a murder or homicide principal in the felony, there are regularly two things requisite, 1. He must be present. 2. He must be aiding and abetting *ad feloniam & murdrum sive homicidium.*

If he were procuring, or abetting, and absent, he is accessory in case of murder, and not principal, as hath been shewn, [439] unless in some cases of poisoning, *ut supra.*

If he be present, and not aiding or abetting to the felony, he is neither principal nor accessory.

If *A.* and *B.* be fighting, and *C.* a man of full age comes by chance, and is a looker on only, and assists neither, he is not guilty of murder or homicide, as principal in the second degree, but it is a misprision, for which he shall be fined, unless he use means to apprehend the felon. 8. *E. 2. Coron.* 395. 3 *E. 3. ibidem* 293. 14 *H. 7. 31. b. Stamford's P. C.* 40. *b. Dalton, cap.* 108. *p.* 284. (e)

Therefore it remains to be inquired, 1. Who shall be said to be present. 2. Who shall be said abetting, aiding or assisting to the felony.

I. As to the first: if divers persons come to make an affray, &c. and are of the same party, and come into the same house, but are in several rooms of the same house, and one be killed in one of the rooms, those that are of that party, and that came for that purpose, tho in other rooms of the same house, shall be said to be present. *Dalt. cap.* 93. *p.* 241. (f)

The lord *Dacre* and divers others came to steel deer in the park of one *Pelham, Rayden* one of the company killed the keeper in the park, the lord *Dacre* and the rest of the company being in other parts of the park, it was ruled, that it was murder in them all, and they died for it. *Crompt. 25. a. Dalt. ubi supra, 34 H. 8. B. Coron.* 172. (g)

The like in case of burglary, tho some stood at the lane's end or field-gate to watch if any came to disturb them, *Cō. P. C. p.* 64. 11 *H. 4. 13 b.* yet they are said to be burglars, because present, aiding, and assisting to the burglary.

II. Who shall be said abetting, aiding and assisting.

If *A.* comes and kills a man, and *B.* runs with an intent to be assisting to him, if there should be occasion, tho *de facto* he doth nothing, yet he is principal being present, as well as *A.* 3 *E. 3. Coron.* 309.

If divers come with one assent to do mischief, (*male faire*) as to kill, rob or beat, and one doth it, they are all principals in the felony, &c. 3 *E. 3. Coron.* 314. [440]

If *A.* and divers others in his company intending to rob a person charge him with felony, and as they are carrying him to gaol, some of the company rob the person attached, this is robbery in all; but if the rest of the company come without any such intent, it seems they are not guilty. 3 *E. 3. Coron.* 350.

If *A.* comes in company with *B.* to beat *C.* and *B.* beats *C.* that he die, *A.* is principal, but then, according to those elder times, the indictment must not be only, that he was present, aiding, and assisting, for that, as the law was then taken, makes him only accessory, but the indictment must shew the special matter, that they came to that intent, 19 *E. 2. Coron.* 433. but now that course is altered, and

(e) *New Edit. cap.* 161. *p.* 527.

(g) See also *Moor* 86. *Kelynge* 56.

(f) *New Edit. cap.* 145. *p.* 472.

the indictment only runs, that *A.* was present, aiding, and assisting, and that is sufficient to make him principal.

So if *A.* being present command *B.* to kill *C.* and he doth it, both are principals. 13 *H.* 7. 10. *a.* (*h*)

If many be present, and one only gives the stroke, whereof the party dies, they are all principals, if they came for that purpose. 21 *E.* 4. 71. *a.*

The case of *Drayton Basset* reported by Mr. *Crompton*, fol. 28. was this: *A.* with thirty others and more entered with force upon the manor-house of *Drayton Basset*, and ejected *B.* his children, and servants out of the same; afterwards twenty others on the behalf of *B.* three days after, in the night, came with weapons with intent to re-enter, and one of the twenty, about ten of the clock in the night, cast fire into a thatcht house adjoining to the house, whereupon one that was in the house shot off a gun, and killed one of the party of *B.* and then the rest of the party of *B.* fled, and *A.* and his company continued the forcible possession of the house

for many days after, whereupon *A.* and twenty-seven more [441] were indicted of murder, and arraigned in the king's bench, and the matter aforesaid given in evidence against him, and *Mich.* 22 & 23 *Eliz.* he was found guilty of manslaughter, & divers autres de rioters, que fueront in le meason al temps, que le home fuit tue, fueront arraigns come principals, coment que ne assent al setter del gunne ne al tuer, purceo que fueront la illoyalment assemblies, & in forcible manner gard le meason oue *A.* que fuit convict.

And consonant to this is Mr. *Dallou*, p. 241. (*i*) in these words: "Note also, that if divers persons come in one company to do any unlawful thing, as to kill, rob or beat a man, or to commit a riot, or to do any other trespass, and one of them in doing thereof kill a man, this shall be adjudged murder in them all that are present of that party abetting him, and consenting to the act, or ready to aid him, altho they did but look on.

A man seizeth the goods of a *Frenchman* in time of war, and carries them to his house, a stranger pretending to be deputy-admiral with a great multitude of men came with force to the house, where the goods were, and at the gate of the house made an assault upon them that were in the house, a woman issued out of the house without any weapon, and is killed by one of the servants, who came to take the goods, by throwing a stone at another, that was in the gate, and the person, that came to seize the goods, said, (before his coming) he would make him a cokes that kept the goods and would make him to know the basest in his house. By five judges, two serjeants, the queen's attorney, and solicitor, it was held, that if it appear that the woman came in defense of the master of the house, then it was murder in the vice-admiral and all

(*h*) This case was something more than a bare command, for one held him, while the other killed him; but what our author here says is more directly proved by the case in 4. *H.* 7. 18. *a.*

(*i*) *New Edit.* p. 472.

his companions: but by other five judges contrary, for no malice was against the woman, and murder shall not be extended further, than it was intended, and the former held, that if *A.* and *B.* fight by appointment before-hand, and a stranger comes between them to part them, and he is *killed* by *A.* it is murder in [442] him; and some said in both, but the others *notuerunt ad hoc concordare.* *Mansell* and *Herbert's* case, *H. 2 & 3 P. & M. Dyer* 128. *b.*

That point, wherein the judges differed, was whether the mistake of the person excuseth it from murder, but it seems not questioned, but all agreed it manslaughter, and that not only in him, that gave the blow but in all the companions of that party: but now the former point is sufficiently settled, that if it had been murder, in case the man had been *killed*, that was meant, it is murder in killing the woman, and that, whether she came as a partizan to *Mansell*, the owner of the house, or not, *quod vide supra*: and in the last case put, in *Herbert's* case before, it is certainly murder in him that kills the man that comes to part them, and if it had been only a sudden quarrel, it had been manslaughter in him that kills him, and *Dall. cap. 93. p. 240. (k)* yea, and if the combating were by malice prepense, it is held, that the killing of him, that comes to part them, is murder in both, and both were hanged for it, because each of them had a purpose to have kild the other. 22 *E. 3. Corone* 262. *Lambert* out of *Dallison's* report, *p. 217.* but that seems to me to be mistaken, it is not murder in both, unless both struck him that came to part them; and by the book of 22 *Ass. 71. Coron.* 180. (which seems to be the same case, tho more at large,) he only that gave the stroke, had judgment, and was executed. (l) [1]

And therefore it is a mistake in those that say, if it be not known which of them did it, they shall both have judgment, for the jury ought precisely to inquire, and upon circumstances to satisfy themselves, whether the one, or the other, or both did it, and neither to acquit, nor convict both, because they know not who did it.

But to return to the aiders and abettors again.

By the cases of *Drayton Basset* and *Herbert* it appears, that if many come to commit a riotous unlawful act, if in the pursuit of that action one of them commits murder or manslaughter, they are all guilty, that are of that party, that committed the dis- [443] order; wherein nevertheless these things must be observed.

1. In that case it must be intended, when one of the same party

(k) *New Edit. cap. 145. p. 472.*

(l) The other doth not appear to have been before the court, but upon putting the case, the court said, he that struck is guilty of felony, but said nothing as to him who did not strike.

[1] *Dyer*, 128. *Kel.* 111, 112, 117. *Foster*, 251. 1 *Hawk. c. 31. s. 42. State v. Cooper*, 1 *Green*, (N. J.) *State v. Bentry*, 2 *Dev. & Bat.* 196.

commits the murder or manslaughter upon one of the other party, or upon those that came to appease or part them, or by due course of law to disperse them.

And therefore I have always taken the law to be, that if *A.* and *B.* have a design to fight one with another upon premeditation or malice, and *A.* takes *C.* for his second, and *B.* take *D.* for his second, *A.* kills *B.* in this case *C.* is principal, as present, aiding, and abetting, but *D.* is not a principal, because he was of the part of him, that was killed, and yet I know, that some have held, that *D.* is principal as well as *C.* because it is a compact, and rely much upon the book of 22 *E.* 3. *Coron.* 262. before-mentioned, but, as I think, the law was strained too far in that case, and so it is much more in making *D.* a principal in the death of *B.* that was his friend, tho it be, I confess, a great misdemeanor, yet I think it is not murder in *D.*

And the books in all the instances of this nature say, that it is murder or manslaughter in that party, that abetted him, (*) and consented to the act, that *D.* never abetted *A.* to kill *B.* but abetted *B.* indeed to have killed *A.* [2]

2. It must be a killing in pursuit of that unlawful act, that they were all engaged in, as in the case of the lord *Dacre* before-mentioned, they all came with an intent to steal the deer, and consequently the law presumes they came all with intent to oppose all that should hinder them in that design, and consequently when one killed the keeper, it is presumed to be the act of all, because pursuant to that intent: but suppose, that *A.* *B.* and *C.* and divers others come together to commit a riot, as to steal deer, or pull down inclosures, and in their march upon their design, *A.* meets with *D.* or some other with whom he had a former quarrel, or that by reason of some collateral provocation given by *D.* to *A.* *A.* kills him without any abetting by any of the rest of his company, this doth not make all the

(*) *Viz.* who committed the homicide.

[2] When upon a previous agreement, and after there has been time for the blood to cool, two persons meet with deadly weapons, and one of them is killed, the party who occasions the death is guilty of murder, and the seconds also are equally guilty; and with respect to others shown to be present, the question is, did they give their aid and assistance by their countenance and encouragement of the principals in the contest? Mere presence will not be sufficient; but if they sustain the principals, either by advice or assistance, or go to the ground for the purpose of encouraging and forwarding the unlawful conflicts, although they do not say or do any thing, yet, if they are present assisting and encouraging by their presence at the moment when the fatal shot is fired, they are, in law, guilty of the crime of murder. *Reg. v. Young*, 8 *Car. & P.* 644.

If two persons deliberately fight a duel, and one of them be killed, the other and his second are guilty of murder. 1 *Hawk. c.* 31. *s.* 31. *Rex v. Onely*, 2 *Strange*, 776. No matter how grievous the provocation, or by which party given. The second of the deceased also is now deemed guilty of murder, as being present, aiding and abetting; and although Lord *Hale* seems to think the rule of law, as to principals in the second degree, too far strained in that case, yet in several late cases it has been laid down that both the seconds are guilty, if they are present assisting and encouraging. See *Smith v. The State*, 1 *Yerger*, 228. *Tavernier's case*, 3 *Bulstrode*, 171-2. 1 *Roll. Rep.* 361. *Rex v. Murphy*, 6 *C. & P.* 103. *Reg. v. Cuddy*, 1 *Car. & P.* 210. *Foster*, 297. 4 *Bl. Com.* 191. 3 *Inst.* 51. *Rex v. Rice*, 3 *East*, 581, *post*, 453.

party of *A.* tho present, to be therefore aiding and abetting, and consequently principals in this murder or manslaughter, which was accidental, and not within the compass of their original intention.

But if, when they had come to steal the deer, or throw down the inclosure, any had opposed them in it, either by words or actual resistance, and *A.* had killed him, it had been murder in all the rest of the company, that came with the intent to do that unlawful act, tho there were no express intention to kill any person in the first enterprize, because the law presumes they come to make good their design against all opposition.

And this is the reason of the book 3 *E.* 3. *Coron.* 350. where many came to commit a disseisin, and one was killed, and all that were of the company were arraigned as principals, and the fact found and they were condemned, tho the jury said they did nothing (*de male volunt*) of malice, but were of the company; tho possibly, as the circumstances of that case were, it was only manslaughter, as in the case of *Drayton Basset*, because it was upon a sudden, and upon a pretense of title.

3. Again, altho if many come upon an unlawful design, and one of the company kill one of the adverse party in pursuance of that design, all are principals; yet if many be together upon a lawful account, and one of the company kill another of an adverse party without any particular abetment of the rest to this fact of homicide, they are not all guilty that are of the company, but only those, that gave the stroke, or actually abetted him to do it.

There is a common nuisance committed in the highway by *A. B. C. D.* in the vill of *M.* and *E. F. G. H. J. &c.* and twenty more of the inhabitants of *M.* come to remove the nuisance, *A. B. C.* and *D.* oppose, *F.* strikes *A.* suddenly, and kills him, *F.* is guilty of manslaughter, but the rest of the party of *F.* are not therefore guilty, barely upon this account that they were of the company, but only such of the company, as did actually assist or abet *F.* to strike or kill *A.*

But if in truth it were no nuisance, but an act that was lawfully done by *A.* and then *A.* had been killed by *F.* all the rest of the party and company of *F.* had been guilty, that came with design to remove *that* which they thought a nuisance, but [445] was not, because it was a riotous and unlawful assembly.

If *A.* hath a good title to his house, or hath been in possession thereof for three years, (in which case he may detain it with force by the statute of 8 *H.* 6. *cap.* 9.) if any person come to rob him or kill him, and he shoot and kill him, it is not felony, nor doth he forfeit his goods, as in case of homicide *se defendendo.* 11 *Co. Rep.* 82. *b.* 5 *Co. Rep.* 91. *b.*

But if *A.* comes to enter with force, and in order thereunto shoots at his house, and *B.* the possessor, having other company in his house, shoots and kills *A.* this is manslaughter in *B.* and so it is ruled 5 *Eliz.* in *Harcourt's* case, *Crompt.* 29. *a.* *Dalt. cap.* 78. *p.* 105. (m) *Ibid. cap.* 98. *p.* 250. (n)

(m) *New Edit. cap.* 127. *p.* 427.

(n) *cap.* 150. *p.* 483.

And in this case, if *B.* shoot out of his house, and killeth *A.* I think it plain, that it is not felony in the rest of the household, nay, tho he had hired extraordinary company to help to guard his house upon such an occasion, (as by law it seems he may do, notwithstanding the opinion of *Crompton*, fol. 70. *a.* to the contrary, vide 21. *H.* 7. 39. *a.* 5 *Co. Rep.* 91. *b.* *Seaman's case*, 11 *Co. Rep.* 82. *b.* *Lewes Bowle's case*) yet this is not manslaughter in the rest of the company, because the assembly was lawful and justifiable.

And therefore in that case, no others of the company, that are in the house, shall be said guilty, but only such as actually abet him to do the fact; and these indeed will be principals by reason of actual abetting, but not barely upon the account of being in the house, and of the same company, because the assembly to defend the house by lawful means was lawful.

But in the case of a riotous assembly to rob, or steal deer, or do any unlawful act of violence, there the offense of one is the offense of all the company; as in the case of the lord *Dacre*, and of the house of *Drayton Basset*, where there was first a riotous and unlawful entry, and keeping possession by those that shot.

4. If there be many, that are present, abetting, aiding, [446] and assisting, tho all may, as in the cases afore shewn, be guilty of homicide, yet upon different circumstances some may be guilty of homicide, and not of murder, others may be guilty of murder; vide the case of *Salisbury* before, *Plowd Com.* 101. *a.* The master assaults with malice prepense, the servant being ignorant of the malice of his master, takes part with his master, and kills the other, it is manslaughter in the servant, and murder in the master.

Upon a sudden falling out between *A.* and *B.* in the street, *A.* gathers many of his friends together to assault *B.* and *B.* doth the like, the constable, and some in his aid, come to part the affray, and keep the peace. *A.* hath notice, that he is the constable, but divers of his company know it not, nor could reasonably or probably know it, *A.* kills the constable, this is murder in *A.* but the rest of his company, that knew it not, are not guilty of the murder.

But such of them, as knowing it to be the constable, yet abetted *A.* to kill him, are guilty of murder, those that knew it not, and yet abetted *A.* to kill him, are guilty of manslaughter; and those, that neither knew him to be the constable, nor did actually abet nor assist *A.* to kill him, are not guilty, as it seems, because this was a new emergency, and out of the bounds and verge of the quarrel, wherein they were before engaged, and such whereunto these were not privy; *quod lamen quære.* [5]

See Foster 121-131. and his discourse III. p. 341.—per tot. 4 Blacks. Com. ch. 3. p. 34-40. See Index to 1 Hawk. P. C. tit. Accessary.

[3] One who procures, counsels, or commands another, but is absent when the crime is consummated, is an accessory before the fact. *Post*, 612. 615, 616. *Dyer*, 186. 3 *Inst.* 108. 139. 2 *Hawk. P. C.* 315-19. *Foster*, 73. 125. 361. 1 *Moody C. C.* 417. 7 *C. & P.* 836. 4 *Bl. Com.* 35. 40. 323.

If several persons meet together for the prosecution of some unlawful design, and in

fartherance of that design a man be killed, the guilt of the killing will attach to all present, whether it be murder or manslaughter. *Foster*, 261. *Macklin's case*, 2 *Lew.* 225.

As to what will excuse persons otherwise liable as accessaries, see *ante* 52 *et seq.* *Rex v. Sawyer*, 1 *Russ.* 424. *Rex v. Dyson*, R. & R. C. C. 528. *Reg. v. Tyler*, 8 C. & P. 616.

On indictment for murder against several, one cannot be convicted of an assault committed on the deceased in a previous scuffle, such assault not being in any way connected with the cause of death. *Reg. v. Phelps*, 2 M. C. C. R. 240.

All present at the time of committing an offence are principals, although one only acts, if they are confederated and engaged in a common design, of which the offence is part. *Rex v. Tattersall*, 1 *Russ.* 22. *Rex v. Dyson*, R. & R. C. C. 523.

All those who assemble themselves together, with an intent, even to commit a trespass, the execution whereof causes a felony to be committed, and continue together, abetting one another till they have actually put their design into execution, and also, all those who are present when a felony is committed, and abet the doing of it are principals in felony. *Reg. v. Howell*, 9 Car. & P. 437.

Where persons combine to stand by one another in a breach of the peace, with a general resolution to resist all opposers, and in the execution of their design a murder is committed; all of the company are equally principals in the murder, though at the time of the fact some of them were at such a distance as to be out of view. *Reg. v. Howell*, cited *supra*.

If several are out for the purpose of committing a felony, and upon an alarm run different ways, and one of them maim a pursuer, to avoid being taken, the others are not to be considered principals in such act. *Rex v. White*, R. & R. C. C. 99.

If a charge against an accessory is, that the principal felony was committed by persons unknown, it is no objection that the same grand jury have found a bill imputing the principal felony to another person. *Rex v. Bush*, R. & R. C. C. 372.

It is not essential that there should have been any direct communication between an accessory before the fact and the principal felon. It is enough if the accessory direct an intermediate agent, to procure another to commit a felony, and it will be sufficient even if the accessory does not name the person to be procured, but merely directs the agent to employ some person. *Rex v. Cooper*, 5 Car. & P. 535. *Rex v. Morris*, 2 Leach C. C. 1096. *Rex v. Giles*, R. & M. 166. *Rex v. Badcock*, R. & R. C. C. 249. *Rex v. Stewart*, R. & R. C. C. 363.

If A. is charged in the indictment as principal, and B. as accessory, and the jury find B. to be the principal and A. the accessory, the indictment is sustained. *State v. Mairs*, Coxe, N. J. 453.

The crime of an accessory before the fact to a murder is murder. *The People v. Mather*, 4 Wend. 229.

An accessory in a capital felony cannot be tried without his own consent when the principal has died before conviction. *Commonwealth v. Phillips*, 16 Mass. 423. But he must answer to an indictment charging him as accessory to two principals, one of whom only has been convicted, the other having died. *Commonwealth v. Knapp*, 10 Pick. 477. Conviction of the principal is *prima facie* evidence of his guilt, on the trial of an accessory, and throws the burden of proof, as to his innocence, on the accessory; but the accessory is not restricted to the proof of new facts. *Idem*.

The charge of Kne, P. in the case of *Daily* (4 Penns. Law J., 155, Philadelphia, 1845,) contains an excellent summary of the common law doctrine of the responsibility of persons engaged in unlawful combinations resulting in death. "When divers persons, (says Judge King) resolve generally to resist all officers in the commission of a breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays, and in doing so happen to kill a man, they are all guilty of murder, for they must at their peril abide the event of their actions, who unlawfully engage in such bold disturbances of the public peace in opposition to, and in defiance of the justice of the nation. Malice in such a killing is implied by law, in all who were engaged in the unlawful enterprise; whether the deceased fall by the hand of the accused in particular, or otherwise, is immaterial. All are responsible for the acts of each, if done in pursuance and furtherance of the common design. This doctrine may seem hard and severe, but has been found necessary to prevent riotous combinations committing murder with impunity. For when such illegal associates are numerous, it would scarcely be practicable to establish the identity of the individual actually guilty of the homicide. When, however, a homicide is committed by one or more of a body unlawfully associated, from causes having no

connexion with the common object, the responsibility for such homicides attaches exclusively to its actual perpetrators."

If several persons combine to commit murder, and before the killing is actually effected, one of them withdraws from the combination and leaves the others, doing nothing to aid or encourage them in any way, he is not responsible for their acts, although they carry out the object of the original combination by committing murder. *Commonwealth v. Haughey*, M. S. before the Oyer and Terminer for Philadelphia county, March, 1845. KING, President. See also, *U. S. v. Cornell*, 2 Mason, C. C. R. 91. *U. S. v. Ross*, 1 Gallison, C. C. R. 524.

He who kills another upon his desire or command is, in the judgment of the law, as much a murderer as if he had done it merely of his own head. 1 Hawk. c. 27, s. 6; *Sawyer's case*, O. B. 1815, MS. 1 Russ. 485.

If two persons mutually agree to commit suicide together, and the means employed to produce death only take effect on one, the survivor will, in point of law, be guilty of the murder of the one who died. *R. v. Alison*, 8 Car. & P. 418.

If one counsel another to commit suicide, and the other, through the influence of the advice, kill himself, the adviser is guilty of murder as principal. The presumption of law in such case is, that the advice had the effect intended by the adviser, unless the contrary be shown. *Commonwealth v. Bowen*, 13 Mass. 359. See *Rex v. Dyson*, R. & R. C. C. 523. 1 Hawk. P. C. c. 27, s. 4.

But ALDERSON, J. in *Regina v. Liddington*, 9 C. & P. 79, ruled that a person cannot be tried for inciting another to commit suicide, although that other commit suicide.

[447]

CHAPTER XXXV.

CONCERNING THE DEATH OF A PERSON UNKNOWN, AND THE PROCEEDINGS THEREUPON.

BECAUSE this chapter as well concerns *murder* as *manslaughter*, before I come to examine the particular offenses themselves, I shall subjoin a few words touching this title.

Antiently there was a law introduced by *Canutus the Dane*, that if any man were slain in the fields, and the manslayer were unknown, and could not be taken, the township, where he was slain, should be amerced to sixty-six marks, (*) and if it were not sufficient to pay it, the hundred should be charged, unless it could be made appear before the coroner, upon the view of the body, that the party slain were an *Englishman*, and this *making it appear* was various, according to the custom of several places, but most ordinarily it was by the testimony of two males of the part of the father of him that was slain, and by two females of the part of his mother.

And this amercement was usually called *murdrum*; and the presentment and proof, that the party slain was an *Englishman*, was called *Englesbury*, and presentment of *Englesbury*.

And this was therefore provided to avoid the secret murder of the *Danes*, who were hated by the *English*, and oftentimes privily mur-

(*) See the laws of *Edward the confessor*, Lib. XV. & XVI. by which it appears the amerciament was XLVI. marks, and not LXVI. marks, as *Bracton* says, which mistake might probably be occasioned, as *Wilkins* observes in his notes *ad Leg. Anglo-Sax.* p. 280. by the transposition of the numeral letters L and X.

dered; this appears by *Bracton*, (a) and is transcribed out of him by *Stamf. Lib. I. cap. 10. fol. 17.*

When *William* the first came in, he found the like animosity by the *Danes* and *Saxons* against the *French* and *Normans*, who were many times secretly killed by the natives, and therefore he did in effect continue this law, (†) only he applied it to the *French* and *Normans*, viz. that if a person were slain by an un- [448] known hand, if he were a *Frenchman* or a *Norman*, the hundred was amerced, where he was found, and if they were insufficient, then the county, which was sometimes 36*l.* sometimes 24*l.*

And tho this was instituted for the preservation of the *French* and *Normans*, yet intermarriages happening between the natives and them, so that in process of time they became, as it were, one people, the same custom was continued as to all persons that were killed by unknown hands, and this amerciamment was called *murdrum*.†

This appears at large by the black book of the Exchequer written by *Gervasius Tilburriensis*, *Lib. I. cap. Quid murdrum, & quare sit dictum*, which expounds the true scope of the statute of *Marlbridge*, *cap. 26. Quod murdrum de cætero non adjudicetur pro mortuo per infortunium.*

But as well the presentment of *Englesbery*, as the amerciamment for secret homicide by persons unknown, was taken away by the statute of 14 *E. 3. cap. 4.* yet there remained a certain amerciamment upon the township, where a person was slain, and the offender escaped, viz. If a person were slain in the day-time, in a town walled, or not walled, the town is to be amerced, if the vill be not sufficient, the hundred shall be charged, and on default of them the county.

If he be slain in the day-time out of any vill, the hundred shall be amerced, and on their disability the county shall be charged with the amerciamment.

If a man be killed either in day or night, and the offender be taken and committed to the constable, or to the vill, if he escape, the township where the party was slain, or where the offender was taken, shall be fined. (b)

But if a person be slain in the day or night in a walled town, and the offender be not taken, the town or city shall be fined.

If any private person be present when a murder or manslaughter is committed, and doth not his best endeavour [449] to apprehend the malefactor, he shall be fined and imprisoned.

All which differences appear by comparing the books of *Stamf.*

(a) *Lib. III. de corona cap. 15. p. 134. b. vide Spelm. verb. Englecheria. Blacks. Com. Lib. IV. cap. 14. p. 195.*

(†) *Vide Leg. Gul. Con. l. 26. & Leg. Hen. I. l. 91. Wilk. Leg. Anglo-Sax. p. 224. 280.*

† By the word "murder" in grants, the grantee claimed to have amerciament of murderers. *Bro. tit. quo warranto. Pl. 2.*

(b) For the vill is not discharged till he be delivered into goal, or to the custody of the sheriff, after which the sheriff will be chargeable. *Stamf. P. C. cap. 31.*

P. C. cap. 30 & 31. Coke P. C. cap. 7. p. 53. 3 H. 7. cap. 1. and the books there cited.[1]

[1] All persons who are present when a felony is committed, or a dangerous wound given, are bound to apprehend the offender, on pain of being fined and imprisoned for their neglect, unless they are under age at the time. 2 Hawk. c. 12. s. 1.

Also every private person is bound to assist any officer demanding his help for the taking of a felon, or the suppression of an affray, *id. s. 12*, and may be indicted if he refuses without lawful excuse. *Reg. v. Brown*, 1 C. & Mer. 314.

And it is the duty of all private persons to arrest without warrant any person detected in the attempt to commit a felony. *R. v. Hunt*, R. & M. C. C. 93; *R. v. Howarth*, R. & M. C. C. 207. And though the offender run away, and give over his intention of committing the felony, still it seems, on fresh pursuit, he may be apprehended by any one. *R. v. Howarth*, R. & M. C. C. 207.

If a felony has been actually committed by some one, a private person may arrest, or direct a peace officer to arrest a party whom he has reasonable grounds for suspecting to have been guilty of it, though in fact such party be really innocent; but he is not absolutely bound to do so, like a peace officer; and he does so at his peril, for if these grounds for suspecting the party be not reasonable, or there has been no felony committed, the person arresting is guilty of a false imprisonment, and liable accordingly. *Paulson v. Williams*, 1 G. & D. 504. 2 Ad. & E. (N. S.) 69; *Allen v. Wright*, 8 C. & P. 522.

A bare surmise, however, is plainly insufficient. *Davis v. Russell*, 5 Bing. 364. 2 M. & P. 590, S. C. 4 Inst. 144.

See Vol. 2d, chapter 10.

CHAPTER XXXVI.

TOUCHING MURDER, WHAT IT IS, AND THE KINDS THEREOF.

MURDER and manslaughter differ not in the kind or nature of the offense, but only in the degree, the former being the killing of a man of malice prepense,[2] the latter upon a sudden provocation and falling out.[1]

[1] For manslaughter, see chapter XXXVIII. p. 466.

[2] The best explanation of the legal meaning of malice, is that of Justice Foster. Its brevity, accuracy and felicity of language have recommended it and caused its almost universal recognition as well in America as in England, particularly the closing clause, in which an act is declared to be malicious, which shows "a heart regardless of social duty and fatally bent on mischief." When (says Foster) the law maketh use of the term *malice aforethought*, as descriptive of the crime of murder, it is not to be understood in that narrow restrained sense, to which the modern use of the word *malice* is apt to lead one, a principle of malevolence to particulars; for the law by the term *malice* in this instance meaneth, that the fact hath been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, malignant spirit.

In the case of an appeal of death, which was anciently the ordinary method of prosecution, the term *malice* is not made use of as descriptive of the offence of murder, in contradistinction to simple felonious homicide. The precedents charge, that the fact was done *nequiter & in feloniam*, which fully taketh in the legal sense of the word *malice*. The words *per malitiam* and *malitiosè* our oldest writers do indeed frequently use in some other cases; and they constantly mean an action flowing from a wicked and corrupt motive, a thing done *malo animo*, *malâ conscientiâ*, as they express themselves. Of which many instances might be given. I will mention one or two.

The method of proceeding in ancient times in a case of robbery or larceny, when the stolen goods were found upon the defendant, was, that if he alleged that he bought them of another, whom he named and vouched to warranty, the voucher, if he appeared and entered into warranty was to stand in the place of the defendant *pro bono & male*. The

And therefore it is, that upon an indictment of murder the party offending may be acquitted of murder, and yet found guilty of man-

legislature hath likewise frequently used the terms *malice* and *maliciously* in the same general sense, as denoting a wicked, perverse, and incorrigible disposition." *Foster* refers to the statutes 28 Ed. 1. st. 2, 4 & 5 W. & M. c. 4. and continues: "In the same latitude are the words *malice aforethought* to be understood in the statutes which oust clergy in the case of wilful murder. The *malus animus*, which is to be collected from all the circumstances is what bringeth the offence within the denomination of wilful malicious murder, whatever might be the immediate motive to it; whether it be done as the old writers express themselves, '*Irâ vel odio, vel causâ lucii*,' or from any other wicked or mischievous incentive. And most if not all the cases, which in the books are ranged under the head of *implied malice*, will if carefully adverted to, be found to turn upon this single point, that the fact hath been attended with such circumstances as carry in them the plain indications of an heart regardless of social duty and fatally bent upon mischief." *Foster*, 256, 257. An act "flowing from a wicked heart, a mind grievously depraved, and acting from motives highly criminal, is the genuine notion of malice in our law." *Curtis' case. Foster*, 138.

Lord Holt says upon this subject, "some have been led into mistakes by not well considering what the passion of malice is; they have construed it to be a rancour of mind lodged in the person killing for some considerable time before the commission of the fact; which is a mistake, arising from a not well distinguishing between hatred and malice, Envy, hatred and malice, are three distinct passions of the mind." *Kel.* 127. Amongst the *Romans*, and in the civil law, *malitia* appears to have imported a mixture of fraud, and of that which is opposite to simplicity and honesty. *Cicero* speaks of it *De Nat. Deor. Lib. 3. s. 30.* as "*versuta et fallax nocendi ratio*;" and in other work *De Offic. Lib. 3. s. 18.* he says, "*mihi quidem etiam veræ hereditates non honestæ videntur si sint malitiosæ, (i. e. according to Pearce, a malo animo profectis,) blanditiis officiorum; non veritate sed simulatione quasitæ.*" And see *Dig. Lib. 2. Tit. 13. Lex 8.* where, in speaking of a banker or cashier giving his accounts, it is said, "*Ubi exigitur argentarius rationes edere, tunc punitur cum dolo malo non exhibet.*" * * * *Dolo malo autem non edit, et qui malitiose edidit, et qui in totum non edit.*" "Amongst us malice is a term of law importing directly wickedness, and excluding a just cause or excuse." 1 *Russell on Crimes*, 483.

Lord Coke, in his comment on the words *per malitiam*, says, "if one be appealed of murder, and it is found by verdict that he killed the party *se defendendo*, this shall not be said to be *per malitiam*, because he had a just cause." 2 *Inst.* 384. And where the statutes speak of a prisoner on his arraignment standing mute of malice, the word clearly cannot be understood in its common acceptation of anger or desire of revenge against another. Thus, where the 25 Hen. VIII. c. 2. says, that persons arraigned of petit treason, &c. standing "mute of malice or froward mind," or challenging &c., shall be excluded from clergy, the word malice, explained by the accompanying words, seems to signify a wickedness or frowardness of mind in refusing to submit to the course of justice; in opposition to cases where some just cause may be assigned for the silence, as that it proceeds from madness, or some other disability or distemper. And in the statute 21 Edw. 1. *De malefactoribus in parcis*, trespassers are mentioned who shall not yield themselves to the foresters, &c. but "*immo malitiam suam prosequendo et continuando*," shall fly or stand upon their defence. And where the question of malice has arisen in cases of homicide, the matter for consideration has been whether the act were done with or without just cause or excuse; so that it has been suggested that what is usually called malice, implied by the law, would perhaps be expressed more intelligibly and familiarly to the understanding if it were called malice in a legal sense. Malice, "in its legal sense, denotes a wrongful act done intentionally without just cause or excuse." *Per Little-dale, J., McPherson v. Daniels*, 10 B. & C. 272. "We must settle what is meant by the term malice. The legal import of this term differs from its acceptation in common conversation. It is not, as in ordinary speech, only an expression of hatred and ill will to an individual, but means any wicked or mischievous intention of the mind. Thus in the crime of murder, which is always stated in the indictment to be committed with malice aforethought, it is neither necessary in support of such indictment to show that the prisoner had any enmity to the deceased, nor would proof of absence of ill will furnish the accused with any defence, when it is proved that the act of killing was intentional, and done without any justifiable cause." *Per Best, J., Rex v. Harvey*, 2 B. & C. 268. 1 *Russell on Crimes*, 483. note 1. See 4 Bl. Com. 199. 1 East. P. C. 215. 1 Hawk. P. C. c. 29. s. 12.

slaughter, as daily experience witnesseth,(a) and they may not find him generally *not guilty*, if guilty of manslaughter.[3]

In an appeal of murder it is agreed on all hands, that the jury may find him not guilty of the murder, and guilty of manslaughter; this was accordingly ruled(b) *P. 34 Eliz. B. R.* the case of *Wroth and Wiggès*,(c) *P. 5 Jac. B. R. n. 20. Pellet and Barendon, P. 7. Jac. B. R. n. 11.*;(d) but it hath been held, that altho upon an indictment of murder, if the party appear to be guilty of manslaughter, the jury ought not to acquit him generally, but find him guilty of manslaughter; yet in an appeal of murder, tho the jury may, if they please, find him guilty of manslaughter, if the fact be such, yet they [450] may find generally, that he is *not guilty*, because it is the suit of the party, and he should lay his case according to the truth.

With this agrees *H. 38 Eliz. B. R. Penryn and Corbett*,(e) *H. 38 Eliz. B. R. B. 183.* (f) *M. 22 Jac. B. R. L. 278. Blount's case*,(g) but it was held *P. 2. Car. 1. in Bassage's case*,(h) that they may not in such a case find a general verdict of *not guilty*, but must find him guilty of manslaughter, because included in murder, as well in case of an appeal, as in case of an indictment, and so it seems the law is.

The difference between the offenses of murder and manslaughter seems to rest in these particulars.

1. In the degree and quality of the offense, for murder, as hath been said, is accompanied with malice forethought, either express or presumed; but bare homicide is upon a sudden provocation or falling out.

2. And therefore in murder there may be accessaries before, as well as after, because ordinarily it is an act of deliberation, and not merely of sudden passion; but in bare homicide or manslaughter there can be no accessaries before, tho there may be accessaries after, and therefore, if an indictment be of murder against *A.* and that *B.* and *C.* were counselling and abetting as accessaries before only, (and not as present, aiding and abetting, for such are principals, as hath been said) if *A.* be found guilty only of homicide, and acquit of the murder, the accessaries before are hereby discharged.(4)

(a) See *Dalison* 14.

(b) Or rather taken for granted.

(c) *Cro. Eliz.* 276. See also *Cro. Eliz.* 296. 1 *Sid.* 325.

(d) These two cases I do not find any where among the printed reports.

(e) *Cro. Eliz.* 464.

(f) I suppose this may be the case of *Goff and Byby, Cro. Eliz.* 540.

(g) 2 *Roll. Rep.* 460.

(h) *Latch.* 126.

Rex v. Greenacre, 8 *Car. & P.* 35. *Rex v. Walters*, 1 *Car. & M.* 164. *Reg. v. Kirkham*, 8 *Car. & P.* 115. *Reg. v. Marryatt*, 8 *Car. & P.* 425. *Rex v. Self*, 1 *Leach.* 137. *Rex v. Bailey*, *R. & R. C. C.* 1. *Commonwealth v. Drew*, 4 *Mass.* 391. *Respublica v. Mulatto Bob*, 4 *Dallas*, 146. *Pennsylvania v. Lewis Addison*, 282. *Commonwealth v. Green*, 1 *Ashmead*, 289. *Coffee v. The State*, 3 *Yerger*, 283. and post in this chapter and chapter 37.

[3] This is unchanged either in *England* or the *United States*.

[4] Those who are charged only as accessaries before the fact, when the principal is

3. The indictment of murder essentially requires these words, *felonice ex malitia sua præcogitata interfecit & murtheravit*, but the indictment of simple homicide is only *felonice interfecit*.

4. Altho at common law, and by the statute of 25 E. 3. cap. 4. clergy was promiscuously allowed, as well in case of murder, as of homicide and manslaughter, yet by the statute of 23 H. 8. cap. 1. 25 H. 8. cap. 3. 1 E. 6. cap. 12. 5 & 6 E. 6. cap. 10. clergy is taken away from murder *ex malitia præcogitata*. [5]

Now having before, cap. 93. declared those things, that are common to the offenses of murder and manslaughter, it [451] remaining that I consider those things, that are specific and peculiar to murder, which is what shall be said a killing *ex malitia præcogitata*, or what in law is said such a malice, as makes the offense of killing a person thereby to be murder.

Such a malice therefore, that makes the killing of a man to be murder, is of two kinds, 1. Malice in fact, or 2. Malice in law, or *ex præsumptione legis*.

Malice in fact is a deliberate intention of doing some corporal harm to the person of another.

Malice in law, or presumed malice, is of several kinds, viz. 1. In respect of the manner of the homicide, when without provocation. 2. In respect of the person kild, viz. a minister of justice in execution of his office. 3. In respect of the person killing.

Touching the first of these in this chapter, viz. malice in fact.

Malice in fact is a deliberate intention of doing any bodily harm to another, whereunto by law he is not authorized.

The evidences of such a malice must arise from external circumstances discovering that inward intention, as lying in wait, menacings antecedent, former grudges, deliberate compassings, and the like, which are various according to variety of circumstances.

It must be a compassing or designing to do some bodily harm. [6]

found guilty of manslaughter, cannot be punished, because that necessarily supposes the fact to have happened on a sudden, for if it had been done on premeditation, it would have been murder. 4 Cokes, 43, 44. Moore, 461. Dalt. c. 108.

Hawkins suggests that under the law of principal and accessory as it stood before the statute 1 Anne, c. 9. they who are charged as accessories after the fact should be discharged at common law when the principal is found guilty of manslaughter, and admitted to the benefit of clergy, because in such case it could not appear by any judgment that there was a principal. 2 Hawk. c. 29. s. 24, 3 Inst. 25. Co. Eliz. 540. Foster, 863.

But see *Rex v. Greenacre*, 8 C. & P. 35. where it was ruled that an accessory after the fact was liable.

[5] For the *English* statutes, since *Hale's* time, see note at the end of this chapter, 454, d.

[6] It has been suggested that the distinction between express malice (malice in fact) and implied malice (malice in law,) is not of practical importance. It is not, perhaps, in a mere classification of crime with reference to punishment, but as an aid to the ascertainment of guilt, its antiquity and frequent observation show its value. When the act alleged is one from which the law presumes malice, the examination of a jury may be confined to the single question of *whether or not the act was committed*, in order to arrive at a conclusion of the guilt or innocence of the accused. It is true that the classification of murder in most of the *United States* into murder of the first and second degrees, usually renders it necessary for the jury in their deliberations,

If there have been a long suit in law between *A.* and *B.* either touching interest or wrong done, as if *A.* sue *B.* or threaten to sue him, this alone is not a sufficient evidence of malice prepense, tho possibly they meet and fall out, and fight, and one kills the other, if

after having ascertained that the party is guilty of murder, to pursue the investigation so as to determine to which degree the killing belongs, and on this point the question of intention, which is the great test, often involves substantially the points connected with the malice in fact of the text. The value of the distinction, as applied to murder generally or manslaughter, remains notwithstanding.

Hawkins says that express malice exists in such murder as is occasioned through an express purpose to do some personal injury to him who is slain in particular. As to murder in this sense, such acts as show a direct and deliberate intent to kill another, as poisoning, stabbing, and such like, are clearly murder. 1 *Hawk. P. C.* 31. s. 19.

Implied malice is where there is such killing as happens in the execution of an unlawful action, principally intended for some other purpose, and not to do a personal injury to him in particular who is slain, in which case the malice seems to be most properly said to be implied. The cases which have borne dispute have generally happened in the following instances: First, in duelling. Secondly, in killing another without any provocation, or but upon a slight one. Thirdly, in killing one whom the person killing intended to hurt in a less degree. 1 *Hawk. c.* 31. s. 20.

Blackstone, who quotes *Hale* in the first sentence, and follows him and *Hawkins*, says of the distinction between express and implied malice: "Express malice is when one, with a sedate, deliberate mind and formed design, doth kill another: which formed design is evidenced by external circumstances discovering that inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm. This takes in the case of deliberate duelling, where both parties meet avowedly with an intent to murder. Also, if even upon a sudden provocation one beats another in a cruel and unusual manner, so that he dies, though he did not intend his death, yet he is guilty of murder by express malice; that is, by an express evil design, the genuine sense of malitia. As when a park-keeper tied a boy, that was stealing wood, to a horse's tail, and dragged him along the park; when a master corrected his servant with an iron bar; and a schoolmaster stamped on his scholar's belly; so that each of the sufferers died; these were justly held to be murders, because the correction being excessive, and such as could not proceed but from a bad heart, it was equivalent to a deliberate act of slaughter. Neither shall he be guilty of a less crime, who kills another in consequence of such a wilful act, as shows him to be an enemy to all mankind in general; as going deliberately, and with an intent to do mischief, upon a horse used to strike, or coolly discharging a gun among a multitude of people. So if a man resolves to kill the next man he meets, and does kill him, it is murder, although he knew him not; for this is universal malice. And, if two or more come together to do an unlawful act against the king's peace, of which the probable consequence might be bloodshed, as to beat a man, to commit a riot, or to rob a park: and one of them kills a man, it is murder in them all, because of the unlawful act; the *malitia præcogitata*, or evil intended beforehand." 4 *Bl. Com.* 199.

And of implied malice, he adds: "In many cases where no malice is expressed, the law will imply it: as where a man wilfully poisons another, in such a deliberate act the law presumes malice, though no particular enmity can be proved. And if a man kills another suddenly, without any, or without a considerable provocation, the law implies malice, for no person, unless of an abandoned heart, would be guilty of such an act, upon a slight or no apparent cause. No affront, by words or gestures only, is a sufficient provocation, so as to excuse or extenuate such acts of violence as manifestly endanger the life of another. But if the person so provoked had unfortunately killed the other, by beating him in such a manner as showed only an intent to chastise and not to kill him; the law so far considers the provocation of contumelious behaviour, as to adjudge it only manslaughter, and not murder. In like manner if one kills an officer of justice, either civil or criminal, in the execution of his duty, or any of his assistants endeavouring to conserve the peace, or any private person endeavouring to suppress an affray or apprehend a felon, knowing his authority or the intention with which he interposes, the law will imply malice, and the killer shall be guilty of murder. And if

it happen upon sudden provocation; but this may by circumstances be heightened into a malice prepense, as if *A.* without any new provocation strike *B.* upon the account of that difference in law, whereof *B.* dies, or *è converso*, or if he lie in wait to kill him, or come

one, intends to do another felony, and undesignedly kills a man, this is also murder. Thus if one shoots at *A.* and misses him, but kills *B.* this is murder; because of the previous felonious intent, which the law transfers from one to the other. The same is the case where one lays poison for *A.* and *B.* against whom the prisoner had no malicious intent, takes it, and it kills him; this is likewise murder. So also, if one gives a woman with child a medicine to procure abortion, and it operates so violently as to kill the woman, this is murder in the person who gave it." 4 *Bl. Com.* 200.

Restoe, Cr. Ev. 579; *Archbald, Cr. Pl.* 338; and *Russell, 1 C. & M.* 482, follow, and quote *Hale* and *Hawkins*.

The collections of cases do not always accurately indicate the distinctions between the two sorts of malice, less, perhaps, in *Hale's Pleas of the Crown*, than in the more modern works; so that many of the cases which might be introduced in the notes under the head of malice in fact, will be found in the next chapter, being there put the more fully to illustrate the text.

Whenever malice is shown to exist, the offence is murder, though there may have been intervening provocation. If one seek another, and enter into a fight with him, with the purpose, under the pretence of fighting, to stab him; if a homicide ensue, it will be clearly murder in the assailant, no matter what provocation was apparently then given, or how high the assailant's passion rose during the combat, for the malice is express. *State v. Ferguson*, 2 *Hill*, 619. *State v. Lane*, 4 *Iredell*, 113, (*N. Carolina*.) So if *A.*, from previous angry feelings, on meeting with *B.* strike him with a whip, with the view of inducing *B.* to draw a pistol, or believing he will do so in resentment of the insult, and determines, if he do so, to shoot *B.* as soon as he draws, and *B.* does draw, and *A.* immediately shoots and kills *B.*, this is murder. *State v. Martin*, 2 *Iredell*, 101.

Blows previously received will not extenuate homicide upon deliberate malice and revenge; especially where it is to be collected from the circumstances that the provocation was sought for the purpose of colouring the revenge. *Rex v. Mason*, 1 *East*, P. C. 239.

If a party, under colour of fighting upon equal terms, uses from the beginning of the contest a deadly weapon, without the knowledge of the other party, whom he kills with such weapon; or if at the beginning of the contest he prepares a deadly weapon, so as to have the power of using it in some part of the contest, and accordingly does so, and kills the other party; the killing in both these cases will be murder. *Rex v. Whiteley*, 1 *Lewin, C. C.* 173.

If a person, being in possession of a deadly weapon, enter into a contest with another, intending at the time to avail himself of it, and in the course of the contest actually use it, and kill the other, it will be murder; but if he did not intend to use it when he began the contest, but used it in the heat of passion, in consequence of an attack made upon him, it will be manslaughter. If he use it to protect his own life, or to protect himself from such serious bodily harm as would give him a reasonable apprehension that his life was in immediate danger, having no other means of defence, and no means of escape, and retreating as far as he can, it will be justifiable homicide. *Reg v. Smith*, 8 *Car. & P.* 160.

If *A.* had formed a deliberate design to kill *B.*, and after this they meet and have a quarrel, and many blows pass, and *A.* kill *B.*, this will be murder, if the jury are of opinion that the death was in consequence of previous malice, and not of the sudden provocation. *Reg v. Kirkham*, 8 *Car. & P.* 115.

Although a person may not go in search of, or lie in wait for another, whom he kills, yet, if he has formed the purpose to kill him, and within a short time after forming and avowing such purpose, he duly armed, meets the other, by chance, whether in public or in secret, and slays him immediately, there is a presumption that he did it on the previous purpose and grudge, if there be no evidence of a change of purpose. *State v. Tilly*, 3 *Iredell*, 424.

When a deliberate purpose to kill, or to do great bodily harm, is ascertained, and there is a consequent unlawful act of killing, the provocation, whatever it may be, which im-

with a resolution to strike or kill him, for in such a case the difference in the law-suit, (which alone makes not malice) is coupled and joined with circumstances, that prove the purpose of the [452] party was more, than the law allows in a legal vindication of wrong done.

mediately precedes the act, is to be thrown out of the case and goes for nothing, unless it can be shown, that this purpose was abandoned, before the act was done. *State v. Johnson*, 1 *Iredell*, 354.

If, upon a provocation received, one party deliberately and advisedly denounce vengeance against the other, as by declaring that he will have his blood, or by preparing for the conflict, or the like, and afterwards carry his design into execution, he will be guilty of murder, although the death happened so recently after the provocation, as that the law might, apart from such evidence of express malice, have imputed the act to unadvised passion. 1 *Vent.* 159. *Onely's case*, 2 *Ld. Raym.* 190.

Thus, where two persons quarrel, and one throws a brick-bat at the other, who has privately armed himself with a deadly weapon, and keeps it concealed, in expectation of the affray, and, on such an assault being made upon him, immediately draws forth the weapon, and, with it, kills the assailant, though then retreating; it was held, that a verdict of murder would not be disturbed, though there was no proof of previous malice, malice being implied from the *res gesta*, and from the preparation of the defendant. *Slaughter v. The Commonwealth*, 1 *Leigh*, 681.

And where two parties had previously had words, and a general challenge to fight passed, and, three hours afterwards, the defendant, belonging to one of them, renewed the challenge, which was accepted, and a fight ensued, which resulted in the death of one of the other party, it was held murder. *Commonwealth v. Crane*, *General Court of Virginia*, Nov. 1791. 2 *Wheeler's cases*, 587.

Where it appeared that the deceased had threatened the prisoner, about three weeks before, that he would kill him, that they met in the street, on a star-light night, when they could see each other, that the deceased pressed for a fight, but the prisoner retreated a short distance, that when the deceased overtook him the prisoner stabbed him with some sharp instrument which caused his death, and that, at the time of this meeting, the deceased had no deadly weapon, it was held, that the offence was murder. *State v. Scott*, 4 *Iredell*, 409.

Where the deceased, after being married for some years, left the country; and his wife, not hearing from him for two years, married the defendant, though not under circumstances which would make the second marriage legal under the Pennsylvania statute, and the deceased returned, after a lapse of a year from the second marriage, and found his wife living with the defendant, upon which a quarrel arose, which was partially composed, but which ended in the defendant deliberately shooting the deceased at his own house; it was held murder in the first degree. *Commonwealth v. Smith*, 7 *Smith's Pa. Laws, Appendix*, 2 *Wheeler's cases*, 80.

Where, however, fresh provocation occurs between pre-conceived malice and death, it ought clearly to appear that the killing was upon the antecedent malice; which may be difficult, in some cases, to show satisfactorily, if the new provocation be a grievous one. In such cases, it should not be presumed that they fought on the old grudge, unless it appear by the whole circumstances of the fact. But, with respect to poisoning, that necessarily implies malice, however great the provocation may have been, because it is a deliberate act, though no other proof of malice exists. 1 *Hawk*, c. 31. s. 30. 3 *Inst.* 48. 4 *Bl. Com.* 193-200. *Foster*, 68. *Commonwealth v. Norton*, 3 *Boston Law Reporter*, 241. *Commonwealth v. Kinney*, *ibid.* 405.

By the common law, independent of all local legislation, it is not only murder for one man to kill another in a duel, but his second, also, is guilty of murder: and the better opinion is that this extends even to the second of him who was killed, because the death happened upon a compact in which all were engaged. See *ante*, 443, and *post*, 453.

To make a man principal in a murder, it is not necessary that he should inflict the mortal wound; It is sufficient if he be present, aiding and abetting the act. Nor is it necessary that there should be a particular malice against the deceased. It is sufficient if there be deliberate malignity and depravity in the conduct of the party. *U. States v. Ross*, 1 *Gallison. C. C. R.* 524.

If there be an old quarrel betwixt *A.* and *B.* and they are reconciled again, and then upon a new and sudden falling out *A.* kills *B.* this is not murder, but if upon circumstances it appears, that the reconciliation was but pretended or counterfeit, and that the hurt done was upon the score of the old malice, then it is murder.

Malice may be exerted against a party in his absence; as where *A.* lays poison for *B.* in his victuals, which *B.* afterwards takes and dies. So, where *A.* procures an idiot or lunatic to kill *B.*, which he does. In both instances *A.* is guilty of the murder as principal, and *B.* is merely an instrument. *Vaux's case*, 4 *Coke*, 446. *Rex v. Giles*, 1 *Moody*, C. C. 166. *Hawkins*, c. 1. s. 2.

Most of the above cases on the subject of express malice are collected in *Wharton's Am. Cr. L.* p. 227-9.

If two persons fight, and one overpower the other, and knock him down, and put a rope round his neck and strangle him, this will be murder. *Rex v. Shaw*, 6 *Car. & P.* 372.

If persons cover another with straw and set fire to it, intending to do him a serious injury, and he die, it is murder, though they did not intend to kill him. But if they intended to act in sport, and merely to frighten him, it is manslaughter, *Errington's case*, 2 *Lewin*, C. C. 217.

Seem, that where guns are fired by one vessel at another vessel, and those on board her generally, those guns are to be considered as shot at each individual on board her. *Rex v. Bailey*, R. & R. C. C. 1. 1 *Russ. C. & M.* 109.

If a person being attacked should, from an apprehension of immediate violence—an apprehension which must be well grounded and justified by the circumstances—throw himself for escape into a river, and be drowned, the person attacking him is guilty of murder. *Reg. v. Pitts*, 1 *Car. & M.* 284.

If a master, by premeditated negligence, or harsh usage, cause the death of his apprentice, it is murder. *Rex v. Self*, 1 *Leach*, C. C. 137; 1 *East*, P. C. 226.

It is murder to cause the death of an infant of tender years, unable to provide food for and take care of itself, by not providing sufficient food and nourishment, whether such infant be child, apprentice or servant, whom the party is obliged by duty or contract to provide for. *Rex v. Squires*, 1 *Russ. C. & M.* 426.

Where a person in *loco parentis*, inflicts corporal punishment on a child, and compels it to work for an unreasonable number of hours, and beyond its strength, and the child dies, the death being of consumption, but hastened by the ill-treatment, it will not be murder, but only manslaughter in the person inflicting the punishment, although it was cruel and excessive, and accompanied by violent and threatening language, if such person believed that the child was shamming illness, and was really able to do the quantity of work required. *Rex v. Cheeseman*, 7 *Car. & P.* 454.

On an indictment for the murder of an aged and infirm woman, by confining her against her will, and not providing her with meat, drink, clothing, firing, medicines, and other necessaries, and not allowing her the enjoyment of the open air, in breach of an alleged duty; if the jury think that the prisoner was guilty of wilful neglect, so gross and wilful that they are satisfied he must have contemplated her death, he will be guilty of murder; but if they only think that he was so careless that her death was occasioned by his negligence, though he did not contemplate it, he will be guilty of manslaughter. *Reg. v. Marriott*, 8 *Car. & P.* 425.

If a woman left her child, a young infant, at a gentleman's door, or other place where it was likely to be found and taken care of, and the child died, it would be manslaughter only; but if the child were left in a remote place, where it was not likely to be found, e. g. on a barren heath, and the death of the child ensued, it would be murder. *Ib.*

If a person do an act towards another who is helpless, which must necessarily lead to the death of that other, the crime amounts to murder; but if the circumstances are such that the person could not have been aware that the result would be death, that would reduce the crime to manslaughter, provided that the death was occasioned by an unlawful act, but not such an act as showed a malicious mind. *Reg. v. Walters*, 1 *Car. & M.* 164.

"Malice is express" (says Chief Justice *Parsons*, *Selfridge's Trial*, p. 5.) "where there was a premeditated intention to kill. Malice is implied when the killing is attended

If there be malice by *A.* against *B.* and by *B.* against *A.* and they meet, and upon the account of that malice *A.* strikes *B.* and *B.* thereupon kills *A.* (otherwise than in his own necessary defense) it is murder in *B.* but if they meet accidentally, and *A.* assaults *B.* first, and *B.* merely in his own defense, without any other malicious design kills *A.* this is not murder in *B.* for it was not upon the account of the former malice, but upon a new and sudden emergency for the safe-guard of his life; but if *A.* and *B.* had met deliberately to fight, and *A.* strikes *B.* and pursues *B.* so closely, that *B.* in safe-guard of his own life kills *A.* this is murder in *B.* because their meeting was a compact, and an act of deliberation, and therefore all, that follows thereupon, is presumed to be done in pursuance thereof, and thus is *Mr. Dalton, cap. 93. p. 241.(i)* to be understood.

But yet *quære*, whether if *B.* had really and truly declined the fight, ran away as far as he could, (suppose it half a mile,) offered to

(i) *New Edit. cap. 145. p. 471.*

with circumstances which indicate great wickedness and depravity of disposition, a heart void of social duty and fatally bent on mischief." "Malice is implied," says *Mr. East*, "from any deliberate act however sudden." And he adds, (225.) "He who wilfully and deliberately does any act which apparently endangers another's life, and thereby occasions his death shall, unless he clearly prove the contrary, be adjudged to kill him of malice prepense." "Malice," says *Judge Addison*, quoted and approved by *Judge Rush*, (trial of *Richard Smith*, in *Philadelphia*, for murder of *John Carson*, May, 1816, p. 83.) "is a deliberate, wicked, vindictive temper, regardless of social duty, and bent on mischief. When a wilful killing is proved, the law presumes malice, unless the killer prove the contrary," (page 84.) Deliberate killing without passion, whatever may have been the provocation, is murder. In page 231 it is said, the law does not fix the time of such deliberation. "If the defendant has time to think," said *Judge Rush*, in that trial, (page 231.) "and did intend to kill for a minute, as well as for an hour or a day, it is a deliberate, premeditated killing, constituting murder. To deliberate is to reflect with a view to make a choice, and a reflection but for a minute is a sufficient deliberation. No time is too short for a wicked man to frame in his mind a scheme of murder, and to contrive the means of accomplishing it."

If a man, says *Chief Justice Parker*, in *Philips' Trial*, 45, kills another suddenly with alight or no provocation, the law implies malice.

Foster says, (*Crown Law*, 380,) malice is implied where an officer is killed in the lawful discharge of his duty. *Lord Hale* expresses it rather more strongly: "To kill an officer in the faithful discharge of his duty, is murder, and the law will imply the highest degree of malice," *post*, 465.

Malice may also be inferred from the instrument used, the mode in which the weapon was obtained and selected, especially if it was the best choice for the purpose; the manner, too, in which the weapon was used, the repetition of dangerous wounds, the choice of vital spots for those wounds, and the perseverance in the assault until death be produced; these are all circumstances indicative of malice. Deliberate malice may also be seen in the mode of attack, the time selected for it when the victim is off his guard, when he has no opportunity for self defence, when stabs are given from behind, pursuing a man, selecting him from among others, advancing on him in a studied, circuitous manner which could not be perceived, intercepted, or prevented, also show calculation, deliberation, and malice.

Finally, if there was cause, real or imaginary, for resentment; if the purpose of killing was long harboured; if no motive but revenge can be assigned for the fatal deed; if revenge was harboured, and if previous threats have been made, these facts would be evidence of express malice.

yield, and yet *A.* refusing to decline it had attempted his death, and *B.* after all this kills *A.* in his own defence, whether it excuseth him from murder; but if the running away were only a pretense to save his own life, but was really designed to draw out *A.* to kill him, it were murder.[7]

A. commands *B.* to kill *C.* and before the act done repents, and countermands *B.* and charges him not to do it, yet *B.* doth it, *A.* is not guilty. *Coke P. C. p. 51.*

A. challenges *C.* to meet in the field to fight, *C.* declines it as much as he can, but is threatened by *A.* to be posted for a coward, &c. if he meet not, and thereupon *A.* and *B.* his second, and *C.* and *D.* his second, meet and fight, and *C.* kills *A.* [453] this is murder in *C.* and *D.* his second, and so ruled in *P.*

14 *Jac.* in *Taverner's case*, (k) tho *C.* unwillingly accepted the challenge.[8]

But if it seems not to be murder in *B.* because tho he had malice against *C.* and *D.* his opponents, yet he had none against *A.* tho some have thought it to be murder also in *B.* because done by compact and agreement. 22 *Eliz.* 3. 262. *sed quære de hoc.*[9]

If *A.* challenge *B.* to fight, *B.* declines the challenge, but lets *A.* know, that he will not be beaten, but will defend himself; if *B.* going about his occasions wears his sword, is assaulted by *A.* and kild, this is murder in *A.* but if *B.* had kild *A.* upon that assault, it

(k) 1 *Rel. Rep.* 360. 3 *Bul.* 171.

[7] This quære of lord *Hale* is discussed by Mr. *East*, and it is observed that *Blackstone* (4 *Bl. Com.* 185,) expressly puts the same case of a duel as *Hale*, but does not subjoin the same doubt; and that it was considered as settled law by the Chief Justice in *Onely's case*, (*Ld. Raymond*, 1489.) Mr. *East*, after reasoning in extenuation of the crime of one so declining to fight, proceeds thus: "Yet still it may be doubtful, whether, admitting the full force of this reasoning, the offence can be less than manslaughter, or whether in such case the party can altogether excuse himself upon the foot of necessity in self-defence, because the necessity which was induced from his own faulty and illegal act, namely, the agreement to fight, was in the first instance deliberately foreseen and resolved upon, in defiance of the law." 1 *East, P. C. c. 5. s. 54. p. 284.*

[8] Upon this principle, deliberate duelling if death ensueth, is in the eye of the law murder; for duels are generally founded in deep revenge; and though a person should be drawn into a duel, not upon a motive so criminal, but merely upon the punctilio of what the swordsmen falsely call honour, that will not excuse; for he that deliberately seeketh the blood of another upon a private quarrel, acteth in defiance of all laws, human and divine, whatever his motive may be. *Foster*, 297. 1 *Hawk. c. 31. s. 21, 22-29.* 4 *Bl. Com.* 191. 3 *Inst.* 51. *Lord Morley's case*, 7 *St. Tr.* 421.

Both principals and seconds are liable for murder if either of the parties are killed, all being engaged in an unlawful act, having for its direct object the taking of life. The old view, that the second of the killed is not liable, is now not law, if it ever was. *Reg. v. Young*, 8 *Car. & P.* 644. See also *Smith v. The State*, 1 *Yerger*, 228. *Rex v. Rice*, 3 *East*, 581. *Rex v. Murphy*, 6 *C. & P.* 103. 1 *Rel. Rep.* 360. *ante*, 443.

If, however, the combat is not deliberate, but the immediate consequence of sudden quarrel, it does not fall within this doctrine, and must be judged of by the circumstances attending the particular case. *Foster*, 295. 1 *East, P. C.* 242.

[9] The later cases consider all present, aiding and abetting, alike guilty of murder, and do not recognise the distinction made in the text. See *ante*, p. 443, and p. 453, *note*.

had been *se defendendo*, if he could not otherwise escape, or bare homicide, if he could escape, and did not.

But if *B.* had only made this as a disguise to secure himself from the danger of the law, and purposely went to the place, where probably he might meet *A.* and there they fight, and he kills *A.* then it had been murder in *B.* but herein circumstances of the fact must guide the jury.

If *A.* and *B.* fall suddenly out, and they presently agree to fight in the field, and run and fetch their weapons, and go into the field and fight, and *A.* kills *B.* this is not murder but homicide; for it is but a continuance of the sudden falling out, and the blood was never cooled; but if there were deliberation, as that they meet the next day, nay, tho it were the same day, if there were such a competent distance of time, that in common presumption they had time of deliberation, then it is murder. *Co. P. C. p. 51. Jac. B. R. Ferrer's case, M. 8 Jac. B. R. Morgan's case.*[10]

A. the son of *B.* and *C.* the son of *D.* fall out in the field and fight, *A.* is beaten, and runs home to his father all bloody, *B.* presently takes a staff, runs into the field, being three-quarters of a mile distant, and strikes *C.* that he dies, this is not murder in *B.* because done in sudden heat and passion. *T. 9 Jac. B. R. 12 Co. Rep. p. 87.(1)*[11]

(1) *Cro. Jac. 296. Rayley's case.*

[10] *Foster, 296. Rex v. Lynch, 5 C. & P. 324. Reg. v. Kirkham, 8 C. & P. 115.*

[11] In every case of homicide upon provocation, how great soever it be, if there is sufficient time for passion to subside, and for reason to interpose, such homicide will be murder. *A.* findeth a man in the act of adultery with his wife, and in the first transport of passion killeth him; this is no more than manslaughter. But had he killed the adulterer deliberately and upon revenge after the fact and sufficient cooling time, it had been undoubtedly murder. For let it be observed, that in all possible cases deliberate homicide upon a principle of revenge is murder. No man under the protection of the law is to be the avenger of his own wrongs. If they are of such a nature for which the laws of society will give him an adequate remedy, thither he ought to resort. But be they of what nature soever, he ought to bear his lot with patience, and remember that vengeance belongeth only to the Most High. *1 Vent, 158. Sir T. Raym. 212.*

But if, upon a sudden quarrel, the parties fight upon the spot, or if they presently fetch their weapons and go into the field and fight, and one of them falleth, it will be but manslaughter; because it may be presumed the blood never cooled. It will be otherwise if they appoint to fight the next day, or even upon the same day at such an interval as that the passion might have subsided: or if from any circumstances attending the case it may be reasonably concluded, that their judgment had actually controlled the first transports of passion before they engaged. The same rule will hold, if after a quarrel they fall into other discourse or diversions, and continue so engaged a reasonable time for cooling. *Foster, 297. Kel. 27. 1 Hawk, c. 31. s. 22, 29. 4 Bl. Com. 191. 3 Inst. 51. 1 Bulst, 86. See Morley's case, 7 St. Tr. 421. Cromp. 23. Kel. 56.*

Where a man assailed has retreated from the assailant, and is secure in his separation from further personal aggression, he has no right to return armed to the scene of conflict, and voluntarily engage in a new contest with the aggressor. If he do so, and slay him, he is guilty of murder or manslaughter, according to the circumstances under which the homicide is committed. If, on receiving such a deadly assault, he suddenly leave the scene of outrage, procure arms, and in the heat of blood consequent upon the wrong, return and renew the combat, and slay his adversary, both being armed, such an homicide would be but manslaughter. For the law from its sense of and tenderness towards human infirmity, would consider that sufficient time had not elapsed for the blood

A boy came into *Osterly* park to steal wood, and seeing the woodward climbs up a tree to hide himself, the woodward bids him come down, he comes down, and the woodward struck him

to cool and reason to resume its empire over the mind, smarting under the original wrong. *Com. v. Hare*, 4 *Penn. Law Jour.* 257. The law assigns no limits within which cooling time may be said to take place. Every case must depend on its own circumstances, *Com. v. Dougherty*, 7 *Smith's Law*, 695, but the time in which an ordinary man, in like circumstances, would have cooled, may be said to be the reasonable time. *Stole v. McCants*, 1 *Spear*, 384.

In 1725, *John Onely* was indicted for the murder of *William Gower*, and a special verdict was found, stating that the prisoner, being in company with the deceased and three other persons at a tavern in a friendly manner, after some time began playing at hazard, when *Rich*, one of the company, asked if any one would set him three half-crowns, whereupon the deceased, in a jocular manner, laid down three half-pence, telling *Rich* he had set him three pieces, and the prisoner at the same time set *Rich* three half-crowns, and lost them to him; immediately after which the prisoner, in an angry manner, turned about to the deceased, and said, "it was an impertinent thing to set half-pence, and that he was an impertinent puppy for so doing;" to which the deceased answered, "whoever called him so was a rascal." Thereupon the prisoner took up a bottle, and with great force threw it at the deceased's head, but did not hit him, the bottle only brushing some of the powder out of his hair. The deceased, in return, immediately tossed a candlestick or bottle at the prisoner, which missed him; upon which they both rose up to fetch their swords, which then hung up in the room, and the deceased threw his sword, but the prisoner was prevented from drawing his by the company; the deceased thereupon threw away his sword, and the company interposing, they sat down again for the space of an hour. At the expiration of that time the deceased said to the prisoner, "we have had hot words, but you were the aggressor; but I think we may pass it over, and at the same time offered his hand to the prisoner, who made answer, "No, damn you, I will have your blood;" after which, the reckoning being paid, all the company except the prisoner left the room; but he, calling back the deceased, closed the door, and the rest of the company, shortly after, hearing a clashing of swords, found the deceased had received from the prisoner a mortal wound. It was further found, that from the throwing of the bottles there had been no reconciliation. Upon these facts all the judges were of opinion, that the defendant had been guilty of murder, and that from the period which had elapsed there had been reasonable time for cooling.

In delivering the opinion in this case, *Raymond*, C. J. discussed the subject of cooling time at length, and said, among other things, that "in cases of this nature the judges are to determine what is malice, or what is a reasonable time to cool; and they must do it upon the circumstances of the case; the jury are judges only of the fact, and we must determine whether it be deliberate or not. Hence it is, that in summing up an evidence, the judges direct the jury,—if you believe such a fact, it is so; if not, it is otherwise; and they find either a general or a special verdict upon it. There is no instance where the jury ever found that the fact was done of malice, or that the party had or had not time to cool; but that must be left to the judges upon the circumstances of the case. In *Holloway's* case, it was left to the court to determine whether the tying the boy to the horse's tail was not a malicious act. So in the case of the two boys who had quarrelled, and the father ran after one of them and killed him, the court, and not the jury, determined whether it was malice or not. *Palm*, 545.

In *Bromwick's* case, 1 *Lev.* 180, the declining an immediate encounter, because of the disadvantage of his high heels, was held to be a deliberate act, that manifested a coolness: and the same has been held, where the parties have debated about the conveniency of place. *Kelyng*, 56.

If *A.* says to *B.* I will give you a pot of ale to strike me, and *B.* strikes him, and immediately *A.* kills *B.*, it is murder; for *A.* knew what he was about, and deliberated with himself how he might perpetrate the fact, and be at the same time (as he thought) within the protection of the law. *Crompt.* 49.

From all which cases it appears, that though the law of *England* is peculiarly favourable in making this distinction with regard to the passions of men, yet it must be such a passion as for the time deprives a man of the exercise of his reason; and wherever it

twice, and then bound him to his horse-tail, and dragged him till his shoulder was broke, whereof he died; it was ruled murder, be-

has appeared that he had the exercise of his reason, he is out of the protection of the law, and has been held guilty of murder. Here was a reasonable time to cool, and it is plain it had its operation: the prisoner was cool enough to discourse for an hour; he determined in his own mind upon deliberation what he would do; and declared his intention in those bitter and deliberate expressions: "No, he would not pass it over, damn him, he would have his blood;" the young man must come back, for he had something to say to him. The interchange of blows, where there is malice, will make no alteration: it does not, indeed, appear who struck first upon his returning into the room; but it is sufficient that the verdict finds no act inconsistent with the malicious declaration of the party; nor can the declaration of the party deceased avail in this case, for that goes only to his receiving the wound in a fair manner with regard to the nature of the combat." *Rex v. Onely*, 2 *Strange*, 766.

Where the defendant, having been violently beaten and abused, made his escape, ran to his house, eighty yards off, got a knife, ran back, and on meeting with the deceased, stabbed him, it was held but manslaughter; but it was said that if, on the second meeting, the defendant had disguised the fact of having a weapon for the purpose of inducing the deceased to come within his reach, it would have been murder, such concealment affording ground for the presumption of deliberation. *State v. Norris*, 1 *Hay*, 429.

In order to mitigate a homicide, committed in a second combat, by what occurred at a previous one, which had fairly began on the sudden, both contests must be considered as making one combat, or the first as a separate combat, must be considered as a sufficient sudden provocation for either a second combat, or for a subsequent attack producing a contest not entitled to be called a mutual combat. Where it appeared that the prisoner and the deceased, after having been engaged in mutual combat, on sudden occasion, fairly begun, were separated at the request of the prisoner, who was overcome and beaten in the contest; that the prisoner was held by one of the persons present, but drew his knife and swore he would kill the deceased; that after releasing himself from the person holding him, he pursued the deceased, who had left the place of combat, and who, upon being apprized of the pursuit by a call from the person holding the prisoner, left the road on which he was walking, and provided himself with a rail from a neighbouring fence; that on his return towards the road he met the prisoner, gave back and struck him several blows upon the head as he rushed on, with the rail, which, breaking some ten paces from the point where the deceased began to give back, the prisoner closed and inflicted the mortal blow; and that sufficient time had transpired, not only for the deceased to adjust himself after the fight and walk deliberately two hundred and twenty-five yards, but for the prisoner afterwards to pass over the same ground, as also for a person at a neighbouring house, within hearing of the noise of the second quarrel, to reach the place of strife. The court, under this state of facts, were of opinion, that both contests could not have constituted one combat, nor could the second, in which the prisoner rushed with his drawn knife upon his adversary, who had snatched the readiest means of defence at hand, but was neither equally armed, nor willing to meet such a weapon, have been that fair struggle which the law denominates a mutual combat. The jury having found a verdict of guilty, the court refused to disturb it. *State v. McCants*, 1 *Spear*, 384.

If a father see a person in the act of committing an unnatural offence with his son, and instantly kill him, it seems that it would be only manslaughter, and that of the lowest degree; but if he only hear of it, and go in search of the person, and meeting him, strike him with a stick, and afterwards stab him with a knife and kill him, in point of law, it will be murder. *Reg. v. Fisher*, 8 *Car. & P.* 182.

In the same case, *per Park Baron, and Recorder Law*.

In a case of killing, whether the blood has had time to cool or not, is a question for the court and not for the jury; but it is for the jury to find what length of time elapsed between the provocation received and the act done. *Ib.*

Where the prisoner and the deceased, who were previously on intimate terms, were at a public-house drinking, when a scuffle ensued, and the deceased struck the prisoner in the eye and gave him a black eye, the prisoner called for the police, and went away upon

cause, 1. The correction was excessive, and 2. It was an act of deliberate cruelty. *M. 4 Car. B. R. Holloway's case.*(m)[12]

If the master designeth moderate correction to his servant, and accordingly useth it, and the servant by some misfortune dieth thereof, this is not murder, but *per infortunium*. *Crompt. 136. b. Dalt. cap. 96. p. 245.*(n) because the law alloweth him to use moderate correction, and therefore the deliberate purpose thereof is not *ex malitia præcogitata*.

But if the master design an immoderate or unreasonable correction, either in respect of the measure, or manner, or instrument thereof, and the servant die thereof, I see not how this can be excused from murder, if done with deliberation and design, nor from manslaughter, if done hastily, passionately, and without deliberation; and herein consideration must be had of the manner of the provocation, the danger of the instrument, which the master useth, and the age or condition of the servant that is stricken, and the like of a school-master towards his scholar.(o)

The sheriff hath a warrant to hang a man for felony, and he beheads him, this is held murder, for it is an act of deliberation. *Co. P. C. p. 52.*[13]

A man hath the liberty of *Infangthiefe*,(p) the steward of the court gives judgment of death against a prisoner against law, this was a cause of seizure of the liberty, but was not murder in the

(m) *Crö. Car. 131. W. Jones, 198. Kelyng, 127.*

(n) *Cap. 148. p. 478.*

(o) *Kelyng, 64, 65.*

(p) See *Spelman's Glossary, 313.*

the policeman coming up; in about five minutes, however, he returned and stabbed the deceased with a knife, which he usually carried about him: Lord Tenterden, C. J., said, that it was not every slight provocation, even by a blow, which will, when the party receiving it strikes with a deadly weapon, reduce the offence from murder to manslaughter; and that, if there had been any evidence of an old grudge between the parties, the crime would probably be murder; but he left it to the jury to say, whether, in the interval during which the prisoner was absent, there was time for his passion to cool and reason to gain dominion over his mind: if not, they should find him guilty of manslaughter only. *Rex v. Lynch, 5 C. & P. 324.*

If, in fine, there be a sufficient cooling time for passion to subside and reason to interpose, and the person so provoked afterwards kill the other this is deliberate revenge, and not heat of blood, and accordingly amounts to murder. *Wh. Am. C. L. 247. State v. Yarborough, 1 Hawks, 78. Rex v. Thomas, 7 C. & P. 817. 1 Hawkins, P. C. c. 31. s. 29. State v. Rutherford, 1 Hawks, 329. U. S. v. Thayer, 2 Wheeler, C. C. 503. People v. Garretson, 2 Wheeler's C. C. 347. Rex v. Rankin, 1 R. & R. 43. Rex v. Ayres, ibid. 1 East, P. C. 243. Rex v. Anderson, 1 Russ. 447. Rex v. Kissell, 1 C. & P. 437. Commonwealth v. Daily, 4 Penn. Law Journal, 158. Commonwealth v. Green, 1 Ashmead, 289.*

[12] So in all other cases when, upon a sudden provocation, one beats another in a cruel and unusual manner so that he dies, it is murder. *4 Bl. Com. 199. R. v. Tranter, et al, 1 Strange, 499. Foster, 291.* So also when the instrument used evidently endangers life, malice will be implied. *Rex v. Howland, 7 C. & P. 274. Macklin's case, 7 Lew. 225. 1 Hawk. P. C. c. 31. s. 39. Com. v. Drew, 4 Mass. 391. State v. Morgan, 3 Iredell, 136. Com. v. Murray, 2 Ashmead, 41. Penna. v. Bell Addison, 163; and the intention to kill, see Murder of First and Second Degrees, post, page 454.*

[13] See post. 496-502.

judge, *quia factum judicialiter, licet ignoranter.* 2 R. 3. 10. *n.* the case of the steward of the liberty of the abbot of *Crowland*. [14]

[14] The statutes which have chiefly affected the law of homicide since *Hale's* time are as follow:

The act, 9 *Geo.* 4. c. 31. "for consolidating and amending the statutes of *England* relative to offences against the person," provides:

I. That so much of the great charter made in the ninth year of the reign of king *Henry* the Third, as relates to inquisitions of life or member; and so much of a statute made in the fifty-second year of the same reign, as relates to murder; and so much of a statute made in the third year of the reign of king *Edward* the First, as relates to inquests of murder; and so much of a statute made in the sixth year of the same reign, as relates to any person killing another by misfortune or in his own defence, or in other manner without felony; and so much of a statute made in the second year of the reign of king *Henry* the Fifth as relates to persons fleeing for murders, manslaughter, robberies, and batteries; an act passed in the twenty-fourth year of the reign of king *Henry* the Eighth, intituled, "An act where a man killing a thief shall not forfeit his goods;" so much of an act passed the thirty-third year of the same reign, intituled "An act for murder and malicious bloodshed within the Courts," as relates to the punishment of manslaughter and of malicious striking, by reason whereof blood shall be shed; so much of an act passed in the first year of the reign of king *Edward* the Sixth, intituled "An act for the repeal of certain statutes concerning treasons, felonies, &c.," as relates to petty treason, murder, &c.; an act passed the fourth and fifth years of the reign of king *Philip* and queen *Mary*, intituled "An act that accessaries in murder and divers felonies shall not have the benefits of the clergy;" an act passed in the first year of the reign of king *James* the First, intituled "An act to take away the benefit of clergy from some kind of manslaughter;" an act passed in the second year of the reign of king *George* the Second, intituled, "An act for the trial of murders in cases where either the stroke or death only happens within that part of *Great Britain* called *England*;" that part of the act of the twelfth year of king *George* the First which is hereinbefore referred to, and the whole of an act in the twenty-fifth year of the reign of king *George* the Second, intituled, "An act for better preventing the horrid crime of murder," except so far as relates to rescues and attempts to rescue; an act passed in the forty-third year of the reign of king *George* the Third, intituled, "An act for the further prevention of malicious shooting, and attempting to discharge loaded fire arms, stabbing, cutting, wounding, poisoning, and the malicious using of means to procure the miscarriage of women, and also the malicious setting fire to buildings; and also for repealing a certain act made in *England* in the twenty-first year of the late king *James* the First, intituled, "An act to prevent the destroying and murdering bastard children," and also an act made in *Ireland* in the sixth year of the reign of the late queen *Anne*, also intituled "An act to prevent the destroying and murdering of bastard children," and for making other provisions in lieu thereof, and an act passed in the same forty-third year, intituled, "An act for the more effectually providing for the punishment of offences in wilfully casting away, burning or destroying ships and vessels, and for the more convenient trial of accessaries in felonies, and for extending the powers of an act made in the thirty-third year of the reign of king *Henry* the Eighth, as far as relates to murders, to accessaries to murders, and to manslaughter;" so much of an act passed in the first year of the reign of his present majesty, intituled, "An act to remove doubts and to remedy defects in the law with respect to certain offences committed upon the sea or within the jurisdiction of the Admiralty," as refers to the act of the forty-third year of the reign of *George* the Third hereinbefore first mentioned; an act passed the first year of the reign of his present majesty, intituled, "An act to repeal so much of the several acts passed in the thirty-ninth year of the reign of *Elizabeth*, the fourth of *George* the First, the fifth and eighth of *George* the Second, as inflict capital punishment on certain offences therein specified, and to provide more suitable and effectual punishment for such offences;" and an act passed in the third year of the present reign, intituled "An act for the further and more adequate punishment of persons convicted of manslaughter, and of servants convicted of robbing their masters, and of accessaries before the fact of grand larceny, and certain other felonies," shall continue in force until and throughout the last day of *June* in the present year, and shall from and after that

day as to that part of the United Kingdom called *England*, and as to offences committed within the jurisdiction of the Admiralty of *England*, be repealed, except so far as any of the said acts may repeal the whole or any part of any other acts, and except as to offences committed before or upon the said last day of *June*, which shall be dealt with and punished as if this act had not been passed; and this act shall commence and take effect (except as hereinbefore excepted) on the first-day of *July* in the present year.

II. That every offence which before the commencement of this act would have amounted to petit treason, shall be deemed to be murder only, and no greater offence; and all persons guilty in respect thereof, whether as principals or as accessaries, shall be dealt with, indicted, tried and punished as principals and accessaries in murder.

III. Provides for the punishment of principals and accessaries in murder.

IV. Provides for period of execution as to marks of infamy—sentence to be pronounced immediately—judges power to respite.

V. Provides for the dissection of the bodies of murderers.

VI. Prison regulation as to murderers under sentence.

VII. *British* subjects charged in *England* may be tried there for murder or manslaughter committed abroad.

VIII. Provides for the trial of murder and manslaughter in *England* when the death or the cause of the death only happens in *England*.

IX. Provides for the punishment of manslaughter.

The Act of 2 & 3 Will. IV. c. 75. s. 16. repeals so much of the foregoing act of 9 Geo. IV. c. 31, as directs that the bodies of murderers may be dissected—and provides that such bodies may be hung in chains or buried as the court shall direct.

The Act of 4 & 5 Will. IV. c. 26.

I. Recites that whereas by an act passed in the 9th year of Geo. IV. it was enacted, That the body of every person convicted of murder should after execution either be dissected or hung in chains as to the court which tried the offender should seem meet. And whereas by an act passed in the 10th year of the same reign a like provision is made with respect to persons convicted of murder in *Ireland*. And whereas by an act passed in the second and third years of Will. IV. so much of the provision of the act passed in the ninth year of Geo. IV. as authorized the court to direct that the body of a person convicted of murder should after execution be dissected is repealed, and instead thereof it was enacted that such court shall direct that a prisoner so convicted shall be either hung in chains or buried within the precincts of the prison in which such prisoner shall have been confined after conviction, as to the court should seem meet; and that the sentence to be pronounced by the court should express that the body of such prisoner shall be either hung in chains or buried within the precincts of the prison—and whereas it is expedient to amend these acts—enacts, That so much of the Act of 9 Geo. IV. as authorizes the court to direct that the body of a person convicted of murder should, after execution, be hung in chains, and also so much of the Act of 10 Geo. IV. as authorizes the court to direct that the body of a person convicted of murder should, after execution, be dissected or hung in chains, and also so much of the Act of the 2d & 3d Will. IV. as provides, that in every case of conviction of any prisoner for murder, the court shall direct such prisoner to be hung in chains, is hereby repealed.

II. That in every case of conviction in *Ireland*, of any prisoner for murder, the court shall direct such prisoner to be buried within the precincts of the prison where he shall have been confined after conviction.

The Act of 6 & 7 Will. IV. c. 30.

I. Repeals so much of two Acts of 9 and 10 Geo. IV. as directs the period of execution, and the prison discipline of persons convicted of the crime of murder; and

II. Enacts, that sentence of death may be pronounced after convictions for murder, in the same manner, and the judge shall have the same power, in all respects, as after conviction for other capital offences.

UNITED STATES.

In the *United States* statutory enactments have made some changes in the ancient doctrines of homicide. The rules of construction, however, remain the same and the meaning of technical terms is unaffected. In questions of the law of homicide, the common law authorities are the basis on which courts apply the statutes of the several states. *U. S. v. Magill*, 1 W. C. C. R. 463. *Pa. v. McFall*, Add. 456. *Com. v. Thompson*, 6 Mass. 134. *State v. Zeller*, 3 Halstead, 220. *State v. Norris*, 1 Hay, 429. *State v. Weaver*, 2 Hay. Com. v. Daily, 4 Penn. Law Journal, 154.

The Act of Congress of April 30, 1790, provides: If any person or persons shall commit, upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular State, murder or robbery, or any other offence, which, if committed within the body of a county, would, by the laws of the *United States*, be punishable with death; or if any captain or mariner of any ship or other vessel, shall piratically and feloniously run away with such ship or vessel, or any goods or merchandises to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship, or goods committed to his trust, or shall make a revolt in the ship; every such offender shall be deemed, taken and adjudged to be a pirate and felon, and being thereof convicted shall suffer death; and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended or into which he may first be brought.—*Act 30th April, 1790, sect. 8. See post. Act of 3d March, 1845, sec. 4.*

If any seaman or other person shall commit manslaughter upon the high seas, or confederate, or attempt or endeavour to corrupt any commander, master, officer, or mariner, to yield up, or to run away with any vessel, or with any goods, or to turn pirate, or to go over to or confederate with pirates, or in any wise trade with any pirate knowing him to be such, or shall furnish such pirate with any ammunition, stores or provisions of any kind, or shall fit out any vessel knowingly and with a design to trade with or supply or correspond with any pirate or robber upon the seas; or if any person shall any ways consult, combine, confederate or correspond with any pirate or robber on the seas, knowing him to be guilty of any such piracy or robbery; or if any seaman shall confine the master of any vessel, or endeavour to make a revolt in such vessel; such person so offending, and being thereof convicted, shall be imprisoned not exceeding three years, and fined not exceeding one thousand dollars. *Ibid. sect. 12.*

If any person or persons shall, within any fort, arsenal, dock-yard, magazine, or in any other place or district of country, under the sole and exclusive jurisdiction of the *United States*, commit the crime of wilful murder, such person or persons, on being thereof convicted, shall suffer death. *Ibid. sect. 3.*

If any person or persons shall, within any fort, arsenal, dock-yard, magazine, or other place or district of country, under the sole and exclusive jurisdiction of the *United States*, commit the crime of manslaughter, and shall be thereof convicted, such person or persons shall be imprisoned not exceeding three years, and fined not exceeding one thousand dollars. *Act 30th April, 1790, sec. 7.*

If any person upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin or bay, within the admiralty and maritime jurisdiction of the *United States*, and out of the jurisdiction of any particular state, shall commit the crime of wilful murder, or rape, or shall, wilfully and maliciously, strike, stab, wound, poison, or shoot at, any other person, of which striking, stabbing, wounding, poisoning, or shooting, such person shall afterwards die upon land within or without the *United States*; every person so offending, his or her counsellors, aiders or abettors, shall be deemed guilty of felony, and shall upon conviction thereof, suffer death. *Act 3d March, 1825, sect. 4.*

Whenever any criminal, convicted of any offence against the *United States*, shall be imprisoned in pursuance of such conviction, and of the sentence thereupon in the prison or penitentiary of any state or territory, such criminal shall, in all respects, be subject to the same discipline and treatment as convicts sentenced by the courts of the state or territory in which such prison or penitentiary is situated; and, while so confined therein, shall also be exclusively under the control of the officers having charge of the same, under the laws of the said state or territory. *Act of June 30, 1834.*

In a case before the Supreme Court of the *United States*, in 1818, the court said, that admitting that the third article of the constitution of the *United States*, which declares that, "The judicial power shall extend to all cases of admiralty and maritime jurisdiction," vests in the *United States* exclusive jurisdiction of all such cases, and that a murder committed in the waters of a state, where the tide ebbs and flows, is a case of admiralty and maritime jurisdiction; Congress have not, in the 8th section of the act of 1791, ch. 9. "for the punishment of certain offences against the *United States*," so exercised this power as to confer on the courts of the *United States* jurisdiction over such murder. *United States v. Evans, 3 Wheaton, 336.*

Congress having in the 8th section of the act of 1790, chapter 9th, provided for the punishment of murder, &c. committed "upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular State," it is not the offence committed, but the bay, &c. in which it is committed, that must be out of the jurisdiction of the State. *Ibid.*

The grant to the *United States* in the constitution of all cases of admiralty and maritime jurisdiction, does not extend to a cession of the waters in which these cases may arise, or of general jurisdiction over the same. Congress may pass all laws which are necessary for giving the most complete effect to the exercise of the admiralty and maritime jurisdiction granted to the government of the Union; but the general jurisdiction over the place, subject to this grant, adheres to the territory as a portion of territory not yet given away; and the residuary powers of legislation still remain in the state. *The United States v. Bevens*, 3 *Wheaton*, 336.

On an indictment for murder, founded on the 8th Sect. of the Act of Congress of April 30th, 1790, Ch. 36, the death as well as the mortal stroke must happen on the high seas. *United States v. Magill*, 4 *Dallas*, 426.

The Federal Courts have no cognizance of a case where the mortal stroke was given on the high seas, and the death occurred on shore in a foreign country. *Ibid.*

Murder, &c. committed by persons on board a vessel not at the time belonging to the subjects of any foreign power, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no government whatever, is within the 8th Section of the Act of Congress of April 30, 1790, Ch. 36, and is punishable in the Courts of the United States. *United States v. Palmer and others*, 3 *Wheaton*, 610. *United States v. Pirates*, 5 *Wheaton*, 192. See also *U. S. v. Furlong*, 5 *Wheaton*, 134.

Under the 12th Sect. of the Act of Congress of April 30, 1790, Ch. 36, manslaughter is not punishable in the Courts of the United States, unless it be committed on the high seas. *United States v. Wiltberger*, 5 *Wheaton*, 56.

The Courts of the United States have jurisdiction of murder, committed on the high seas, from a vessel belonging to the United States, by a foreigner being on board of such vessel, upon another foreigner being on board of a foreign vessel. *Ibid.*

The Courts of the United States have not jurisdiction of a murder committed by one foreigner on another foreigner, on board a foreign vessel on the high seas. *Ibid.*

There is a distinction between the crimes of murder and piracy. The latter is an offence within the criminal jurisdiction of all nations; not so with murder; it is punishable under the laws of each State. *Ibid.*

The Courts of the United States have jurisdiction, under the Act of April 30th, 1790, Ch. 36, of murder or robbery committed on the high seas, although not committed on board of a vessel belonging to citizens of the United States; as if she had no national character, but was held by pirates, or persons not lawfully sailing under the flag of any foreign nation. *United States v. Holmes et al.*, 5 *Wheat*, 412.

In the same case, and under the same act, if the offence be committed on board of a foreign vessel, by a citizen of the United States, or on board a vessel belonging to citizens of the United States by a foreigner, or by a citizen or foreigner, on board of a piratical vessel, the offence is equally cognizable by the Courts of the United States. *Ibid.*

It is immaterial whether the offence was committed on board of a vessel, or in the sea, by throwing the deceased overboard and drowning him, or by shooting him in the sea, though he was not thrown overboard. *Ibid.*

In an indictment for a piratical murder, under the eighth section of the Act of April 30th, 1790, Ch. 36, it is not necessary to allege the prisoner to be a citizen of the United States, nor that the crime was committed on board a vessel belonging to citizens of the United States, but it is sufficient to charge it as committed from on board such a vessel, by a mariner sailing on board such a vessel. *United States v. Pirates*, 5 *Wheaton*, 184.

To make a man a principal in a murder, it is not necessary that he should inflict the mortal wound. It is sufficient if he be present, aiding and abetting the act. Nor is it necessary that there should be a particular malice against the deceased. It is sufficient if there be deliberate malignity and depravity in the conduct of the party. *United States v. Ross*, 1 *Gallison*, C. G. R. 524.

If a number of persons conspire together to do an unlawful act, and death happen in the prosecution of the design, it is murder in all. If the unlawful act was a trespass, the murder, to affect all, must be done in the prosecution of the design. If the unlawful act be a felony, it will be murder in all, although the death happen collaterally, or beside the principal design. *Ibid.*

If several persons conspire to seize, with force and violence, a vessel, and run away with her, and if necessary, to kill any person who shall oppose them in the execution of the design, and death ensue in the prosecution of the design, it is murder in all who are present, aiding and abetting in executing the design. *Ibid.*

The legal meaning of "malice aforethought," in cases of homicide, is not confined to homicide committed in cold blood with settled design and premeditation, but extends to all cases of homicide, however sudden the occasion, where the act is done with such cruel circumstances as are the ordinary indications of a wicked, depraved, and malignant spirit; as where the punishment inflicted by a party, even upon provocation, is outrageous in its nature and continuance, and beyond all proportion to the offence; so that it is rather to be attributed to diabolical malignity and brutality than to human infirmity. And much, in these cases, depends on the instrument employed—whether dangerous to life or not. *The United States v. Cornell*, 2 *Mason's C. C. R.* 91.

NEW YORK.

Revised Statutes, Part IV. Chap. 1. Title 1.

Sec. 4. The killing of a human being without the authority of law, by poison, shooting, stabbing, or any other means, or in any other manner, is either murder, manslaughter, or excusable or justifiable homicide, according to the facts and circumstances of each case.

Sec. 5. Such killing, unless it be manslaughter or excusable or justifiable homicide, as hereinafter provided, shall be murder in the following cases:

1st. When perpetrated from a premeditated design to effect the death of the person killed, or of any human being.

2d. When perpetrated by any act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual.

3d. When perpetrated without any design to effect death, by a person engaged in the commission of any felony.

Sec. 6. Every inhabitant or resident of this State, who shall by previous appointment or engagement, fight a duel without the jurisdiction of this State, and in so doing, shall inflict a wound upon his antagonist or any other person, whereof the person thus injured shall die within this State, and every second, engaged in such duel, shall be deemed guilty of murder within this State, and may be indicted, tried and convicted in the county where such death shall happen.

Sec. 7. Every person indicted under the provisions of the last section may plead a former conviction or acquittal for the same offence, in another State or country; and if such plea be admitted or established, it shall be a bar to any further or other proceedings against such person for the same offence, within this State.

Sec. 8. The killing of a master by his servant, or of a husband by his wife, shall not be deemed any other or higher offence than if committed by any other person.

Sec. 9. Arson in the first degree, the punishment of which is prescribed in this title, consists in willfully setting fire to or burning in the night time, a dwelling-house, in which there shall be, at the time, some human being; and every house, prison, jail, or other edifice, which shall have been usually occupied by persons lodging therein at night, shall be deemed a dwelling-house of any person so lodging therein.

Sec. 10. But no warehouse, barn, shed, or other out-house, shall be deemed a dwelling-house, or part of a dwelling-house, within the meaning of the last section, unless the same be joined to, immediately connected with, and part of a dwelling-house.

Sec. 11. Whenever any convict shall be sentenced to the punishment of death, the Court, or a mayor thereof—of whom the presiding judge shall always be one, shall make out, sign and deliver to the Sheriff of the county, a warrant stating such conviction and sentence, and appointing the day on which such sentence shall be executed.

Sec. 12. Such day shall not be less than four weeks, and not more than eight weeks from the time of the sentence.

Sec. 13. The presiding judge of the Court at which such conviction shall have taken place, shall immediately thereupon transmit to the Governor of this State, by mail, a statement of such conviction and sentence, with the notes of testimony taken by such judge on the trial. The expense of such statement, to be estimated at the rate allowed for drafts and copies of pleadings in the Supreme Court, shall be audited by the Comptroller, and paid out of the treasury.

Sec. 14. The Governor shall be authorized to require the opinion of the Chancellor, the justices of the Supreme Court, and of the attorney general, or of any of them, upon any statement so furnished.

Sec. 15. No judge, Court, or officer, other than the Governor, shall have any authority

to reprieve or suspend the execution of any convict sentenced to the punishment of death; except sheriffs, in the cases and in the manner hereinafter provided.

Sec. 16. If after any convict shall have been sentenced to the punishment of death, he shall become insane, the Sheriff of the county, with the concurrence of the circuit judge of the circuit, or if he be absent from the county, with the concurrence of any judge of the Court before which the conviction was had, may summon a jury of twelve electors to inquire into such insanity, and shall give immediate notice thereof to the district attorney of the county.

Sec. 17. The district attorney shall attend such inquiry, and may produce witnesses before the jury; for which purpose he shall have the same power to issue subpoenas as for witnesses to attend a grand jury, and disobedience thereto may be punished by the Court of Oyer and Terminer which shall next sit in such county, in the same manner as disobedience to any process issued by such Court.

Sec. 18. The inquisition of the jury shall be signed by them and the Sheriff. If it be found by such inquisition that such convict is insane, the Sheriff shall suspend execution of the warrant directing the death of such convict, until he shall receive a warrant from the Governor of this State, or from the justices of the Supreme Court, directing the execution of such convict.

Sec. 19. The Sheriff shall immediately transmit such inquisition to the Governor, who may, as soon as he shall be convinced of the sanity of such convict, issue a warrant appointing a time and place for his execution, pursuant to his sentence.

Sec. 20. If a female convict sentenced to the punishment of death, be pregnant, the Sheriff shall in like manner summon a jury of six physicians, and shall give the like notice thereof to the district attorney, who shall attend and have power to issue subpoenas, as herein before provided, and with the like effect. An inquisition shall in like manner be made and signed by the jurors and the Sheriff.

Sec. 21. If by such inquisition it appear that such female convict is quick with child, the Sheriff shall in like manner suspend the execution of her sentence, and shall transmit the inquisition to the Governor.

Sec. 22. Whenever the Governor shall be satisfied that such female convict is no longer quick with child, he shall issue his warrant appointing a day for her execution pursuant to her sentence, or he may in his discretion commute her punishment to perpetual imprisonment in the State prison.

Sec. 23. Whenever for any reason, any convict sentenced to the punishment of death, shall not have been executed pursuant to such sentence, and the same shall stand in full force, the Supreme Court, on the application of the attorney general, or of the district attorney of the county where the conviction was had, shall issue a writ of habeas corpus, to bring such convict before such Court; or if he be at large, a warrant for his apprehension may be issued by the said Court, or any justice thereof.

Sec. 24. Upon such convict being brought before the Court, they shall proceed to inquire into the facts and circumstances—and if no legal reasons exist against the execution of such sentence, they shall sign a warrant to the Sheriff of the proper county, commanding him to do execution of such sentence, at such time as shall be appointed therein; which shall be obeyed by such sheriff accordingly.

Sec. 25. The punishment of death shall in all cases be inflicted, by hanging the convict by the neck, until he be dead.

Sec. 26. Whenever any person shall be condemned to suffer death for any crime of which such person shall have been convicted in any Court of this State, such punishment shall be inflicted within the walls of the prison of the county in which such conviction shall have taken place, or within a yard or enclosure adjoining said prison.

Sec. 27. It shall be the duty of the Sheriff or under-sheriff of the county to be present at such execution, and to invite the presence, by at least three days' previous notice, of the judges, district attorney, clerk and surrogate of said county, together with two physicians and twelve reputable citizens, to be selected by said Sheriff or under-sheriff. And the said Sheriff or under-sheriff shall, at the request of the criminal, permit such minister or ministers of the gospel, not exceeding two, as said criminal shall name, and any of the immediate relatives of said criminal, to attend and be present at such execution; and also such officers of the prison, deputies and constables as said Sheriff or under-sheriff shall deem expedient to have present; but no other persons than those herein mentioned shall be permitted to be present at such execution; nor shall any person under age be allowed to witness the same.

Sec. 28. The Sheriff or under-sheriff and judges attending such execution, shall prepare and sign, officially, a certificate setting forth the time and place thereof, and that

such criminal was then and there executed in conformity to the sentence of the Court, and the provisions of this act; and shall procure to said certificate the signatures of the other public officers and persons not relatives of the criminal, who witnessed such execution. And the Sheriff or under-sheriff shall cause such certificate to be filed in the office of the clerk of said county, and a copy thereof to be published in the State paper, and in one newspaper, if any, printed in said county. 2 R. S. 2d Ed. p. 546, et seq.

Title 2, Article 1, (of same part and chapter.)

Sec. 1. The killing of one human being, by the act, procurement or omission of another, in cases where such killing shall not be murder according to the provisions of the first title of this chapter, is either justifiable or excusable homicide or manslaughter.

Sec. 2. Such homicide is justifiable when committed by public officers, and those acting by their command, in their aid and assistance, either—

1. In obedience to any judgment of a competent court; or,
2. When necessarily committed in overcoming actual resistance to the execution of some legal process, or to the discharge of any other legal duty; or,
3. When necessarily committed in retaking felons who have been rescued or who have escaped; or,
4. When necessarily committed in arresting felons fleeing from justice.

Sec. 3. Such homicide is also justifiable, when committed by any person, in either of the following cases:

1. When resisting any attempt to murder such person, or to commit any felony upon him or her, or upon or in any dwelling-house in which such person shall be; or,
2. When committed in the lawful defence of such person, or of his or her husband, wife, parent, child, master, mistress or servant, when there shall be a reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and there shall be imminent danger of such design being accomplished; or,
3. When necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed; or in lawfully suppressing any riot; or in lawfully keeping and preserving the peace.

Sec. 4. Such homicide is excusable when committed—

1. By accident and misfortune in lawfully correcting a child or servant; or in doing any other lawful act by lawful means with usual and ordinary caution, and without any unlawful intent; or,
2. By accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any undue advantage being taken, and without any dangerous weapon being used, and not done in a cruel or usual manner.

Sec. 5. Whenever it shall appear to the jury, on the trial of any person indicted for murder or manslaughter, that the alleged homicide was committed under circumstances, or in cases where by law such homicide was justifiable or excusable, the jury shall render a general verdict of not guilty.

Sec. 6. The killing of a human being, without a design to effect death, by the act, procurement, or culpable negligence of any other, while such other is engaged—

1. In the perpetration of any crime or misdemeanor not amounting to felony; or,
2. In an attempt to perpetrate any such crime or misdemeanor.

In cases where such killing would be murder at the common law, shall be deemed manslaughter in the first degree.

Sec. 7. Every person deliberately assisting another in the commission of self-murder, shall be deemed guilty of manslaughter in the first degree.

Sec. 8. The wilful killing of an unborn quick child, by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter in the first degree.

Sec. 9. Repealed. See post, act of May 13th, 1845.

Sec. 10. The killing of a human being, without a design to effect death, in a heat of passion, but in a cruel and usual manner, unless it be committed under such circumstances as to constitute excusable or justifiable homicide, shall be deemed manslaughter in the second degree.

Sec. 11. Every person who shall unnecessarily kill another, either

1. While resisting an attempt by such other person to commit any felony, or to do any other unlawful act; or,
 2. After such attempt shall have failed;
- Shall be deemed guilty of manslaughter in the second degree.

Sec. 12. The killing of another in the heat of passion, without a design to effect death, by a dangerous weapon, in any case except such wherein the killing of another

is herein declared to be justifiable or excusable, shall be deemed manslaughter in the third degree.

Sec. 13. The involuntary killing of a human being, by the act, procurement, or culpable negligence of another, while such other person is engaged in the commission of a trespass, or other injury to private rights or property, or engaged in an attempt to commit such injury, shall be deemed manslaughter in the third degree.

Sec. 14. If the owner of a mischievous animal, knowing its propensities, wilfully suffer it to go at large, or shall keep it without ordinary care, and such animal, while so at large or not confined, kill any human being, who shall have taken all the precautions which the circumstances may permit, to avoid such animal, such owner shall be deemed guilty of manslaughter in the third degree.

Sec. 15. Any person navigating any boat or vessel for gain, who shall wilfully or negligently receive so many passengers, or such a quantity of other lading, that by means thereof such boat or vessel shall sink or overset, and thereby any human being shall be drowned or otherwise killed, shall be deemed guilty of manslaughter in the third degree.

Sec. 16. If the captain or any other person, having charge of any steamboat used for the conveyance of passengers, or if the engineer or other person having charge of the boiler of such boat or of any other apparatus for the generation of steam, shall, from ignorance or gross neglect, or for the purpose of excelling any other boat in speed, create, or allow to be created, such an undue quantity of steam as to burst or break the boiler or other apparatus in which it shall be generated, or any apparatus or machinery connected therewith, by which bursting or breaking, any person shall be killed: every such captain, engineer, or other person, shall be deemed guilty of manslaughter in the third degree.

Sec. 17. If any physician, while in a state of intoxication, shall, without a design to effect death, administer any poison, drug or medicine, or do any other act to another person, which shall produce the death of such other, he shall be deemed guilty of manslaughter in the third degree.

Sec. 18. The involuntary killing of another, by any weapon, or by means neither cruel nor unusual in the heat of passion, in any cases other than such as are herein declared to be excusable homicide, shall be deemed manslaughter in the fourth degree.

Sec. 19. Every other killing of a human being, by the act, procurement, or culpable negligence of another, where such killing is not justifiable or excusable, or is not declared in this chapter murder, or in this title manslaughter of some other degree, shall be deemed manslaughter in the fourth degree.

Sec. 20. Persons convicted of manslaughter in the first, second, or third degrees, shall be punished by imprisonment in a state prison, as follows:

1. Persons convicted of manslaughter in the first degree, for a term not less than seven years.

2. If convicted of manslaughter in the second degree, for a term not less than four, and not more than seven years.

3. If convicted of manslaughter in the third degree, for a term not more than four years, and not less than two years.

Sec. 21. Every person convicted of manslaughter in the fourth degree, shall be punished by imprisonment in a state prison for two years, or by imprisonment in a county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment. 2 R. S. 2d ed. p. 546, et seq.

By the Act of May 13, 1845.

1. Every person who shall administer to any person pregnant with a quick child, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, shall be deemed guilty of manslaughter in the second degree.

2. Every person who shall administer to any pregnant woman, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug, or substance or thing whatever, or shall use or employ any instruments or other means whatever, with intent thereby to procure the miscarriage of any such woman, shall, upon conviction, be punished by imprisonment in a county jail, not less than three months nor more than one year.

3. Every woman who shall solicit of any person any medicine, drug, or substance or thing whatever, and shall take the same, or shall submit to any operation or other means

whatever, with intent thereby to procure a miscarriage, shall be deemed guilty of a misdemeanor, and shall upon conviction, be punished by imprisonment in the county jail not less than three months nor more than one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment.

4. Any woman who shall endeavour privately, either by herself or the procurement of others, to conceal the death of any issue of her body, which if born alive would by law be a bastard, whether it was born dead or alive, or whether it was murdered or not, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by imprisonment in a county jail not exceeding one year.

5. Any woman who shall be convicted a second time of the offence specified in the fourth section of this act, shall be imprisoned in a state prison for a term not less than two or more than five years.

6. Section nine, article first, title second, of chapter one, of the fourth part of the *Revised Statutes*; and section twenty-one, title six, chapter one, of the fourth part of the *Revised Statutes*, are hereby repealed.

In *Enoch's case*, (1834) Chancellor *Walworth* delivering the judgment of the Court of Errors of *New York*, said: "Where an offence is created by statute, which was not an offence by the common law, it is a general rule that the indictment must charge the offence to have been committed under the circumstances, and with the intent mentioned in the statute, which of course contains the only appropriate definition of the crime. *State v. Jones*, 2 *Yerg. Ten. R.* 22. *State v. O. Bannon*, 1 *Bailey's Law, R.* 144. But even in that case it is not necessary to pursue the exact words of the statute creating the offence, provided other words are used in the indictment which are equivalent, or words of more extensive signification, and which necessarily include the words used in the statute; as where *advisedly* is substituted for *knowingly*, or *maliciously* for *wilfully*, and the like. *The King v. Fuller*, 1 *Bos. & Pull.* 180. *United States v. Bachelder*, 2 *Gall. R.* 15. It is otherwise in indictments for common law offences, where the law has adopted certain technical expressions to define the offence, or to indicate the intention with which it was committed; in which cases the crime must be described, or the intention must be expressed by the technical terms prescribed, and no other. Thus, in an indictment for murder, the terms, murder of his malice aforethought, are considered absolutely necessary in describing the offence: and if these words are left out of the indictment, it will be deemed a case of manslaughter only. In determining the question whether an indictment should be drawn as at the common law, or should appear to be founded upon a statutory provision which is applicable to the offence, the following rules are to be observed: If the statute creates an offence, or declares a common law offence, when committed under particular circumstances not necessarily included in the original offence, punishable in a different manner from what it would have been without such circumstances; or where the statute changes the nature of the common law offence to one of a higher degree, as where what was originally a misdemeanor is made a felony, the indictment should be drawn in reference to the provisions of the statute creating or changing the nature of the offence, and should conclude against the form of the statute; but if the statute is only declaratory of what was previously an offence at common law, without adding to, or altering the punishment, as was the statute of 25 *Edward III.*, declaring what should be considered and adjudged treason, the indictment need not conclude against the form of the statute. 1 *Deac. Crim. Law*, 661.

The object of the legislature in adopting the provisions of the revised statutes relative to homicide, in the recent revision of the laws, certainly was not to create a new offence of murder; but the intention undoubtedly was to restore the ancient common law on that subject, as it existed at the time when the common law form of indictment was originally adopted, and to draw a proper line of discrimination, if possible, between the offences which was hereafter to be considered a felonious killing, with malice aforethought, which alone constitutes the crime of murder, and what was to be deemed a felonious killing without such malice. How far they have succeeded as to the last of these objects, may perhaps be considered as a matter of some doubt. But they have unquestionably succeeded in restricting some cases to the grade of manslaughter, which, upon the principles of the common law, never ought to have been considered or adjudged to be offences of a higher grade; such as the unintentional killing of a person, or an offender who was engaged in a riot or other offence, that was a mere misdemeanor, and not a felony.

There is another class of cases, referred to on the argument as cases of murder at the common law, which, under the provisions of the revised statutes, must hereafter unquestionably be considered and adjudged to be manslaughter, and not murder. And there is also another and much larger class of cases which hereafter must be deemed murder, by

reason of the implied malice that will now attach to the unlawful killing; which-cases, before the revision of the statutes, were cases of manslaughter only. The two classes to which I allude, depend however, upon a principle which does not require any change to be made in the common law form of the indictment for murder. Malice was implied in many cases at the common law, where it was evident that the offenders could not have had any intention of destroying human life, merely on the ground that the homicide was committed, while the person who did the act was engaged in the commission of some other felony, or in an attempt to perpetrate some offence of that grade. Every felony, by the common law, involved a forfeiture of the lands or goods of the offender, upon a conviction of the offence; and nearly all offences of that grade were punishable with death, with or without benefit of clergy. In such cases, therefore, the malicious and premeditated intent to perpetrate one kind of felony, was, by implication of law, transferred from such offence to the homicide which was actually committed, so as to make the latter offence a killing with malice aforethought, contrary to the real fact of the case as it appeared in evidence. This principle is still retained in the law of homicide; and it necessarily follows, from the principle itself, that as often as the legislature creates new felonies, or raises offences which were only misdemeanors at the common law to the grade of felony, a new class of murders is created by the application of this principle to the case of a killing of a human being, by a person who is engaged in the perpetration of a newly created felony. So, on the other hand, when the legislature abolishes an offence which at the common law was a felony, or reduces it to the grade of a misdemeanor only, the case of an unlawful killing, by a person engaged in the act which was before a felony, will no longer be considered to be murder, but manslaughter merely. Such changes in the law of murder have often occurred, both in this country and in England; yet it never has before been thought necessary to change the common law form of the indictment to meet cases of this description. The court and jury in such cases immediately apply the common law principle, and the killing is adjudged to be murder or manslaughter, according to the nature and quality of the crime that the offender was perpetrating at the time the homicide was committed. Let us then apply these principles to the case now under consideration. The revised statutes having declared that hereafter offences punishable with death or with imprisonment in the state prison, and such offences only, shall be deemed felonies, it follows, of course, that an accessory to a suicide, or a person who unintentionally kills in an attempt to perpetrate a first offence of petit larceny, could not now be guilty of the common law offence of murder; and therefore the jury could not have found him guilty under an indictment like the one now before us. The unintentional killing of a female, in an attempt to produce an abortion, with her own consent, was not in itself murder, although at the common law, if she was quick with child, it formed a very aggravated case of felonious homicide; and it is now made murder in England, by the operation of the statute which makes the destruction of the child a capital felony. It was also murder here, by the operation of the third subdivision of the fifth section of the revised statutes, which attempt to define the crime of murder, until the legislature, by the amendment of the ninth section of the next title, 2 R. S. 661. § 9. 3. R. S. app. 158. § 58. made the killing of the mother, as well as the child, a case of manslaughter only. Some other cases of unintentional killing, by persons engaged in riots and other misdemeanors below the grade of felonies, which previous to the revision had also been improperly considered as cases of murder contrary to principles of the ancient common law, are now restored to that grade of homicide to which they properly belong. All offences of that description are now placed in the class of homicides committed without malice aforethought; except where the killing is perpetrated by an act imminently dangerous to others, and evincing a depraved mind, regardless of human life; which circumstances now, as at the common law, are sufficient to authorize the jury to find the defendant guilty of killing with malice aforethought. 2 R. S. 657. § 5. sub. 2.

From this examination of the subject, I have arrived at the conclusion that a common law indictment for murder is proper, under the provision of the revised statutes. And a defendant cannot be convicted on such an indictment of a felonious homicide with malice aforethought, unless the evidence is such as to bring the case within the statutory definition of murder." *The People v. Enoch*, 13 Wendell, 159. Vide *The People v. McLeod*, 1 Hill, 377. *The People v. Jackson*, 3 Hill, 92.

On the trial of an indictment for murder, where there is no pretence that the prisoner killed the deceased, while engaged in a riot or other misdemeanor, not amounting to a felony, by misadventure, but the death ensued in consequence of an intentional violence upon the person of the deceased; whether the prisoner designed to kill or not, he is not entitled to have the jury instructed that they cannot convict of murder, if they should

come to the conclusion that the mortal wound was inflicted in committing, or attempting to commit an offence which of itself is less than felony. Homicide, occasioned by committing or attempting to commit a misdemeanor, though murder at the common law, is by the revised statutes reduced to manslaughter in the first degree. *The People v. Rector*, 19 Wendell, 569.

Manslaughter differs from murder in this, that though the act which occasioned the death be unlawful, or likely to be attended with bodily mischief, yet the malice, either express or implied, which is the very essence of murder, is presumed to be wanting; and the act being imputed to the infirmity of human nature, the punishment is proportionably lenient. *Ex parte Tayloe*, 5 Cowen, 51.

On a trial for murder, where it appeared that the deceased sought to gain admittance into a house of ill fame by violence and against the will of the keeper thereof, who made an attack upon the aggressor, and death ensued, it was held, that testimony that threats made a week previous to the assault by persons who had broken into the house, that they would return some other night and break in again, might be received and submitted to the consideration of the jury, under the instruction of the court; although it seems that for the rejection of such evidence, where it was not shown that the deceased was of the party who made the threats, a new trial would not be granted. *The People v. Rector*, 19 Wendell, 569.

As to bail in homicide, see *Ex parte Tayloe*, 5 Cowen, 51. *Goodwin's case*, 1 Wh. Cr. C. 443.

MASSACHUSETTS.

Every person who shall commit the crime of murder, shall suffer the punishment of death for the same, *Rev. Stat. chap. 125, sect. 1.*

In every case of conviction of the crime of murder, the court may, in their discretion, order the body of the convict, after his execution, to be dissected, and the sheriff, in such case, shall deliver the dead body of such convict, to a professor of anatomy and surgery, in some college or public seminary, if requested; otherwise, it shall be delivered to any surgeon, who may be attending to receive it, and who will engage for the dissection thereof. *Ibid. sect. 2.*

Every person, being an inhabitant or resident of this state, who shall, by previous appointment or engagement made within the same, fight a duel without the jurisdiction of the state, and in so doing, shall inflict a mortal wound upon any person, whereof the person so injured shall afterwards die, within this state, shall be deemed guilty of murder within this state, and may be indicted, tried, and convicted in the county where such death shall happen. *Ibid. sect. 3.*

Every person, being an inhabitant or resident of this state, who shall, by previous appointment or engagement made within the same, be the second of either party, in such as is mentioned in the preceding section, and shall be present as second, when such mortal wound is inflicted, whereof death shall ensue within this state, shall be deemed to be an accessory before the fact to the crime of murder in this state, and may be indicted, tried, and convicted in the county where death shall happen. *Ibid. sect. 4.*

Any person indicted under either of the two preceding sections, may plead a former conviction or acquittal of the same offence, in any other state or county, and such plea, if admitted or established, shall be a bar to all further or other proceedings against such person, for the same offence, within this state. *Ibid. sect. 5.*

Every person, who shall commit the crime of manslaughter, shall be punished by imprisonment in the state prison, not more than twenty years, or by fine not exceeding one thousand dollars, and imprisonment in the county jail not more than three years. *Ibid. sect. 9.*

Where the act is committed deliberately, and is likely to be attended with dangerous consequences, the malice requisite to murder will be presumed; for the law infers that the natural or probable effects of any act deliberately done, were intended by the actor. *Commonwealth v. Drew*, 4 Mass. 391.

A bare trespass against the property of another, not his dwelling-house, is not a sufficient provocation to warrant the owner in using a deadly weapon in its defence; and if he do, and with it kill the trespasser, it will be murder. *Ibid.*

If the beating, however, be with an instrument and in a manner not likely to kill, it will be no more than manslaughter. *Ibid.*

So, if any one, under colour or claim of legal authority, unlawfully arrest, or actually attempt or offer to arrest another, and this latter in his resistance kills the aggressor, it will be no more than manslaughter. *Ibid.*

So if one, not a stranger, aids the injured party by endeavouring to rescue him,

or to prevent an unlawful arrest when actually attempted. *Commonwealth v. Drew*, 4 Mass. 391.

If one, assuming to be a physician, however ignorant of the medical art, administers to his patient remedies which result in his death, he is not guilty of manslaughter, unless he has so much knowledge or probable information of the fatal tendency of his prescriptions as to raise a presumption of obstinate, wilful rashness. *Commonwealth v. Thompson*, 6 Mass. 134.

Where, however, such person has opportunity to know of the injurious effects of his remedies, and then administers them, it would be competent for the jury to find him guilty of manslaughter, even though he might not have intended any bodily harm to his patient. *Commonwealth v. Thompson*, 6 Mass. 134.

Where one, having committed a homicide, had been sent to the house of correction, pursuant to Stat. 1797, c. 61, § 3, as a person dangerous to go at large, and was then tried for murder, and acquitted on the ground of insanity, the court remanded him to the house of correction till he should be duly discharged. *Commonwealth v. Meriam*, 7 Mass. 168.

If one counsel another to commit suicide, and the other, through the influence of the advice, kill himself, the adviser is guilty of murder as principal. The presumption of law in such case is, that the advice had the effect intended by the adviser, unless the contrary be shown. *Commonwealth v. Bowen*, 13 Mass. 359.

When on the trial of an indictment for murder, the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of law is, that it was malicious, and an act of murder, and proof of matter of excuse or extenuation lies on the defendant. *Commonwealth v. York*, 9 Metcalf, 93.

PENNSYLVANIA.

The Act of April 22d, 1794, reciting that, whereas the design of punishment is to prevent the commission of crimes, and to repair the injury that hath been done thereby to society, or the individual; and it hath been found by experience, that these objects are better obtained by moderate, but certain penalties, than by severe and excessive punishments; and whereas it is the duty of every government to endeavour to reform, rather than exterminate offenders, and the punishment of death ought never to be inflicted where it is not absolutely necessary to the public safety; provides that

No crime whatsoever, hereafter committed, except murder of the first degree, shall be punished with death in the state of *Pennsylvania*.

And whereas the several offences which are included under the general denomination of murder, differ so greatly from each other in the degree of their atrociousness, that it is unjust to involve them in the same punishment. Sect. 1; 3 Dallas, 600; 3 Smith, 186; *Par. 7th ed.* 861.

All murder which shall be perpetrated by means of poison, or lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree, and the jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, ascertain in their verdict whether it be murder of the first or second degree; but if such person shall be convicted by confession, the court shall proceed, by examination of witnesses, to determine the degree of the crime, and to give sentence accordingly. *Ib. sect. 2. See post.* Murder in the first and second degree.

Every person liable to be prosecuted for petit treason shall in future, be indicted, proceeded against, and punished as is directed in other kinds of murder. *Act of 23d April, 1829, Pamphlet, p. 341; Purdon, 7th ed.* 861.

Whosoever any person shall be charged with involuntary manslaughter, happening in consequence of an unlawful act, it shall and may be lawful for the attorney-general, or other person prosecuting the pleas of the commonwealth, with the leave of the court, to waive the felony, and to proceed against and charge such person with a misdemeanor, and to give in evidence any act or acts of manslaughter; and such person or persons, on conviction, shall be fined or imprisoned, as in cases of misdemeanor; or the said attorney-general, or other person prosecuting the pleas of the commonwealth, may charge both offences in the same indictment, in which case the jury may acquit the party of one, and find him or her guilty of the other charge. *Ib. sect. 8.*

Every person convicted of murder in the first degree, his or her aiders, abettors and counsellors, shall suffer death by hanging by the neck. Sec. 15.

Instead of the penitentiary punishment heretofore prescribed, the punishment by solitary confinement at labour, shall be inflicted upon the several offenders who shall, after the first day of *July* next, commit and be legally convicted of any of the offences hereinafter enumerated and specified; that is to say:

Every person convicted of murder in the second degree, shall be sentenced to undergo imprisonment in one of the state penitentiaries, as the case may be, and be kept in separate or solitary confinement at labour for the first offence, for a period of not less than four, nor more than twelve years, and for the second offence for the period of his natural life, and be fed, clothed and treated as is provided in this act.

Every person duly convicted of voluntary manslaughter, shall be sentenced to undergo a similar confinement at labor for the first offence, for a period not less than two, nor more than six years; for a second offence for a period of not less than six, nor more than twelve years, under the same conditions as are expressed in the first clause of this section, and to give security on conviction either for the first or second offence, for good behaviour during life, or for any less time, according to the nature and enormity of the offence. *Act of 23d April, 1829, sect. 4, Pamph. p. 341; 7th ed. Purdon, 862.*

The act of April 10th, 1834, provides:

Whenever hereafter any person shall be condemned to suffer death by hanging for any crime of which he or she shall have been convicted, the said punishment shall be inflicted on him or her within the walls or yard of the jail of the county in which he or she shall have been convicted; and it shall be the duty of the sheriff or coroner of the said county to attend and be present at such execution, to which he shall invite the presence of a physician, attorney-general or deputy attorney-general of the county, and twelve reputable citizens, who shall be selected by the sheriff; and the said sheriff shall, at the request of the criminal, permit such ministers of the gospel, not exceeding two, as he or she may name, and any of his or her immediate relatives, to attend and be present at such execution, together with such officers of the prison and such of the sheriff's deputies as the said sheriff or coroner in his discretion may think it expedient to have present, and it shall be only permitted to the persons above designated to witness the said execution; *Provided*, That no person under age shall be permitted on any account to witness the same. *Sec. 1.*

After the execution, the said sheriff or coroner shall make oath or affirmation in writing, that he proceed to execute the said criminal within the walls or yard aforesaid, at the time designated by the death-warrant of the Governor, and the same shall be filed in the office of the clerk of the court of Oyer and Terminer of the aforesaid county, and a copy thereof published in two or more newspapers, one at least of which shall be printed in the county where the execution took place. *Sec. 2. Pamph. L. 234. Purd. Dig. 7, ed. p. 945.*

Manslaughter, though distinguished by the act of 1794, into voluntary and involuntary, remains in other respects in *Pennsylvania* as in *England*. *Pennsylvania v. McFall, Addison, 256.* In order to constitute the crime of voluntary manslaughter, evidence of a positive intent to kill is not necessary; it is sufficient if there be such acts of violence as may be expected to produce great bodily harm. Involuntary manslaughter is where it plainly appears that neither death nor any great bodily harm was intended, but death is accidentally caused by some unlawful act, or an act not strictly unlawful in itself, but done in an unlawful manner, and without due caution. *Com. v. Gable, 7 S. & R. 428.* Under the act of 1794, the attorney general must prosecute involuntary manslaughter as a misdemeanor. *Ibid.*

One who is indicted for murder, cannot be convicted of involuntary manslaughter; because it is well settled that one cannot be convicted of a misdemeanor on an indictment for felony. *Com. v. Gable, 7 S. & R. 423.*

Passion, arising from sufficient provocation, is evidence of the absence of malice, and reduces homicide to manslaughter; but passion, without provocation, or provocation without passion, is not sufficient; and when there is both provocation and passion, the provocation must be sufficient. *Pennsylvania v. Honeyman, Add. 149. Pennsylvania v. Bell, id. 162.*

In order to constitute the crime of voluntary manslaughter, evidence of a positive intent to kill, is not necessary; it is sufficient if there be such acts of violence as may be expected to produce great bodily harm. *Commonwealth v. Gable, 7 S. & R. 428. Tilghman, C. J.*

Every act which apparently must do harm; which is done with intent to do harm;

and without provocation, and of which death is the consequence, is murder. *Pennsylvania v. Honeyman, Add. 148.*

Unlawful killing, with a design to kill, is murder in the first degree; if with a design only to hurt, it is murder in the second degree. *Pennsylvania v. Lewis, Add. 283.*

Premeditation is an essential ingredient to constitute murder in the first degree, under the act of 1794; but the *intention* still remains the true criterion of the crime, and the intention of the party can only be collected from his words and actions. *Respublica v. Mulatto Bob, 4 Dall. 146.*

If one, without uttering a word, should strike another on the head with an axe, this would be deemed a *premeditated* violence, within the act of 1794. *Ibid.*

With respect to the three modes of killing, first mentioned in the act of 1794, viz. by poison, lying in wait, or any other kind of wilful and deliberate killing, the intention is the essence of the crime. But in the last enumerated mode, viz. in the perpetration of the crimes mentioned in the act, the intention is excluded as not necessary to constitute murder in the first degree. *Com. v. Dougherty, before Rush, Pres. 1 Br. Appx. xviii.*

Wherever it appears, from the whole evidence, that the crime was, at the moment, deliberately or intentionally executed, the killing is murder in the first degree. *Ibid.*

It is sufficient to constitute the crime if the circumstances of wilfulness and deliberation were proven, although they arose and were generated at the period of the transaction. *Ibid. Pennsylvania v. McFall, Add. 257.*

If the party killing had time to think, and did intend to kill, for a minute, as well as an hour or a day, it is a deliberate, wilful, and premeditated killing, constituting murder in the first degree, within the act of Assembly. *Com. v. Richard Smith, Oyer and Terminer, Philad. 1816, before Rush, Pres., Pamphlet 231. Com. v. O'Hara, before McKean, C. J., cited ibid.*

The common law implied malice in every unlawful killing, and the burden of proof of extenuating circumstances lay on the defendant. *Pennsylvania v. Honeyman, Add. 148. Pennsylvania v. Bell, id. 171. Pennsylvania v. McFall, id. 257. Pennsylvania v. Lewis & al., id. 282.*

Involuntary manslaughter is, where it plainly appears that neither death nor any great bodily harm was intended, but death is accidentally caused by some unlawful act, or an act not strictly unlawful in itself, but done in an unlawful manner, and without due caution. *Ibid.*

Killing by a blow, in mutual conflict, without necessity either for the protection of life, or the possession of house, &c. is manslaughter. If necessary for such purpose, it is homicide in self defence. *Pennsylvania v. Robertson, Add. 248.*

Manslaughter, though distinguished by the act of 1794, into voluntary and involuntary, remains in other respects here as in England. *Pennsylvania v. McFall, Add. 256.*

But since the Act of 1794, the burthen of proof lies on the Commonwealth; unless the circumstances of malice are proved, it is murder only of the second degree. *Com. v. O'Hara, ut supra.*

Under the Act of Assembly, an unlawful killing, though it may be presumed murder, will not be presumed murder in the first degree. *Pennsylvania v. Lewis, Add. 282-3.*

Drunkenness does not incapacitate a man from forming a premeditated design of murder; but as drunkenness clouds the understanding, and excites passion, it may be evidence of passion only, and of want of malice and design. *Pennsylvania v. McFall, Add. 257.*

If a person who has determined to take the life of another, seizes a musket to carry that intention into effect, not knowing whether it was loaded or otherwise, but with the expectation and desire that it should be, he is guilty of murder in any killing consequent upon its discharge. *Commonwealth v. Green, 1 Ashmead, 289.*

When a wound is not mortal in itself, but for want of proper application or from neglect, turns to gangrene or fever, and that gangrene or fever is the immediate cause of the death of the party wounded, the party by whom the wound was given is guilty of murder or manslaughter, according to the circumstances of the case. *Ibid.*

To warrant a conviction of murder in the first degree, it is not essential that the weapons used should necessarily produce death. *Com. v. Murray, 2 Ashmead, 41.*

When the deceased was killed by means of blows inflicted by a club not quite as thick as an axe handle, held and used by one person, and by a leather strap with a metal buckle at each end, held and used by another person, it was held that this was murder in the first degree. *Ibid.*

If a pregnant woman be killed in an attempt by another person to produce abortion in

her, this will only be murder in the second degree, if the perpetrator did not intend to take the life of the mother. *Ex parte Chauncey, 2 Ashmead, 227. per King, Prest.*

It is a fixed principle, that if, from the weapon or the manner of striking, an intention to kill may or must be collected; provocation by words only, is not sufficient to make the killing, but manslaughter. *Pennsylvania v. Bell, Add. 163.*

See post, 454, l.

MARYLAND.

The Act of 1809, Ch. 138, may be considered the basis of the law of homicide, and indeed of the whole criminal jurisprudence of the state of Maryland. The 3d Section of this Act defines murder of the first degree to be, "all murder which shall be perpetrated by means of poison, or by lying in wait, or by any kind of wilful, deliberate, and pre-meditated killing, or which shall be committed in the perpetration of, or attempt to perpetrate any arson, or to burn any barn, tobacco-house, stable, warehouse, or other out-house, not parcel of any dwelling-house, having therein any tobacco, grain, hay, horses, cattle or goods, wares and merchandize, rape, sodomy, mayhem, robbery or burglary." All other murder is deemed murder of the second degree. Manslaughter is not defined in the statute, and the offence remains the same as at common law.

Sec. 4th, thus determines the punishment of these crimes. Every person convicted of murder of the first degree, his or her aiders or abettors and counsellors shall suffer death by hanging; every person duly convicted of murder in the second degree, or as accessory thereto, shall be confined in the penitentiary for from five to eighteen years; every person convicted of manslaughter, shall be confined in the penitentiary for a term not exceeding ten years. The Act of 1825, Ch. 93, Sec. 1, enacts that no sentence to the penitentiary shall be for less than two years. The terms of confinement with the limitations aforesaid, are in the discretion of the Court. Sec. 16. No conviction or attainder works corruption of blood or forfeiture of estate; nor can sentence of death be executed within less than twenty days after judgment. The Governor, in whom is lodged the pardoning and commuting power, is empowered and required to issue a warrant to the Sheriff, and appoint the day of execution. 1795, Ch. 82, Sec. 1. Though forfeiture of estate does not result, the estate of persons sentenced to be hung is still liable, after reparation made to the injured party for the expenses of the State. Standing mute is equivalent to a plea of not guilty, and the trial proceeds as if such plea had been actually put in. Sec. 12. In all capital cases the right of challenge exists without cause to twenty jurors, and with cause to any number. Sec. 13. Foreigners who are indicted for an offence committed within the State, are to be tried by a jury of the county, and cannot challenge for want of foreigners on the panel returned. Sec. 15. The venue is laid in the county where the mortal stroke or poison has been given, and not where the consequent death occurs; unless the mortal stroke be given on Chesapeake Bay and the death take place in any county of the State, when the place of death becomes the venue. So where the blow and death both occur on the bay, the place of arrest is the place of trial. Secs. 17, 18, 19. The venue may be changed to an adjoining county, on suggestion supported by affidavit, that an impartial trial cannot be had in the county where the indictment is found. Sec. 20. But the person moving the change, must have resided in the county at least twelve months before indictment. 1821, Ch. 244.

By the Act of 1817, Ch. 72, Sec. 2, convicts confined in the penitentiary may be witnesses against each other for crimes committed in the penitentiary.

No slave can be confined in the penitentiary, but when not punishable with death, is punished with whipping, banishment, or sale into some foreign country. 1818, Ch. 197. And a free negro after having once been an inmate of the penitentiary, may be, upon conviction of a second offence, sold into foreign bondage. 1835, Ch. 200, sec. 3.

The act of 1824, Ch. 144, presents a new element in murder of the first degree. It is there enacted, that all murder committed in the arrest and imprisonment, or attempt to arrest or imprison, with a view to a forcible removal from the state, any free person or one entitled to freedom after a certain time, by one who knows such person to be free, shall be deemed murder of the first degree.

The *Maryland Reports* contain no cases which elucidate the law of homicide. It was, however, decided in the case of *The State of Maryland v. Negro Jesse Evans*, 7 Gill & John. 290, that where a statute creates an offence which did not exist at common law, or changes the nature or degree of an offence existing at common law, there an indictment for such an offence must conclude against the form of the statute; but if a statute only direct a different mode of punishment for a common law offence,

the indictment *may* conclude against the peace. An indictment concluding *contra pacem*, charges only a violation of the common law, and with such an indictment the accused need only refer when preparing for his defence to the criminal code of the common law to ascertain what are the ingredients constituting the offence charged, and what will vindicate or excuse him.

By the 19th section of the *Bill of Rights*, it is the right of every man to be informed of a criminal accusation against him, and to have a copy of the indictment in due time to prepare for his defence.

SOUTH CAROLINA.

The acts of this State on the subject of homicide are—

The act of 1821, 6 *Sts. at large*, 158, which makes the "malicious, wilful, and deliberate murder" of a slave, a capital felony; and punishes the killing a slave "on sudden heat and passion," with fine and imprisonment. It has been decided on these acts, that the offences punished by it, contain no other ingredients than murder and manslaughter at common law, and that the common law definitions of murder and manslaughter apply to them respectively. *MS.*

The act of 1833, 6 *S. L.* 489, abolishes branding, and substitutes fine and imprisonment in all cases. This applies to homicide by manslaughter.

The act of 1840, § 39. 7 *S. L.* 411, makes the master, or person having charge of a slave, responsible for the death of a slave killed when no other white person is present; but in such case, the master, or other person in charge, may exculpate himself by oath.

The statute of stabbing, 1 *Juc.* 1, c. 8, has been made of force in *South Carolina*. 2 *S. L.* 507. So also the *Sts.* 52. *Hen.* 3, c. 25; 2 *S. L.* 418. and all other ancient statutes, ousting murder of clergy are understood to be of force by virtue of the general provisions of the act of 1712, 2 *S. L.* 413. § 2.

In this State the following cases recognise the common law doctrine:

The general distinction between murder and manslaughter is, that the killing in the first instance must be accompanied with malice aforethought, either express or implied. To constitute the latter, it must be the result of sudden heat and passion. *State v. Toohey*, 2 *Rice*, *S. C. Dig.* 104.

But although this general distinction is well understood and universally admitted, yet the shades of difference are many times so small as to render them difficult to be perceived, and in the application of the rule to particular cases, much must always be left to the sound discretion of the court and jury. It is true in general, that when death ensues from a sudden affray, it is considered only as manslaughter; but that is where a sudden quarrel rises without any intention to kill or injure another materially, and in the course of the scuffle, after the parties are heated by the contest, one kills the other with a deadly weapon. But there is no case where an unprovoked attack has been made on a person with a deadly weapon, and death has ensued, that it has been held to be manslaughter merely because it was sudden. Such a decision would go to protect one who should fall upon another suddenly, and take his life, though actuated by the most deep-rooted malignity. There is a difference between a sudden affray and sudden attack. An affray means something like a mutual contest suddenly enacted without an apparent intention to do great bodily harm. But malice is implied from every unprovoked attack upon a person with a deadly weapon, without any apparent cause. *Ibid.*

In an indictment against two persons, *Michael* and *Martin Toohey*, for murder, where the jury found one (*Michael*) guilty of manslaughter, and the other (*Martin*) guilty of murder; on a motion for a new trial on behalf of *Martin Toohey*, the court held, among other things, that it belonged to the jury to determine who gave the mortal blow, and observed, "Even if we admit that it was given by *Michael*, yet this verdict might be supported if they were acting in concert." It would only prove that they ought both to have been convicted, and the wrongful acquittal of one, would not entitle the other to exemption. It is abundantly manifest that the deceased came to his death by one of these defendants, and it belonged to the jury to judge of their respective guilt.

Another fact assumed by the defendants' counsel, that the passions of the defendant were excited by an unintended jostle of the prisoner or his wife by the deceased, is equally unsupported by proof, and unavailing if true. In a city like Charleston, where many persons are constantly passing until a late hour of the night, the accidental impinging of one upon another in the dark would not authorize such a murderous attack upon him. Such an act of itself would be a sure indication of a "depraved and wicked

heart, void of all social duty, and fatally bent on mischief." *State v. Tooley*, 2 *Rice*, S. C. Digest, 104.

Every homicide must be accompanied with malice to make it murder; but so regardful is the law of human life, that it presumes every homicide to be accompanied with malice, unless the contrary shall appear. Malice is said to exist whenever the circumstances attending the homicide exhibit the feelings of a wicked heart, regardless of social duty and fatally bent on mischief. It is inconsistent with the lessons of experience, the dictates of reason, and the highest authority to conclude, because the homicide was committed in a passion, (*furor brevis*), he was not under the influence of a wicked heart. If without provocation he let loose his angry passions, which social duty required him to control, and inflicted a death blow upon an unoffending brother, he exhibits that malevolence of heart which makes him in the language of the law, *hostis humani generis*. *State v. Peters*, 2 *Rice*, S. C. Digest, 105.

If a slave kill his master whilst the latter is correcting him, it is murder at common law; and those present aiding and abetting are guilty of the same offence. They would even be guilty as principals in the first degree, although the actual perpetrator himself were guilty of no crime if they made use of him as the instrument to effect their own deliberate purpose of destroying the deceased. *State v. Crank*, 2 *Bail. Rep.* 64. 2 *Rice's S. C. Dig.* 106.

So long as a party liable to arrest endeavours peaceably to avoid it he may not be killed; But whenever, by his conduct, he puts in jeopardy the life of any attempting to arrest him, he may be killed, and the act may be excusable. *State v. Anderson*, 1 *Hill*, S. C. Rep. 327.

If one in sudden heat of passion take the life of another, it is manslaughter, and not murder; but there must be reasonable provocation, and what will constitute it, is the principal difficulty in applying the distinction. The line which distinguishes between those provocations, which will and will not extenuate the offences, cannot be certainly defined. Such provocations as are in themselves calculated to provoke a high degree of resentment, and ordinarily induce a great degree of violence when compared with those which are slight and trivial, and from which a great degree of violence does not usually follow, may serve to mark the distinction.

But no provocation, however grievous, will excuse from the crime of murder, where from the weapon, or the manner of the assault, an intention to kill or to do some great bodily harm was manifest.

If one interfere in an affray to separate the combatants, and give notice of his intent, and is slain by one of the combatants, it is murder.

The prisoner and one W. engaged in a fight, and were separated by the deceased. Some time after the fight was renewed, and the deceased again interfered; but being unable to take the prisoner off, called a negro to his assistance, who, in the act of separating the combatants, threw the prisoner against the wall. The prisoner then made at the deceased (who endeavoured to avoid him) with a knife, and inflicted a mortal blow: *Held*, that this was a case of murder. *State v. Ferguson*, 2 *Hill*, S. C. Rep. 619. 2 *Rice's Digest*, 106, 107.

MURDER OF THE FIRST AND SECOND DEGREES.

The murder of the common law is, in many parts of the *United States*, divided into murder of the first and second degrees. The distinction of murder into two degrees, is found in Pennsylvania, Maine, New Hampshire, New Jersey, Virginia, Alabama, Tennessee, Maryland, Michigan and Ohio. The distinctions in all these states, except Ohio and Maryland, are substantially the same, and nearly in the same language.

IN MAINE.—Whoever shall, unlawfully, kill any human being, with malice aforethought, either express or implied, shall be deemed guilty of murder.—*Rev. Stat. ch. 154. sect. 1.*

Whoever shall commit murder, with express malice aforethought, or in perpetrating, or attempting to perpetrate any crime punishable with death, or imprisonment in the state prison for life, or for an unlimited term of years, shall be deemed guilty of murder of the first degree, and shall be punished with death.—*Ibid. sect. 2.*

Whoever shall commit murder, otherwise than is set forth in the preceding section, shall be deemed guilty of murder in the second degree, and shall be punished by imprisonment for life in the state prison.—*Ibid. sect. 3.*

Section 4, provides that, upon an indictment for murder, the jury shall inquire and find

whether the offence be of the first or second degree, or, if confessed, the court shall make the inquiry.

IN NEW HAMPSHIRE.—All murder committed by poison, starving, torture, or other deliberate and premeditated killing; or committed in the perpetration, or in the attempt at the perpetration of arson, rape, robbery, or burglary, is murder of the first degree; and all murder not of the first degree is of the second degree. If the jury shall find any person guilty of murder, they shall also find, by their verdict, whether it is of the first or second degree.—*Rev. Stat. chap. 214. sect. 1.*

If any person shall plead guilty to an indictment for murder, the court having cognizance thereof shall determine the degree.—*Ibid. sect. 2.*

The punishment of murder in the first degree shall be death, and the punishment of murder in the second degree shall be solitary imprisonment, not exceeding three years, and confinement to hard labour for life.—*Ibid. sect. 3.*

IN PENNSYLVANIA.—No crime, whatsoever, hereafter committed, (except murder in the first degree,) shall be punished with death in the state of Pennsylvania.—*Act 22d April, 1794, 3 Smith's Laws, 136; 7th ed. Purdon, 861.*

All murder, which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree; and the jury, before whom any person indicted for murder, shall be tried, shall, if they find such person guilty thereof, ascertain, in their verdict, whether it be murder in the first or second degree; but if such person shall be convicted by confession, the court shall proceed, by examination of witnesses, to determine the degree of the crime, and to give sentence accordingly.—*Ibid. Sect. 2. See ante, p. 554.*

IN NEW JERSEY.—All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, and premeditated killing, or which shall be committed in perpetrating, or attempting to perpetrate, any arson, rape, sodomy, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree; and the jury, before whom any person indicted for murder, shall be tried shall, if they find such person guilty thereof, designate, by their verdict, whether it be murder in the first or second degree; but if such person shall be convicted on confession, in open court, the court shall proceed, by examination of witnesses, to determine the degree of the crime, and give sentence accordingly.—(An act, supplementary to an act entitled, "An act for the punishment of crimes," passed the seventeenth day of February, eighteen hundred and twenty-nine, sect. 1.)

Every person convicted of murder of the first degree, his or her aiders, abettors, counsellors and procurers shall suffer death; and every person convicted of murder of the second degree, shall suffer imprisonment at hard labour, for any term, not less than five, nor more than twenty years.—*Sec. 2.*

IN VIRGINIA.—All murder, which shall be perpetrated by means of poison, or by lying in wait, or by duress of imprisonment or confinement, or by starving, or by wilful, malicious and excessive whipping, beating, or other cruel treatment or torture, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate, any arson, rape, robbery, or burglary, shall henceforth be deemed murder in the first degree; and all other kinds of murder shall be deemed murder of the second degree; and the jury, before whom any person, indicted for murder, shall be tried, shall, if they find such person guilty thereof, ascertain, in their verdict, whether it be murder in the first or second degree; but if such person shall be convicted by confession, the court shall proceed by examination of witnesses, to determine the degree of the crime, and to give sentence accordingly.—*R. C. chap. 171. sect. 2.*

IN ALABAMA.—Every homicide, which shall be perpetrated by means of poison, lying in wait, or by any other kind of wilful, deliberate, and premeditated killing, or which

shall be committed in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, or burglary, shall be deemed murder in the first degree; so, also, every homicide perpetrated from a premeditated design, unlawfully and maliciously to effect the death of any human being, other than him who is slain, or perpetrated by an act imminently dangerous to the life of others, and evincing a depraved mind, regardless of human life, although without any preconceived purpose to deprive of life any particular individual; and every person, guilty of murder in the first degree, shall, on conviction, suffer death, or confinement in the penitentiary for life, at the discretion of the jury trying the same. *Penal Code, chap. 111. sect. 1. Clay's Digest, 412.*

The next section provides that all other cases of murder, at common law, shall be murder in the second degree; and punishable by imprisonment for not less than ten years.

IN TENNESSEE.—All murder which shall be perpetrated by means of poison, lying in wait, or by any other kind of wilful, deliberate, malicious and premeditated killing, or shall be committed in the perpetration of, or attempt to perpetrate any arson, rape, robbery, burglary or larceny, shall be deemed murder in the first degree; and all other kinds of murder shall be deemed murder in the second degree; and the jury, before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, ascertain, in their verdict, whether it be murder in the first or second degree; but if such person shall confess his guilt, the court shall proceed by the empanelling of a jury and examination of testimony, to find and determine the degree of the crime, and to give sentence accordingly.—*Act 1829, sect. 3. Laws of Tennessee, p. 316.*

IN MICHIGAN.—All murder, which shall be perpetrated by means of poison or lying in wait, or any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary, shall be deemed murder of the first degree, and shall be punished with death; and all other kinds of murder shall be deemed murder of the second degree, and shall be punished by confinement in the penitentiary for life, or any term of years at the discretion of the court trying the same.—*Rev. Stat. part 4. tit. 1. ch. 3. sect. 1.*

IN MARYLAND.—All murder which shall be perpetrated by means of poison, or by lying wait, or by any kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration of, or attempt to perpetrate any arson, or to burn any barn, tobacco-house, stable, warehouse, or other out-house, not parcel of any dwelling-house, having therein any tobacco, grain, hay, horses, cattle or goods, wares and merchandize, rape, sodomy, mayhem or burglary, is murder of the first degree, and all other murder, is murder of the second degree. *Act of 1809, ch. 138.*

IN OHIO. If any person shall purposely, and of deliberate and premeditated malice, or in the perpetration, or attempt to perpetrate, any rape, arson, robbery, or burglary, or by administering poison, or causing the same to be done, kill another, every such person shall be deemed guilty of murder in the first degree, and upon conviction thereof, shall suffer death. If any person shall purposely and maliciously, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree; and on conviction thereof, shall be imprisoned in the penitentiary, and be kept at hard labour during life. *Act of March 7, 1835, (Statutes p. 229.)*

These acts have not affected the meaning of the term murder, nor changed the common law doctrine, excepting to designate certain classes of murder, by the prefix *first*, and all other kinds by the prefix *second*, and to assign to each kind of killing a distinct punishment—both kinds being murder, at common law. The tests by which to ascertain—murder, generally being proved—to which degree the case belongs, are to be found, either, in the existence of certain facts connected with the manner or circumstances of the killing, or in the condition of the mind of the accused at or before the moment of the killing. As to the former, if murder be by poison, by lying in wait, by starving, or in the perpetration or attempt to perpetrate arson, rape, robbery, or burglary, &c. as set forth in the several statutes; and, as to the latter, if it be murder, with express malice aforethought, wilful, deliberate, premeditated, &c. as also set forth in the several statutes—in either of these

cases, the killing is murder of the first degree—all other species of killing, which are murder at common law, are murder of the second degree.

If the killing be in either of the modes, or under either of the circumstances specifically mentioned in the statutes, the conclusion is inevitable that the accused is guilty of murder of the first degree. The chief points for discussion and decision, and the material difficulty in applying the law to particular cases, arises under the second clause. What is deliberation, express malice aforethought, wilfulness and premeditation, and what state of facts includes a conclusion of their existence?

The earliest case in *Pennsylvania*, under the act of Assembly of 1794, (the earliest in any of the States,) is the *Commonwealth v. Mulatto Bob*, 4 *Dallas*, 137. Chief Justice *McKean* presided at the trial, Judge *Smith* being also on the bench. It appeared that, a number of negroes being assembled, about ten o'clock at night, a quarrel arose between the prisoner and negro *David*, the deceased. For a while, the parties fought with fists; and the prisoner was heard to exclaim "enough." The affray, however, became general, and continued so for some time. When it was over, the prisoner went to a neighbouring pile of wood, and furnished himself with a club. He was advised not to use it, but declared that he would, and entered the crowd with it in his hand. After remaining there about ten minutes, he left the crowd without his club; and, again repairing to the wood-pile, took up an axe. Being, likewise, dissuaded from returning to the crowd with the axe, he said "he would do it;" and striking the instrument, with great passion, into the ground, swore that he would "split down any fellows that were saucy." Accordingly, he mixed once more among the people; a struggle was immediately heard about the axe; the prisoner then struck the deceased with it on the head; the deceased fell; and as he was attempting to rise, the prisoner gave him a second blow on the head with the sharp edge, which penetrated to the brain. After languishing three days, death was the consequence of this wound. "From these facts," said the Chief Justice, in summing up the evidence, "we are to inquire what crime the prisoner has committed? Murder, in the first degree, is the wilful, deliberate, and premeditated killing of another. There are various inferior kinds of homicide; but, on the present indictment, our attention is confined to a consideration of the highest and most aggravated description of crime. Then, let us ask, did the prisoner wilfully kill the deceased? It is not pretended that there was any accident in the case; and, therefore, the act must have been wilful. Was the killing deliberate and premeditated? or was it the effect of sudden passion, produced by a reasonable provocation? There had been a combat with fists; but this was over, when the prisoner, without any new provocation, first procured a club, and losing that weapon, afterwards armed himself with an axe. It cannot surely be thought that the original combat was a sufficient provocation for the prisoner's taking the life of his antagonist. An assault and battery may, indeed, be resisted and repelled by a battery more violent; but the life of a fellow creature must not be taken, unless in self defence. It has been objected, however, that the amendment of our penal code, renders premeditation an indispensable ingredient to constitute murder of the first degree. But still, it must be allowed, that the intention remains, as much as ever, the true criterion of crimes, in law, as well as in ethics; and the intention of the party can only be collected from his words and actions. In the present case, the prisoner declared, that he would 'split the skull of any fellows who should be saucy;' and he actually killed the deceased in the way which he had menaced. But, let it be supposed, that a man, without uttering a word, should strike another on the head with an axe, it must, on every principle by which we can judge of human actions, be deemed a premeditated violence. The construction which is now given to the act of assembly, on this point, must decide, whether the law shall have a beneficial or a pernicious operation. Before the act was passed, the prisoner's offence would clearly have amounted to murder; all the circumstances implying that malice, which is the gist of the definition of the crime at common law: and if he escapes with impunity, under an interpretation of the act different from the one which we have delivered, a case can hardly occur to warrant a conviction for murder in the first degree. Tenderness and mercy are amiable qualities of the mind; but if they are exercised and indulged beyond the control of reason and the limit of justice, for the sake of individuals, the peace, order and happiness of society, will inevitably be impaired and endangered. As far as respects the prisoner, I lament the tendency of these observations: but as far as respects the public, I have felt it a sacred duty to submit them to your consideration." The prisoner was convicted of murder in the first degree. *Resp. v. Mulatto Bob*, 4 *Dallas*, 145. See also, *Bennett v. Com.* 8 *Leigh*, 781.

In a case in *Virginia*, it appeared on trial, that about nine o'clock of the morning on which the homicide was committed, the prisoner and the deceased were seen together in

the streets of *Dumfries*, as if about to engage in a personal conflict, but before any blow they were separated. They had both remained in town from that time until between one and two o'clock of the same day, but how employed it did not appear; about the latter hour, the prisoner was seen passing a tavern on the street, about four hundred yards distant from the spot where the murder was committed, and, on being accosted by the witness, who was in the said tavern, he said he had been much injured by a man, whose name he knew not, who had kicked him in the face; and the witness saw on the side of the prisoner's nose a fresh wound, from which the skin had been abraded to the superficial extent of a four-pence-half-penny, or nine-penny piece. The prisoner seemed angry, and said he was determined to kill the man who had thus injured him. He then proceeded on about thirty yards farther, to the house of a butcher, and calling out the wife of the butcher, who was then at dinner, told her that her father (who was also concerned with her husband in the trade of a butcher,) had sent him to borrow her husband's butcher knife, which she immediately delivered to him. The shop where this took place was about four hundred and thirty yards from that where the murder was committed. Upon his return in about five or six minutes from the last mentioned shop with the knife in his hand, as he was repassing the tavern before mentioned, a short conversation took place between him and the first mentioned witness, in which he reiterated his determination to kill the deceased, and was warned against the act by the witness. He proceeded along the same street about three hundred yards farther and stopped at the ware-room of a merchant, where he asked the young man who was in attendance, for a steel to sharpen the butcher's knife, declaring his intention to kill the man who had injured him. About twenty yards from the ware-room he turned into a cross street, and was heard denouncing loud threats of vengeance against the deceased, and declaring his intention to kill him. At the further corner of the first square, after entering the cross street, the prisoner found the deceased on the steps of a house, with his head hanging on his breast, apparently asleep. He roused the deceased by kicking him, and as the deceased, who was unarmed, and made no attempt at resistance, rose, the prisoner said he had come to kill him, and as the deceased answered that "he reckoned no man wanted to kill him," the prisoner thrust the butcher's knife into the breast of the deceased. The deceased cried out, "You have stabbed me," and the prisoner replied, "damn you, if you don't hush, I will put the knife into you again." The deceased walked about one hundred and fifty yards, fell, and expired. The prisoner immediately going into a shop where he had a bundle, took it up, and walked quietly out of town to a house about two miles distant, where he was domesticated. To the owner of this house he related the incidents, and said he had given the deceased his death wound, and would keep out of the way some days, until he could ascertain whether or not he was dead. The prisoner and the deceased were both laborers. It was proved that the deceased was a turbulent man, and reputed a hard fighter. Nothing was said of the character of the prisoner. It did not appear that they had ever been together until the day preceding the death, when they were at a cock-fight; but whether they had any association there did not appear. At the time of the murder the prisoner either did not know, or had forgotten the name of the deceased. Under the charge of the court a verdict of murder in the first degree was rendered. *Burgess v. Commonwealth*, 2 Virginia cases, 484.

In another case under the *Pennsylvania* act, it appeared that the prisoner was an honest and industrious man, but addicted to intoxication, and when in that state was quarrelsome. It also appeared that his wife occasionally drank too much; and that on the day of the fatal occurrence they had fallen into a drunken squabble. During the quarrel the wife threw several stones at him, one of which struck him on the arm. A few moments after they were seen struggling together, but soon after the wife was discovered fleeing with her infant in her arms, the prisoner pursuing her with an axe, in his hand. When he came within reach of her he aimed a blow at her which fell on the head of the child as it lay upon the wife's shoulder, and caused a mortal wound, of which the child died. The prisoner soon recovered himself and showed many signs of repentance and manifested much distress at the manner of the child's death. The judge who tried the case, in the course of his charge to the jury, said, "We now come to this point:—what was the intention of the prisoner at the bar, when he killed Daniel Dougherty, his child? for, if his intent was to kill his wife, and killing her would have been murder in the first degree, killing his child will also be murder in the same degree; as much as if he had prepared a cup of poison for his wife and his child had drank it. You, however, are in this case to judge of the law and facts. If you are of opinion the injury the prisoner received from his wife throwing stones at him, and hitting him, kept

his passion boiling until he gave the fatal blow, we think it your duty to find him guilty of manslaughter. But if you are of the opinion his passion had time to cool, or in fact had cooled, after the assault on him by his wife, it is your duty to convict him of murder in the first degree." The verdict was manslaughter. *Commonwealth v. Dougherty, T. Smith's Laws, 695.*

In Tennessee, a verdict of murder in the first degree was sustained, where it appeared that the deceased was killed on the night of the 3d of October, 1841; that the prisoner and he had had angry difficulties from a period long anterior up to the time of the commission of the offence, which resulted from mutual wrongs done or charged; that the prisoner accused the deceased of having harboured his wife, to his great personal injury, and the deceased accused him of having fired his house; that on the 11th day of September, 1841, not many days before the murder, the prisoner left the country in a steamboat, with threats in his mouth of vengeance for his injuries, which he declared he would have before he left; that one week before the murder, he returned and kept himself so concealed that but one person saw him certainly, others saw what they took to be his tracks, and one, a person in disguise, whom he supposed might have been him; that on the night the deceased took possession of the building which had formed the subject of the controversy between them, he was killed, cowardly and treacherously; and that the prisoner immediately fled the country again, and being captured at Memphis, denied that he had been in the county of Obion since his first departure on the 11th of September, but admitted that he had returned up the river to within fifty miles of the residence of the deceased. *Stone v. The State, 4 Humphrey, 34.*

Murder in the second degree includes all cases of deliberate homicide where the intention is not to take life, of which, homicide by a workman throwing timber from a house into the street of a populous city, without warning, or of a person shooting at a fowl, *animo furandi*, and killing a man, are instances frequently given. *Whiteford v. Com. 6 Randolph, 721*; There may, also, be cases where death ensues during a riotous affray, under circumstances which would constitute murder at common law, but which, in consequence of the want of a specific intent to take life being shown, amount but to murder in the second degree. Thus, where it appeared that the deceased, during the riots in Philadelphia in 1844, was killed while a desultory fire was going on, the object of which was to prevent either of two contending parties from taking possession of a position which both of them were desirous of obtaining, it was said that a homicide, committed under such circumstances, though murder at common law, deliberation being shown, might not be murder in the first degree, and a verdict of murder in the second degree was consequently rendered. KING, Pres't, who tried the case, however, charged the jury, "that if one or more of the parties so engaged in an unlawful combat, deliberately fire at and kill an innocent third person, taking no part in the conflict, having no just reason to regard him as one of the belligerents, such killing would be murder of the first degree. It would present the case of a wilful, deliberate and premeditated killing, perpetrated with an instrument likely to take life, rendering the actual perpetrators guilty of the highest grade of crime known to our criminal code. If the testimony, in your judgment," he said, "brings clearly home to the defendant such a charge, he should be convicted. If, however, the commonwealth has not fully satisfied your minds in the affirmative of this position, or if the proofs adduced by the defendant have rebutted this allegation, or thrown a fair doubt upon its certainty, you ought not and cannot justly convict him of that part of the charge involving capital punishment." *Com. v. Hare, 4 Penns. Law Jour. 401.*

If a pregnant woman be killed in an attempt to produce abortion in her, and it appears that the design of the operator was not to take the life of the mother, it is murder in the second degree. *Ex parte Chauncey, 2 Ashmead, 227.*

Wherever the deliberate intention is to take life, and death ensues, it is murder in the first degree; wherever it is to do bodily harm, or other mischief, and death ensues, it is murder in the second degree; while the common law definition of manslaughter remains unaltered. But however clear may be the distinction between the two degrees, juries not unfrequently make use of murder in the second degree as a compromise, when they believe murder to have been committed, but are unwilling, in consequence of circumstances of mitigation, to expose the defendant to its full penalties. In such cases courts are not disposed to disturb verdicts, but permit them to stand, though technically incorrect. Thus, where S. having conceived and declared a design to kill P., the parties met afterwards in front of S.'s own house, and a quarrel ensued, in which S. gave the first offence; P. proposed a fight; upon which S. retired for a very brief time into

his house, armed himself with a loaded pistol, which he concealed in his pocket, and instantly returned so armed to the scene of quarrel; then P. threw a brickbat at S., which did not hit him, but falling short of him, broke, and a small fragment struck S.'s child, standing within his own door, who cried out, and his hearing his child cry out, but without looking to see whether he was hurt or not, exclaimed, "he has killed my child and I will kill him," advanced towards P. deliberately aimed and fired the pistol at him, then retreating with his face towards S., and the shot took effect and killed P. A verdict of murder in the second degree being rendered, the court refused to set it aside. *Slaughters v. Com.* 11 Leigh, 682.

There are, however, certain features which, in cases of deliberate homicide, draw forth, generally from the courts instructions to the jury that by them a deliberate intent to take life is shown. Where a man makes use of a weapon likely to take life; where he declares his intentions to be deadly; where he makes preparations for the concealing of the body; where, before the death, he lays a train of circumstances which may be calculated to break the surprise, or baffle the curiosity which would probably be occasioned by it; where, in any way, evidence arises which shows a harboured design against the life of another;—such evidence goes a great way to fix the grade of homicide at murder in the first degree; as in *Resp. v. Mulatto Bob*, quoted *ante*, 454.^v Where a man loaded a pistol, took aim at, and shot another, it was held murder in the first degree. *Com. v. Smith*, 7 *Smith's Laws*, 696. If one man shoot another through the head with a musket or pistol ball,—if he stab him in a vital part with a sword or dagger,—if he cleave his skull with an axe or the like,—it is almost impossible for a reflecting and intelligent mind to come to any other conclusion than that the perpetrator of such acts of deadly violence intended to kill. *Com. v. Daily*, 4 *Penn. Law Journal*, 157. Where the defendant deliberately procured a butcher's knife, and sharpened it for the avowed purpose of killing the deceased; *Com. v. Burgess*, 2 *Va. Cases*, 484; where he concealed a dirk in his breast, stating, shortly before the attack, that he knew where the seat of life was; *Bennett's case*, 11 Leigh, 749; where he thrust a hand-spike deeply into the forehead of the deceased; *Swan v. State*, 4 *Humphrey*, 139; the presumption was held to exist, that the killing was wilful. See *U. S. v. Cornell*, 2 *Mason*, 94; *Woodside v. State*, 2 *Howard*, 656; *State v. Toohey*, 2 *Rice's Digest*, 104; *Com. v. Webb*, 6 *Randolph*, 721. But it is not necessary, to warrant a conviction of murder in the first degree, that the instrument should be such as would necessarily produce death. Thus, where the weapon of death was a club not so thick as an axe-handle, the jury, under the charge of the court, rendered a verdict of murder in the first degree, it appearing that the blow was induced by a deliberate intention to take life. *Com. v. Murray*, 2 *Ashmead*, 57. The same presumption of intention is drawn with still greater strength from the declared purpose of the defendant. Thus, where the prisoner, a negro, said he intended "to lay for the deceased, if he froze, the next Saturday night," and where the homicide took place that night; *Jim v. State*, 5 *Humphrey*, 174; where it was said, "I am determined to kill the man who injured me;" *Com. v. Burgess*, 2 *Va. Cases*, 484; where the prisoner had declared, the day before the murder, that he would certainly shoot the deceased; *Com. v. Smith*, 7 *Smith's Laws*, 697; where, in another case, the language was, "I will split down any fellow that is saucy;" *Com. v. Mulatto Bob*, 4 *Dallas*, 146; where the prisoner rushed rapidly to the deceased, and aimed at a vital part; *Com. v. O'Hara*, 7 *Smith's Laws*, 694; where a grave had been prepared a short time before the homicide, though the deceased was not ultimately placed in it, the whole plan of action being changed; *Com. v. Zephon*, *Oyer & Term. Phila. July*, 1844, MSS. *Wharton's Am. C. L.* 289; in each of these cases it was held murder in the first degree. It must be noticed that premeditation, in the eye of the law, has no defined limits; and if a design be but the conception of a moment it is as deliberate, so far as judicial examination is concerned, as if it were the plan of years. If the party killing had time to think, and did intend to kill, for a minute, as well as an hour or a day, it is a deliberate, wilful, and premeditated, killing, constituting murder in the first degree. *Com. v. Smith*, 7 *Smith's Laws*, 697.

In an early case in Tennessee, it is true, it was said that a previous intent to take life must be positively shown; *Mitchell v. State*, 5 *Yerger*, 340.; but such is not the opinion which now obtains even in that state. *State v. Anderson*, 2 *Tenness.* 6; *Dale v. State*, 10 *Yerger*, 551. If the accused, as he approached the deceased, and first came within view of him at a short distance, then formed the design to kill, and walked up with a quick pace, and killed him without any provocation then, or recently received, it is murder in the first degree. *Whiteford v. Com.* 6 *Randolph*, 721; *Anthony v. State*, 1 *Meigs*, 265; *Resp. v. Mulatto Bob*, 4 *Dallas*, 146. "It is true," as was said in a late case, "the act says the killing must be wilful, deliberate, and premeditated. But every intentional

act is, of course, a wilful one, and deliberation and premeditation simply mean that the act was done with reflection, was conceived beforehand. No specific length of time is required for such deliberation. It would be a most difficult task for human wit to furnish any safe standard in this particular. Every case must rest on its own circumstances. The law, reason, and common sense unite in declaring that an apparently instantaneous act may be accompanied with such circumstances as to leave no doubt of its being the result of predetermination." *Com. v. Daley*, 4 *Penn. Law Journal*, 156; *Davis v. State*, 2 *Humphrey*, 439.

It is not necessary, nor is it the practice to designate the grade of homicide in the indictment, nor that the killing should be charged to be wilful, deliberate, and premeditated. *Com. v. Wicks*, 2 *Va. Cases*, 387; *Mitchell v. State*, 5 *Yerger*, 340; *Com. v. Flannagan*, 8 *Watts & Serg.* 415; *Com. v. White*, 6 *Binney*, 183; *Com. v. Miller*, 1 *Va. Cases*, 310; *Com. v. Gilbert*, 2 *Va. Cases*, 70. So if murder be committed in the perpetration of arson, rape, burglary, or robbery, it is not necessary that it should be so set out in the indictment. *Com. v. Flannagan*, 8 *Watts & Serg.* 415. In Pennsylvania it is not necessary that the indictment should conclude, contrary to the form of the act of assembly, &c. *Com. v. White*, 6 *Binney*, 183. On an indictment for murder, perpetrated by means of poison, a verdict finding the prisoner "guilty in manner and form as stated in the indictment," is as correct as of murder in the first degree, and sufficient to authorize the judgment of death. *Com. v. Earl*, 1 *Wharton*, 525.

In MAINE, the same line of distinction seems to have been taken as appears in the foregoing cases. In the case of *The Commonwealth v. Varney*, *Shepley, J.*, charged the jury that they could find either of four verdicts, not guilty; guilty of manslaughter, guilty of murder in the second degree, or murder in the first degree. "If it was proved that the prisoner killed Otis, the burden was upon him to reduce the offence from murder. The distinction between murder in the first and second degree was, that it must be proved that the deed was done with express malice, and with an intent to take life. Murder in the second degree might be found where there was no intention to take life, but it was taken not upon a mutual combat or sudden provocation, but in an assault made in consequence of preconceived anger or resentment, although not amounting to an intention to kill. That, in this case, to reduce the offence to manslaughter, the prisoner must satisfy them, or they must be satisfied from the facts proved by the government, that the assault was not the result of preconceived anger, but upon some new and sudden provocation given at the time, or in the mutual combat. If the prisoner went there for the purpose of flogging the deceased, and did make the assault accordingly, and there was no sufficient provocation to excite him anew, and no mutual combat, then, although he did not intend to kill, he would be guilty of murder in the second degree." *Com. v. Varney*, 8 *Boston Law, R.* 542. *Vide Wh. Am. C. L.* 287-290, where the above cases are collected.

The distinction taken, in Ohio, between murder in the first and murder in the second degree, is different from that which obtains in other States. Thus it was said, in a charge by Judge Wright; "To convict of murder in the first degree, you must, in addition to the points I have mentioned, be satisfied, 1. That the prisoner perpetrated the act purposely. 2. That he did it with intent to kill. 3. That he did it of deliberate and premeditated malice. To constitute deliberate and premeditated malice, the intention to do the injury must have been deliberated upon, and the design to do it formed, before the act was done, though it is not required that either should have been for any considerable time before. This supposes the party, by reflection, understood what he was about to do, and intended to do it in order to do harm. If these things are all proved, and you find the defendant guilty of murder in the first degree, you need examine no further. If not proven to your satisfaction, you will then examine further. To convict of murder in the second degree, you must be satisfied of the general facts common to all the offences, which I have stated, and also of the following: 1. That the prisoner perpetrated the act purposely and maliciously; 2, with intent to kill; and 3, without deliberation or premeditation. If you are not satisfied of the concurrence of these facts, you should acquit him of murder in the second degree, and will be under the necessity of examining further." *State v. Turner, Wright*, 20; *State v. Town, Wright*, 75; *State v. Gardiner, Wright*, 392.

To constitute the crime of murder in the first degree, when the purpose to maliciously kill, with premeditation and deliberation, is found, the length of time between the design so formed and its execution, is immaterial. *Shoemaker v. State*, 12 *Stanton*, 43.

If the jury do not in a murder case specify in their verdict whether they find the pri-

soner guilty of murder in the first or second degree, or of manslaughter, the court will refuse to pass sentence, and award a new trial, even if not asked for. *State v. Town, Wright*, 75.

In Kentucky, a statute was passed in 1801, 2 *Morehead & Brown*, 1267, by which a similar distinction was supposed to have been created, but at the next session of the legislature it was enacted that the former statute should not be so construed as "in any way to alter or change the idea of murder, as it stands at common law." *Ibid.* 1281. See *Wharton's Am. Cr. L.* p. 287-292, where most of the statutes and cases are collected.

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CHAPTER XXXVII.]

CONCERNING MURDER BY MALICE IMPLIED PRESUMPTIVE, OR MALICE IN LAW.

I HAVE before distinguished malice implied into these kinds: 1. When the homicide is voluntarily committed without provocation. 2. When done upon an officer or minister of justice. 3. When done by a person, that intends a theft or burglary, &c.

1. Therefore touching the former of these.

When one voluntarily kills another without any provocation, it is murder, for the law presumes it to be malicious, and that he is *hostis humani generis*; [1] it remains therefore to be inquired, what is such

[1] The killing being proved, the inference is, that it was malicious, and that the party is guilty of murder, and it is for the accused to show the circumstances which justify, extenuate, or excuse the act; and this is accordant with the ordinary rule of evidence, that the party alleging the affirmative must prove it—a rule which usually applies in criminal as in civil cases. *Kelyng*, 27, 1 *East*, P. C. 224, 340; 4 *Bl. Com.* 201; *Roscoe Cr. Ev.* (2d ed.) 20; *The King v. Onely*, 2 *Ld. Ray.* 1493, and 2 *Strange*, 773; *Mitchell v. The State*, 5 *Yerger*, 340; *Commonwealth v. Knapp*, 10 *Pick*, 484; *Republica v. Mulatto Bob*, 4 *Dallas*, 146; *Matkalley's case*, 9 *Co.* 67 b; *Maugridge's case*, *Kelyng*, 119; *Holloways's case*, *Palm.* 545; *Cro. Car.* 131; *Bac. Ab. Murder*, C. 2; 2 *McNally*, 546; 2 *Starkie Ev.* 948; *Archbold, Cr. Pl.* 212, 213; 3 *Chitty, Cr. L.* (4 *Am. Ed.*) 727; 1 *Gabbitt, Cr. L.* 455; *Queen v. Kirkham*, 8 *Car. & P.* 116-117; *King v. Greenacre*, 8 *Car. & P.* 35; *People v. McLeod*, 1 *Hill*, 436; *State v. Zellers*, 2 *Halstead*, 243; *Pennsylvania v. Honeyman*, *Bell, McFall & Lewis, Addison*, 148, 161, 250, 282; *Commonwealth v. York*, 9 *Metcalf*, 93.

The killing, to be murder, must be committed with malice aforethought; but wherever it appears that a man killed another, it shall be intended, *prima facie*, that he did it maliciously, unless he can make out the contrary, by showing that he did it on a sudden provocation, or the like. 1 *Hawk. c.* 31, s. 32; *R. v. Greenacre*, 8 *C. & P.* 35.

And in general, any formed design of doing mischief may be called malice; and, therefore, not such killing only as proceeds from premeditated hatred or revenge against the person killed, but also in many other cases, such as is accompanied with those circumstances that show the heart to be perversely wicked, is judged to be of malice pre-pense, and consequently, murder. 2 *Hawk. c.* 31, s. 18; 2. *Str.* 766.

For when the law makes use of the term malice aforethought, as descriptive of the crime of murder, it is not to be understood in that narrow restrained sense to which the modern use of the word malice is apt to lead one, a principle of malevolence to par,

a provocation, as will take off the presumption of malice in him, that kills another.

He that wilfully gives poison to another, that hath provoked him or not, is guilty of wilful murder, the reason is, because it is an act of deliberation odious in law, and presumes malice.[2].

If *A.* comes to *B.* and demands a debt of him, or comes to serve him with a *Subpœna ad respondendum* or *ad testificandum*, and *B.* thereupon kills *A.* this is murder, because it is no provocation.

Watts came along by the shop of *Brains*, and distorted his mouth, and smiled at him, *Brains* kills him, it is murder, for it was no such

ticulars; for the law by the term malice (*malitia*) in this instance meaneth, that the fact hath been attended with such circumstances as are the ordinary symptoms of a wicked heart, regardless of social duty, and bent upon mischief. *Fost.* 255, 256, 257.

Also, wherever a person in cool blood, by way of revenge, beats another in such a manner that he afterwards dies thereof, he is guilty of murder, however unwilling he might have been to have gone so far. *1 Hawk. c. 31, s. 38.*

So where a master or other person in authority, *in foro domestico*, exceeds the bounds of moderation in administering correction, and death ensues, it will be manslaughter or murder according to the circumstances.

A blacksmith struck his servant with a bar of iron by way of correction for improper behaviour, by which he was killed; held, murder. A woman kicked and stamped on the belly of her child; ruled the same. *Grey's case, Kel. 64, 65; 1 East, P. C. 261. Foster 262.*

If a man resolve to kill the next person he meets, and do kill him, it is murder, although he knew him not, for it is universal malice. *4 Bl. Com. 400.*

Where the act is committed deliberately, and is likely to be attended with dangerous consequences, the malice requisite to murder will be presumed; for the law infers that the natural or probable effects of any act deliberately done, were intended by its actor. *Commonwealth v. Drew, 4 Mass. 391.*

Forcing a person to do an act which is likely to produce his death, and which does produce it, is murder. *Rex v. Evans, 1 Russ. C. & M. 426.*

And threats may constitute such force. *Ib.*

He who kills another upon his desire or command, is, in the judgment of the law, as much a murderer as if he had done it merely of his own head. *Rex v. Sawyer, 1 Russ. C. & M. 424.*

If a man encourages another to murder himself, and is present abetting him while he does so, such person is guilty of murder as principal. If two encourage each other to murder themselves together, and one does so, but the other fails in the attempt upon himself, he is a principal in the murder of the other. But if it be uncertain whether the deceased really killed himself, or whether he came to his death by accident before the moment when he meant to destroy himself, it will not be murder in either. *Rex v. Dyson, R. & R. C. C. 523.*

Where a wound is wilfully, and without justifiable cause inflicted, and ultimately becomes the cause of death, the party who inflicted it is guilty of murder, though life might have been preserved if the deceased had not refused to submit to a surgical operation. *Reg. v. Holland, 2 M. & Rob. 351.*

See also *Commonwealth v. Drew, 4 Mass. 391; Respublica v. Bob, 4 Dallas, 146; Pennsylvania v. Honeyman, Addison, 148; Pennsylvania v. McFall, Addison, 252; Pennsylvania v. Lewis, Addison, 182; Commonwealth v. York, 7 Boston Law Reporter, 510; State v. Zellers, 2 Halsted, 220; State v. Merrill, 2 Dev. 269; The People v. McLeod, 1 Hill, 377; State v. Town, Wright, 75; State v. Turner, Ibid. 20; Woodsides v. The State, 2 Howard Miss. Rep. 656; Dexter v. Spear, 4 Mason, 115. ante ch. 36 notes.*

[2] *1 East, P. C. 225; 4 Bl. Com, 200.* (See ante Chapter XXXIII. note.) By Statute, *1 Vict. c. 85, s. 2*, administering poison with intent to murder, though no death should ensue, is made a capital offence.

provocation as would abate the presumption of malice in the party killing. *M. 42 & 43 Eliz. B. R. Brain's case.*(a)[3]

If *A.* be passing the street, and *B.* meeting him, (there being convenient distance between *A.* and the wall,) takes the wall of *A.* and thereupon *A.* kills him, this is murder; but if *B.* had justled *A.* this justling had been a provocation, and would have made it [456.] manslaughter, and so it would be, if *A.* riding on the road, *B.* had whipt the horse of *A.* out of the track, and then *A.* had alighted, and killed *B.* it had been manslaughter. 17 *Car. 1. Lanure's case.*

In the case of the lord *Morley*, 18 *Car. 2.*(b) all the judges met, and it was agreed by all judges except one, that if *A.* gives slighting words to *B.* and thereupon *B.* immediately kills him, this is murder in *B.* and that such words are not in law such a provocation, as will extenuate the offense into manslaughter, and the statute of 1 *Jac. cap. 8.* of stabbing in such a case was but provisional, because the juries were apt upon any verbal provocation to find the fact to be manslaughter; but it was there held, that words of menace of bodily harm would come within the reason of such a provocation, as would make the offense to be but manslaughter.

And many, who were of opinion, that bare words of slighting, disdain, or contumely, would not of themselves make such a provocation, as to lessen the crime into manslaughter, yet were of this opinion, that if *A.* gives indecent language to *B.* and *B.* thereupon strikes *A.* but not mortally, and then *A.* strikes *B.* again, and then *B.* kills *A.* that this is but manslaughter, for the second stroke made a new provocation, and so it was but a sudden falling out, and tho *B.* gave the first stroke, and after a blow received from *A.*, *B.* gives him a mortal stroke, this is but manslaughter according to the proverb *the second blow makes the affray*; and this was the opinion of myself and some others.[4]

There was a special verdict found at *Newgate*, viz. *A.* sitting drinking in an alehouse, *B.* a woman called him a *son of a whore*, *A.* takes up a broomstaff, and at a distance throws it at her, which hitting her upon the head kild her, whether this was murder or manslaughter was the question in *P. 26 Car. 2.* it was propounded to all the judges at *Serjeants-Inn*, two questions were named, 1. Whether bare words, or words of this nature, would amount to such a provocation, as would extenuate the fact into manslaughter?(c)

2. Admitting it would not in case there had been a striking [457] with such an instrument, as necessarily would have caused death, as stabbing with a sword, or pistolling, yet whether

(a) *Cro. Eliz.* 778. *Kel.* 131.

(b) *Kelyng*, 55.

(c) See *Kel.* 131.

[3] *State v. Toohy*, 2 *Rice's Dig.* 104. *U. States v. Cornell*, 2 *Mason*, 91. *Woodside v. State*, 2 *Howard, Miss. R.* 656. *Davies v. The State*, 2 *Humphrey*, 437. *Coffee v. The State*, 3 *Yerger*, 288.

[4] 1 *Russ. on C.* 587. *Foster*, 295. *R. v. Maugridge*, *Kel.* 128. *R. v. Snow*, 1 *Leach*, 151. *Reg. v. Smith*, 8 *C. & P.* 160.

this striking, that was so improbable to cause death, will not alter the case; the judges were not unanimous in it; and in respect, that the consequence of a resolution on either side was great, it was advised the king should be moved to pardon him; which was accordingly done.[5]

A. and *B.* are at some difference, *A.* bids *B.* take a pin out of the sleeve of *A.* intending thereby to take an occasion to strike or wound *B.* which *B.* doth accordingly, and then *A.* strikes *B.* whereof he died; this was ruled murder, 1. Because it was no provocation, when he did it by the consent of *A.* 2. Because it appeared to be a malicious and deliberate artifice thereby to take occasion to kill *B.*

If there be chiding between husband and wife, and the husband strikes his wife thereupon with a pestle, that she dies presently, it is murder, and the chiding will not be a provocation to extenuate it to manslaughter. 43 *Eliz. Crompt. fol. 120. a.(d)* [6]

(d) See also *Kel. 64.*

[5] *Hazel's case*, 1 *Leach*, 368. *Twiner's case*, 1 *Ld. Raymond*, 143. *Wigg's case*, 1 *Leach*, 378. *R. v. Howlett*, 7 *C. & P.* 274. *Macklin's case*, 7 *Lew.* 225.

[6] An unwarrantable imprisonment of a man's person has been holden sufficient provocation to make a killing, even with a sword, manslaughter only. *R. v. Buckner*, *Sty.* 467. Therefore where a constable took a man without warrant, upon a charge which gave him no authority to do so, and the prisoner ran away, and *J. S.*, who was with the constable all the time, ran after the prisoner, who, to prevent his being retaken, killed *J. S.*; it was holden to be manslaughter only, although, whilst under the charge of the constable, the prisoner struck the man who gave the charge; because a blow under the provocation of the illegal arrest would not justify the constable in detaining him, unless the blow were likely to be followed by dangerous consequences, and formed a new and distinct ground of detainer. *R. v. Curran*, *R. & M.* 132; see *R. v. Thompson*, *R. & M.* 88.

So where a creditor placed a man at the chamber door of his debtor, with a sword drawn to prevent him from escaping, while a bailiff was sent for to arrest him, and the debtor stabbed the creditor, this was held manslaughter. *R. v. Withers*, 1 *East*, *P. C.* 233.

There are other instances where slight provocation has been considered as extenuating the guilt of homicide, upon the ground that the conduct of the party killing, upon such provocation, might fairly be attributed to an intention to chastise rather than to a cruel and implacable malice. But it must appear that the punishment was not urged with brutal violence. Thus, where *A.* finding a trespasser upon his land, in his passion beat him, and, unluckily, happened to kill him, it was holden to be manslaughter. *Fost. R.* 91. 1 *Russ. on Crimes*, 582.

So where a person, whose pocket has been picked, encouraged by a mob, threw the pick-pocket into a pond, for the purpose of ducking him, but he was unfortunately drowned: this was holden to be manslaughter. *R. v. Ray*, 1 *East*, *P. C.* 236.

It seems to be agreed; that no breach of a man's word or promise, no trespass either to lands or goods, no affront by bare words or gestures, however false or malicious it may be, and aggravated with the most provoking circumstances, will excuse him from being guilty of murder, who is so far transported thereby as immediately to attack the person who offends him in such a manner as manifestly endangers his life, without giving him time to put himself upon his guard; if he kills him in pursuance of such an assault, whether the person slain did at all fight in his defence or not, for so base and cruel a revenge cannot have too severe a construction. 1 *Hawk. c.* 31. *a.* 33.

Nor can any provocation whatever render homicide justifiable, or even excusable; the

II. The second kind of malice implied is, when a minister of justice, as a bailiff, constable, or watchman, &c. is killed in the execution of his office, in such a case it is murder.

If the sheriff's bailiff comes to execute a process, but hath not a

least it can amount to is manslaughter. If a man kill another suddenly, without any, or without a considerable provocation, the law implies malice, and the homicide is murder; but if the provocation were great, and such as must have greatly provoked him, the killing is manslaughter only. *Kel. 135. Fost. 290.*

If a man pull another's nose, or offer him any other great personal indignity, and the other thereupon immediately kill him, it is manslaughter only. *Kel. 135. 4 Bl. Com. 191.* But slight provocation even by a blow will not extenuate the crime where the revenge is disproportioned to the injury, or outrageous and barbarous in its nature; as, if a man, upon being gently pushed by a policeman to make him move on when causing an obstruction, kill him, this is murder. *Reg. v. Hagan, 8 C. & P. 167.* See also *Stedman's case, Fost. 292. R. v. Lynch, 5 C. & P. 324.*

So, if a father see another person in the act of committing an unnatural crime with his son, and instantly kill him, it is manslaughter only; but if, hearing of it, he go in quest of the party and kill him, it is murder. *Reg. v. Fisher, 8 C. & P. 182.* See *Foster, 182.*

Semble, if A. kill B. under provocation of a blow not sufficiently violent in itself to render the killing manslaughter, but the blow be accompanied by very aggravating words and gestures, that will be but manslaughter in A. *Reg. v. Sherwood, 1 Car. & K. 556.*

In a case where there had been mutual blows, and then upon one of the parties being pushed down on the ground, the other stamped upon his stomach and belly with great force, and thereby killed him, it was considered only to be manslaughter. *Rex v. Ayes, 1 Russ. C. & M. 496; R. & R. C. C. 166.* But in the case of *Rex v. Therpe, 1 Lewin C. C., Bailey, J.* intimated that death caused by up-and-down fighting would be murder.

In the case of death by stabbing, if the jury are of opinion that the wound was inflicted by the prisoner while smarting under a provocation, so recent and so strong that the prisoner may be considered as not being at the moment master of his own understanding, the offence will be manslaughter; but if there had been, after the provocation, sufficient time for the blood to cool, for reason to resume its seat, before the mortal wound was given, the offence will amount to murder; and if the prisoner display thought, contrivance, and design in the mode of possessing himself of the weapon, and in again replacing it immediately after the blow was struck, such exercise of contrivance and design denotes rather the presence of judgment and reason than of violent and ungovernable passion. Per *Tindal, C. J. Rex v. Hayward, 6 Car. & P. 157.*

It was held to be no excuse for killing a man who was out at night dressed in white as a ghost, for the purpose of frightening the neighbourhood, that he could not otherwise be taken. *Rex v. Smith, 1 Russ. C. & M. 459.*

Where the prisoner, who was a butcher, had employed the deceased, a shepherd boy, to tend some sheep which were penned, and he had negligently suffered some of them to escape through the hurdles; and the prisoner, upon seeing it, ran towards the boy, and taking up a stake which was lying on the ground, threw it at him, and inflicted an injury of which he died: *Held*, that under the circumstances it was a question for the jury whether it was murder or manslaughter; they found the latter. *Rex v. Wigge, 1 Leach, C. C. 379.*

As an assault, though illegal, will not reduce the crime of the party killing the person assaulting him to manslaughter, when the revenge is disproportionate and barbarous, much less will such personal restraint and coercion as one man may lawfully use towards another form any ground of extenuation. *Rex v. Willoughby, 1 Russ. C. & M. 437; 1 East, P. C. 288.* And see *Rex v. Steadman, 1 East, P. C. 234; Rex v. Nailor, 1 East, P. C. 277; Rex v. Milton, 1 East, P. C. 411.*

If A. stands with an offensive weapon in the doorway of a room, wrongfully to prevent J. S. from leaving it, and others from entering, and C. who has a right in the room,

lawful warrant, as if the name of the bailiff, plaintiff, or defendant be interlined or inserted after the sealing thereof by the bailiff himself, or any other, if such bailiff be killed, it is but manslaughter, and not murder.

But if a process issuing out of a court of record to a serjeant at mace, sheriff, or other minister, be erroneous, as if a *Capias* issue, when a *Distringas* should issue, yet the killing of such a minister in the execution of that process is murder, altho he execute the process in the night,^(e) or upon a *Sunday*.^(f) *Mackally's case*, 9 Co. Rep. 68. a.

But if the process be executed out of the jurisdiction of the court, the killing of the minister is only manslaughter, [458] and so it is, if the issuing of the process, were void, and *coram non iudice*.

A bailiff or officer *jurus & conus* may arrest a man without showing his warrant,^(g) and a private bailiff need not show his warrant upon the arrest, till the party arrested demand it, and therefore, if the party arrested kill a bailiff upon the arrest without such a warrant

(e) 9 Co. 66. a.

(f) 9 Co. 66. b. for ministerial acts might lawfully be executed upon a *Sunday*, but since our author wrote, the law is altered in this respect; for by 29 Car. 2. cap. 7. all process, warrants, &c. served or executed on a *Sunday* are void, except in cases of treason, felony, or breach of the peace, so that now, an officer arresting a man upon a warrant on a *Sunday* is, as if he had him arrested without any warrant at all.

(g) Tho the party do demand it; this is intended of the warrant constituting him bailiff; but as to the writ or process against the party, there is no difference between a public or a private bailiff, for in either case, if the party submit to the arrest, and do demand it, he is bound to shew at whose suit, for what cause, out of what court the process issues, and when and where returnable. 5 Co. 54. a. 9 Co. 69. a.

struggles with him to get his weapon from him, upon which D., a comrade of A., stabs C., it will be murder in D. if C. dies. *Rex v. Longden*, R. & R. C. C. 228; 1 Russ. Q. & M. 439.

A bare trespass against the property of another, not his dwelling-house, is not a sufficient provocation to warrant the owner in using a deadly weapon in its defence; and if he do, and with it kill the trespasser, it will be murder. If the beating, however, be with an instrument, and in a manner not likely to kill, it will be no more than manslaughter. So, if any one, under colour or claim of legal authority, unlawfully arrest, or actually attempt or offer to arrest another, and this latter in his resistance kills the aggressor, it will be no more than manslaughter. So if one, not a stranger, aids the injured party by endeavouring to rescue him, or to prevent an unlawful arrest when actually attempted. *Commonwealth v. Drew*, 4 Mass. 391.

See *Woodhead's case*, 1 Lewin, 163; *Cro. Eliz.* 778; *Kel.* 131; *Langstaff's case*, 1 Lewin, 162; *State v. Yarborough*, 1 Hawks, (N. C.) Rep. 78; *State v. Tacket*, *ibid.* 210; *Allen v. The State*, 5 Yerger, 423; *State v. Ford*, 1 Spears, 146; *Jacob v. The State*, 1 Humphrey, 493; *State v. Piver*, 2 Haywood, R. 29; *State v. Morgan*, 3 Iredell, 136; *State v. Ferguson*, 2 Hill, 619; *Slaughter v. The Commonwealth*, 11 Leigh, 681; *State v. McCarty*, 1 Spears, 384.

Among equals the general rule is, that words are not, but blows are a sufficient provocation; yet there may be words of reproach so aggravating when uttered by a slave, as to excite in the white man the temporary fury, which negatives the charge of malice. *State v. Jarrott*, 1 Iredell, 76.

shewn, it is murder; and so it is, if a serjeant at mace, makes the arrest without showing his mace, *ibidem Mackally's case.*(h)

A bailiff *jurus & conus* had a warrant to arrest *Pew* upon a *Capias*, and came to arrest him, not using any words of arrest, *Pew* said, *Stand off, I know you well enough, come at your peril*, the bailiff takes hold of him, *Pew* thrusts him through; it was ruled murder, tho he used no words of arrest, nor showed his warrant, for possibly he had not time. *P. 6 Car. I. B. R.*(i)

A bailiff having a warrant to arrest *Cook* upon a *Capias ad satisfaciendum* came to *Cook's* house, and gave him notice, *Cook* menaceth to shoot him if he depart not, yet the bailiff departs not, but breaks open the window to make the arrest, *Cook* shoots him, and kills him; it was ruled, 1. That it is not murder, because he cannot break the house,(k) otherwise it had been, if it had been upon an *Habere facias possessionem.*(l) 2. But it was manslaughter, because he knew him to be a bailiff. But 3. Had he not known him to be a bailiff, or one that came upon that business, it had been no felony, because done in defense of his house. *P. 15. Car. B. R.*(m)

But if a sheriff enter the house by the outward door open, he or his bailiff may break open the inward doors, tho the process [459] be without a *Non omittas*, and therefore the killing of him in such case is murder. *M. 17. Jac. B. R. White and Willshire.*(n)

If the sheriff or bailiff have once laid hands upon the prisoner, and so began his execution, he may break open the outward doors to take him, Sir *William Fishe's* case,(o) and if the warrant be directed to five bailiffs, two or three may make execution; resolved in *White's* case, *ubi supra.*

Upon a warrant against a felon, or one that hath dangerously wounded another, or for surety of the peace, or good behaviour, the constable may break open the door where the offender is, *Dalt. cap. 78.*(p) and so may the sheriff or his bailiff upon a *Capias ut legatum*, *Capias pro fine*, or other process for the king, if not opened upon demand.

The constable of the vill of *A.* comes into the vill of *B.* to suppress some disorder, and in the tumult the constable is kild in the vill of *B.* this is only manslaughter, because he had no authority in *B.* as constable.

But it seems, that if the constable of the vill of *A.* had a particular precept from a justice of peace directed to him by name, or by the name of the constable of *A.* to suppress a riot in the vill of *B.* or to apprehend a person in the vill of *B.* for some misdemeanor, and within the jurisdiction and conusance of the justice of peace, and in pursuance of that warrant he go to arrest the party in *B.* and in execution of his warrant is killed in *B.* this is murder; for tho, in such

(h) 9 Co. 69. a.

(i) Cro. Car. 183.

(k) 5 Co. 92. b. *Semayne's case.*

(l) 5 Co. 91. b.

(m) Cra. Car. 537. *W. Jones*, 429.

(n) *Palmer* 52.

(o) Cited in *White's case*, *Palmer* 53.

(p) *New Edit. cap. 127. p. 426.*

case, it seems the constable was not bound to execute the warrant out of his jurisdiction, neither could he do it singly *virtute officii*, as constable of *A.* yet he may do it as bailiff or minister by virtue of the warrant, and the killing of him is murder, as well as if he had been constable of the hundred wherein *A.* and *B.* lie, or sberiff of the county; for a justice of peace may for a matter within his jurisdiction issue his warrant to a private person, as servant; but then such person must shew his warrant, or signify the contents of it. 14 *H.* 8. 16. *a.*

And altho the warrant of the justice be not in strictness lawful, as if it express not the cause particularly enough, [460] yet if the matter be within his jurisdiction as justice of peace, the killing of such officer in execution of his warrant is murder; for in such case the officer cannot dispute the validity of the warrant, if it be under seal of the justice. 14 *H.* 8. 16.

If *A.* and *B.* are constables of the vill of *C.* and there happens a riot or quarrel between several persons, *A.* joins with one party, and commands the adverse party to keep the peace, *B.* joins with the other party, and in like manner commands the adverse party to keep the peace, and the assistants and party of *A.* in the tumult kill *B.* it seems that this is but manslaughter, and not murder, in as much as the officers and their assistants were one engaged against the other, and each had as much authority as the other.

But if the sheriff having a writ of *Habere facias possessionem* against the house and lands of *A.* and *A.* pretending it to be a riot upon him, gain the constable of the vill to assist him, and to suppress the sheriff or his bailiffs, and in the conflict the constable is killed, this is not so much as manslaughter; but if any of the sheriff's officers were killed, it is murder, because the constable had no authority to encounter the sheriff's proceeding or acting by virtue of the king's writ.

If a constable, or tithing-man, or watchman be in execution of his office, and be killed, it is murder; and in all cases of implied malice, or malice in law, the indictment need not be special, but general *ex malitiâ suâ præcogitatâ interfecit & murdravit*, and the malice in law maintains the indictment. 9 *Co. Rep.* 68. *Mackally's case.*

But now touching the point of notice.

1. It is not necessary to make it murder, that the party killing know the person of the bailiff, constable, or watchman.

2. If he be a bailiff *jurus & conus*, it seems there is no necessity for him to notify himself to be such by express words, but it shall be presumed that the offender knew him, as it seems by the book 9 *Co. Rep.* 69. *b.* *Mackally's case*; *quære.*

3. But if it be a private bailiff, either the party must know that he is so, as in *Pew's case* before, or there must be some [461] such notification thereof, whereby the party may know it, as by saying, *I arrest you*, which is of itself sufficient notice, and it is at the peril of the party, if he kill him after these words, or words to that effect pronounced, for it is murder, if *de facto* it

falls out, that he were a bailiff, and had a warrant. 9 Co. Rep. *ubi supra*.

4. A constable coming to appease a sudden affray in the day time in the village, whereof he is constable, it seems every man *ex officio* is bound to take notice that he is the constable, because he is to be chosen and sworn in the leet, where all residents are to attend, 4 Co. Rep. 40. *b. Young's case*; (q) but it is not so in the night-time, unless there be some notification, that he is the constable.

5. But whether it be in the day or night, it is sufficient notice, if he declare himself to be the constable, or command the peace in king's name, and the like for any that come in his assistance, or for a watchman, &c. and therefore, if any of them are killed after such a notification, it is murder in them that kill him. 9 Co. Rep. 68. *b. Mackally's case*.

And these differences may be collected out of the books, 4 Co. Rep. 40. *Young's case*. "Et en cest case fuit tenuis *per totam curiam*, que si sur affray fait le constable and autres en son assistance veignent a suppresser le affray & a preserver le peace, & en fesant leur office le constable ou ascun de ses assistants soit tue, ceo est murder en ley, coment que le murderer ne scavoit le party, que fuit tue, & coment que le affray fuit sodein; pur ceo que le constable & ses assistants veigne per authoritie del ley pur le garder del peace & a preventer le danger, que poit ensuer per le infreinder de ceo, & pur ceo le ley adjudgera ceo murder, & que le murderer avoit malice prepense, pur ceo, que il oppose luy mesme enconter le justice del realme, & issint de le viscont, ou son bailiff, [462] ou watchman en fesant son office." And 9 Co. Rep. 69.

Mackally's case, where it was objected, that the serjeant at mace did not show his mace, whereby the offender might know him to be an officer; yet it was ruled, that the killing of him was murder, 1. Because it was found, that he was *serviens ad clavam, juratus & cognitus*, and a bailiff *jurus & conus* need not show his warrant, tho demanded, nor another bailiff without demand; and when the books speak of a bailiff *jurus & conus*, it is not necessary that he be known to the party arrested, but it is sufficient if he be commonly known. 2. "Si notice fuit requisite il done sufficient notice, quant il dit *jeo toy arrest in le nosme le roy*, &c. Et le party a son peril doit luy obeyer, & sil nad loyall garrant, il poit aver son action de faux imprisonment, issint que in cest case sans question le serjant ne besoigne a monstre son mace, car sils serra chase a monstre leur mace, ceo serra warning al party destre arrest a fuer.

H. 24 & 25 Car. 2. A great number of persons assembled in a house called *Sissinghurst* in *Kent*, issued out and committed a great riot and battery upon the possessors of the wood adjacent. One of

(q) The reason here given by our author is not mentioned in this case, but it is there held, that a person's acting as constable is a sufficient notification, altho the party do not otherwise know him to be so.

their names, *viz.* *A.* was known, the rest were not known; a warrant was obtain'd from a justice of peace to apprehend the said *A.* and divers other persons unknown, which were all together in *Sissinghurst-house*. The constable, with about sixteen or twenty called to his assistance, came with the warrant to the house, and demanded entrance, and acquainted some of the persons within, that he was the constable, and came with the justice's warrant, and demanded *A.* with the rest of the offenders, that were then in the house, and one of the persons within came and read the warrant, but denied admission to the constable, or to deliver *A.* or any of the malefactors, but going in commanded the rest of the company to stand to their staves: the constable and his assistants fearing mischief went away, and being about five rod from the door, *B. C. D. E. F. &c.* about fourteen in number, issued out and pursued the constable and his assistants; the constable commanded the peace, yet they fell on and kild one of the assistants of the constable, and wounded others, and then retired into the house [463] to the rest of their company, which were in the house, whereof the said *A.* and one *G.* that read the warrant, were two, for which the said *A. B. C. D. E. F. G.* and divers others were indicted of murder, and tried at the king's bench bar, wherein these points were unanimously agreed.

1. That altho the indictment were, that *B.* gave the stroke, and the rest were present, aiding and assisting, tho in truth *C.* gave the stroke, or that it did not appear upon the evidence, which of them gave the stroke, but only that it was given by one of the rioters, yet that evidence was sufficient to maintain the indictment, for in law it was the stroke of all that party, according to the resolution in *Mackally's case*, 9 *Co. Rep.* 67. *b.*

2. That in this case all, that were present and assisting to the rioters, were guilty of the death of the party slain, tho they did not all actually strike him, or any of the constable's company.

3. That those within the house, if they abetted or counselled this riot, were in law present, aiding, and assisting, and principals as well as those that issued out and actually committed the assault, for it was but within five rod of the house, and in view thereof, and all done as it were in the same instant; *vide* lord *Dacre's* case before.

4. That here was sufficient notice, that it was the constable before the man was killed, 1. Because he was constable of the same vill. 2. Because he notified his business at the door before the assault, *viz.* that he came with the justice's warrant. 3. Because after his retreat, and before the man slain, the constable commanded the peace, and notwithstanding it, the rioters fell on, and kild the party.

5. It was resolved, that the killing of the assistant of the constable was murder, as well as the killing of the constable himself.

6. That those, that came in the assistance of the constable, tho not

specially called thereunto, are under the same protection as they that are called to his assistance by name.

7. That altho the constable retired with his company upon the not delivering up of *A.* yet the killing of the assistant of the con-
[464] stable in that retreat was murder. 1. Because it was one continued act in the pursuance of his office, his retiring was as necessary, when he could not attain the effect of his warrant, and was in effect a continuation of the execution of his office, and under the same protection of the law, as his coming was. 2. Principally, because the constable in the beginning of the assault, and before the man was stricken, commanded the peace, and is all one with *Yonge's* case.

8. It seems, that tho the constable had not commanded the peace, yet when he and his company came about what the law allowed them, and, when they could not effect it fairly, were going their way, that the rioters pursuing them, and killing one, was murder in them all, because it was done without provocation, for they were peaceably retiring; but this point was not stood upon, because there was enough upon the former point to convict the offenders, and in the conclusion the jury found nine of them guilty, and acquitted those within, not because they were absent, but because there was no clear evidence, that they consented to the assault, as the jury thought, and thereupon judgment was given against the nine to be hanged: and note, that the award was for the marshal to do execution, because they were remanded to the custody of the marshal, and he is the immediate officer of the court, and precedents in cases of judgment given in the king's bench have commonly run, *Et dictum est marescallo, &c. quod faciat executionem periculo incumbente.*(r)

At *Newgate* in *Lent* vacation, 26 *Car.* 2. the case was thus: five persons committed a robbery about *Hounslow-heath* in *Middlesex*, viz. *Jackson* and four others, the party robbed raised hue and cry, the country pursued them, and at *Hampstead Jackson* one of the five turned upon his pursuers, the rest being in the same field, and having often resisted the pursuers, and refusing to yield, killed one of the pursuers, by five judges then present it was ruled. 1. That this was murder, because the country, upon hue and cry levied, are authorized by law to pursue and apprehend the malefactors; and in this case here was a felony done, and a felony done by those persons, that were thus pursued. 2. That altho there was no warrant of a justice of peace to raise hue and cry, and tho there was no constable in the pursuit, yet the hue and cry was a good warrant in law.

(r) And thus it was in the case of the *Althoes*, T. 9. *Geo.* I. B. R. who were convicted of a barbarous murder in *Pembrokeshire*, at *Hereford* assizes, being the next *English* county; the indictment was removed by *Certiorari* into the king's bench, in order to argue some exceptions, which were over-ruled; and after some question made, whether they ought not to be sent back to *Herefordshire* to receive sentence there, the court was of opinion, that they had the same jurisdiction over facts committed in *Wales*, as if committed in the next adjacent county in *England*, and so they were sentenced at the king's bench, and were executed by the marshal at *Kennington* gallows near *Southwark*.

for them to apprehend the offenders, and the killing of any of the pursuants by *Jackson* was murder. 3. In as much as all of the robbers were of a company, and made a common resistance, and so one animated the other, all those of the company of the robbers that were in the same field, tho at a distance from *Jackson*, were all principals, viz. present, aiding, and abetting. 4. That when one of the malefactors was apprehended a little before the party was hurt, *that* person being in custody when the stroke was given was not guilty, unless it could be proved, that after he was apprehended he had animated *Jackson* to kill the party: they had all judgment of death for the robbery, and four of them for the murder.

A press-master seised *B.* for a soldier, and with the assistance of *C.* laid hold on him. *D.* finding fault with the rudeness of *C.* there grew a quarrel between them, and *D.* killed *C.* By the advice of all the judges, except very few, it was ruled, that this was but manslaughter, 17 *Car.* 2.(s)[7]

(s) *Hugget's case*, 25 April 1666. at *Newgate*, *Kel.* 59. 137.

[7] If therefore upon an affray, the constable, or others in his assistance, come to suppress the affray and preserve the peace, and in executing their office the constable or any of his assistants are killed, it is murder in law; although the murderer knew not the party that was killed, and although the affray was sudden because the constable and his assistants came by authority of law to keep the peace, and prevent the danger which might ensue by the breach of it; and, therefore, the law will adjudge it murder, and that the murderer had malice prepense, because he set himself against the justice of the realm; *Cases of Appeals and Indictments*, 4 Co. 40. This rule is not confined to the instant the officer is upon the spot, and at the scene of action, engaged in the business that brought him thither; for he is under the same protection of the law *cundo, morando, et redeundo*: and therefore if he come to do his office, and meeting with great opposition, retire and be killed in the retreat, this will amount to murder; as he went in obedience to the law and in the execution of his office, and his retreat was necessary in order to avoid the danger by which he was threatened; and upon the same principle, if he meet with opposition by the way, and be killed before he come to the place, such opposition being intended to prevent his doing his duty, (which is a fact to be collected from circumstances appearing in evidence,) this likewise will amount to murder. 1 *Russ. on Crimes*, 532. *Fost.* 308, 309. 4 *Penn. Law Jour.* 29. *Charge of King, P., to Grand Jury, Oyer and Terminer, Philadelphia*, 1844. See chap. 40, notes.

A policeman is entitled to the same protection in the execution of his duty as a constable, and if he is killed, while so engaged, it will be murder. Where, therefore, a policeman, between eleven and twelve o'clock at night, was called upon to clear a beer-house, which he did, and then went into the street, where the prisoner and many others were standing near the door, when the prisoner, upon being requested, refused to go home, and used very abusive and violent language, and the policeman laid his hand on his shoulder gently, and told him to go away, on which the prisoner immediately stabbed him with a knife in the throat; it was held that if the policeman had died, this would have been murder. The case would not have been altered had the policeman, without being called upon, gone in of his own accord upon hearing any noise at such a time of night; as thereby he would not only have acted within the line of his duty, but have been guilty of a breach of it had he done otherwise; and in this case, any blow given after the above occurrences, with a cutting instrument, would be precisely the same as if it had been given without any thing having been done by the policeman. *Rez v. Hems*, 7 C. & P. 312. So when a policeman saw the prisoner playing the bagpipes, in a street, at half past eleven o'clock at night, by which he collected a large crowd round him, among whom were prostitutes and thieves, and the policeman told him he could not be allowed to play at that time of night, and he must go on, but he said he would be damned if he would, and the policeman took hold of him by the shoulder, and slightly pushed him, on which the prisoner wounded him with a razor; it was held that if the prisoner was col-

III. The third kind of *malice implied* is in relation to the person killing.

If *A.* come to rob *B.* in his house, or upon the highway, or other-

lecting a crowd of persons at that time of night, and the policeman desired him to go on, and laid his hand upon his shoulder with that view only, he did not exceed his duty, and if the prisoner then wounded him, it would have been murder if he had died; but if the policeman gave the prisoner a blow and knocked him down, he was not justified in so doing. *Reg. v. Hagan*, 8 C. & P. 167.

It is a general rule that, when persons have authority to arrest or imprison, and using the proper means for that purpose, are resisted in so doing, and killed, it will be murder in all who take part in such resistance. *Foster*, 270. But three things are to be attended to in matters of this kind; the legality of the deceased's authority, the legality of the manner in which he executed it, and the defendant's knowledge of that authority; for if an officer be killed in attempting to execute a writ or warrant invalid on the face of it, (or if issued with a blank in it and the blank afterwards filled up; or if issued with an insufficient description of the defendant. 1 *East. P. C.* 310. *Housin v. Barrow*, 6 T. R. 122. *Rex v. Wipwick*, 8 T. R. 454; *Rex v. Hood*, 1 *Moody, C. C.* 81;) or against a wrong person, or out of the district in which alone it could legally be executed; or if a private person interfere and act in a case where he has no authority by law to do so; or if the defendant have no knowledge of the officer's business, or of the intention with which a private person interferes, and the officer or private person be resisted or killed; the killing will be manslaughter only. *Jerv. Arch. Crim. Law*, 9th ed. 429. But when any officer is in the legal execution of his duty, or a private person endeavouring to suppress an affray, or apprehend a felon, and is resisted and killed; if it appear that the slayer knew the officer's business or the intent of the private person, either expressly from the deceased, or impliedly from the circumstances, (*R. v. Heworth*, 1 *Mood, C. C.* 207,) the killing is murder; if it appear he was ignorant in this respect, it is manslaughter only. 1 *Hawk. c.* 31. ss 49, 50; *Fost.* 310. So if a constable having a charge of felony against a defendant, take him without a warrant, and the defendant, knowing the constable, kill him, it will be murder, even though the constable do not tell him of the charge, and the defendant, in fact, has done nothing for which he is liable to be arrested. *R. v. Woolmer*, R. & M. C. C. 334.

If a constable show his staff of office, this, it seems, is a sufficient intimation of his authority. *Fost.* 311. And in such a case it is not necessary to prove the deceased's appointment as constable; proof that he was accustomed to act as constable is sufficient. 1 *East, P. C.* 315. But private persons, when they interfere, must expressly intimate their intention, otherwise killing them will be manslaughter only. *Foster*, 310, 311. An officer is justified in arresting on a charge of felony, though the charge does not in terms specify all the particulars necessary to constitute the felony. *Rex v. Ford*, R. & M. 329. But where a constable attempted to arrest a man while in a privy, without any charge having been made against him, but upon a simple direction to take him; whereupon the man immediately stabbed the constable; it was holden, by a majority of the judges, that, as the actual arrest would have been illegal, the attempt to arrest when the defendant was in such a situation that he could not get away, and when the waiting to give notice might have enabled the constable to make the arrest, was such a provocation as reduced the offence to manslaughter only. *Rex v. Thompson*, R. & M. 80. A constable who had verbal orders from the magistrates to apprehend all thimble-riggers, attempted to apprehend the defendant and his companions, who were playing at thimble-rig, in a public fair, and succeeded in apprehending one of his companions, whom the defendant rescued, and afterwards, in the evening, seeing the defendant in a public house, endeavoured to apprehend him, telling that he did so for what he had been doing in the fair; the defendant escaped into a privy, and the constable calling others to his assistance, broke open the privy and attempted to apprehend the prisoner, who stabbed one of the party; a conviction for feloniously cutting and maiming was held wrong. *R. v. Gardner*, 1 *Mood. C. C.* 390. A police officer found *N.* with potatoes under his shirt, which had been recently dug from the ground, and apprehended him. The policeman called *O.* to assist him; *O.* did so; and a rescue being attempted, *O.* was struck by *A.* who went away, and *O.* was afterwards killed by other persons who attempted the rescue:—Held by the judges that the police officer had no right to apprehend *N.* and that the killing of *O.*, therefore, did not amount to murder, and that, on an indictment for murder, *A.* could not be convicted of an assault. *Reg. v. Phelps*, 1 Car. & M. 180. If a

wise, without any precedent intention of killing him, yet if in the attempt, either without or upon the resistance of *B. A.* kills *B.* this is murder. *Co. P. C. p. 52.*

constable take a man without warrant, upon a charge which gives him no authority to do so, and the prisoner run away, and is pursued by *J. S.* who was with the constable all the time, and charged by him to arrest, and the man kill *J. S.* it is manslaughter only, because the arrest was illegal, and *J. S.* ought to have known it; and, therefore, the attempt to retake the prisoner was illegal also. *R. v. Curran, R. & M. 132.*

If a warrant commanding the arrest of an individual in the name of the State have no seal, it is void. If an officer attempt to arrest the party named upon such authority, he proceeds at his peril, and is a wrong doer; and if he be killed in the attempt by the party, the slayer is guilty of manslaughter and not murder. *Tackett v. The State, 3 Yerger, 392.*

If any one, under color or claim of authority, unlawfully arrest or actually attempt or offer to arrest another, and this latter, in his resistance, kills the aggressor, it will be no more than manslaughter. *Com. v. Drew, 4 Metc. 391.* The same principle applies where one, not a stranger, aids the injured party by endeavoring to rescue him, or to prevent an unlawful arrest, when actually attempted. *Ibid.*; and see *U. S. v. Travers, per Story, 12 Wheeler's C. C. 509.* Where an affray had taken place, and a quarterly sergeant appeared and ordered the wranglers to desist, and on their not doing so, reported to the orderly serjeant, who called at the room, and ordered the persons engaged to the guard-house, but the prisoner remained behind on some pretence connected with his clothes, and when the serjeant was temporarily absent declared he would be the death of any one who attempted to take him to the guard-house, retired to a corner of the room where a number of unloaded muskets had been left, loaded one, and when the serjeant entered, with another, accosted him, "Stand off; if you approach, I will take your life." He immediately afterwards fired, and mortally wounded the serjeant and his companion. The case depended on the question whether or no at the time the defendant was legally liable to arrest, and the court, *Story, J.* and *Davis, J.*, charged the jury if such was the case, the offence was manslaughter, if otherwise, murder. *2 Wheeler's C. C. 495.* Where an officer of a British ship of war, in the year 1769, attempted, without a special warrant, to impress several seamen in a Massachusetts merchant vessel, and was killed in the attempt, it was held but manslaughter, the deceased acting without authority. *Case of the Crew of the Pitt packet, 4 Boston Law Reporter, 369. Wharton's Am. C. L. 236.*

If a person be impressed who is not a proper object of impressment, or if the impressment be made without any legal warrant, it is lawful for the party to make resistance; and if the death of any of the parties concerned ensue, it is murder. *Reg. v. Dixon, 1 East, P. C. 313. R. & R. C. C. 53. Reg. v. Rokeby, 1 East, P. C. 312.*

But if a seaman be impressed, and the pressgang be resisted, and any of them be killed; if the pressgang at the time were under the direction of a commissioned officer, and such officer were then acting with them, the killing would be murder, otherwise but manslaughter. *R. v. Broadfoot, Fost. 154.*

A special constable duly appointed under the statute 1 & 2 Will. IV. c. 41. is appointed for an indefinite time, and retains all the authority of a constable at common law, until his services are suspended or determined under the 9th section of that statute. *Reg. v. Porter, 9 C. & P. 778.*

In all cases where the outer door of a dwelling-house may be broken open in order to execute process, there must be a demand of admittance, or something equivalent thereto, and a refusal, *Fost. 320. 136;* see *Hancock v. Brown, 2 B. & Ald. 592.* otherwise if the officer be killed, it will be manslaughter only. *Arch. Cr. Law, by Jervis, 434, 9th ed.*

In all cases, however, above stated to be manslaughter only, if there be evidence of express malice in the party killing, the homicide will be murder. *R. v. Stockley, 1 East, P. C. 310. R. v. Curtis, Fost. 135.*

With respect to private persons using their endeavours to bring felons to justice, it should be observed by way of caution, that they must be careful to ascertain, in the first instance, that a felony has actually been committed, and that it has been committed by the person whom they would pursue and arrest. For if no felony has been committed, no suspicion, however well founded, will bring the person so interposing within the especial protection of the law, *Cre. Jac. 194. 2 Inst. 52. 172.* nor will it be extended to

So if men come to steal deer in a park or forest, or to rob a warren of conies, and the parker, forester, or warrener resists and is killed, this is murder; the lord *Dacre's* case.[8]

If a prisoner die by reason of duress and hard usage [466] by the gaoler, it is murder in the gaoler. *Co. P. C.* p. 52.[9]

those who, when a felony has actually been committed, upon suspicion possibly well founded, pursue and arrest the wrong person. *Fest.* 318. But the law is otherwise in the case of an officer acting in pursuance of a warrant. 1 *Russ. on Cr.* 534. And per Lord *Tenterden*, C. J., *Beckwith v. Philby*, 6 B. & C. 638. "There is this distinction between a private individual and a constable; in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed; whereas a constable, having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities."

If an innocent person be indicted for a felony, and an attempt be made to arrest him for it, without warrant, and he resist and kill the party attempting to arrest him; if the party attempting the arrest were a constable, the killing is murder; 1 *Hawk. c.* 28. s. 12. if a private person, manslaughter; because the constable has authority by law to arrest in such a case, but a private person has not. And the same in all cases where a person is arrested or attempted to be arrested upon a reasonable suspicion of felony. *Samuel v. Payne*, *Doug.* 359.

But a private person may arrest another whom he sees attempting to commit a felony, and if he be killed in the attempt, it will be murder. 2 *Hawk. c.* 12; s. 19.

Where one interferes to stop a brawl, and exercises no other force than is necessary for the object, having previously announced his purpose, the killing of him by one of the assailants will be murder. Thus, when A., in order to prevent B. from fighting with his brother, laid hold of him and held him down, striking no blow, upon which B. stabbed A., it was decided, that if in such case A. did nothing more than was necessary to prevent B. from beating his brother, the killing of him was murder; if otherwise, it would have been manslaughter only. *R. v. Brown*, 5 P. & C. 120.

The prisoner and one W. engaged in a fight, and were separated by the deceased. Some time after the fight was renewed, and the deceased again interfered, but being unable to take the prisoner off, called a negro to his assistance, who, in the act of separating the combatants, threw the prisoner against the wall. The prisoner then made at the deceased (who endeavoured to avoid him,) with a knife, and inflicted a mortal blow; it was held that this was a case of murder. *State v. Ferguson*, 2 *Hill*, 619.

[8] It is a general principle that, if in the execution of or attempt to execute a felony, a man kill another, he will be guilty of murder. Thus if C., having malice against A., strikes at and misses him, but kills B., this is murder in C. 1 *East, P. C.* 230; or if A. feloniously shoot at the poultry of another, and kill a man, this will be murder. *Fest.* 258.

Accidental homicide may be murder, if it happen in the prosecution of any illegal act; as in carrying away furniture to avoid a distress for rent. *Rex v. Hodgson*, 1 *Leach*, C. C. 6; *Rex v. Hubson*, 1 *East, P. C.* 258.

On the trial of an indictment for murder, where there is no pretence that the prisoner killed the deceased, while engaged in a riot or other misdemeanor, not amounting to a felony, or by misadventure, but the death ensued in consequence of an intentional violence upon the person of the deceased; whether the prisoner designed to kill or not, he is not entitled to have the jury instructed that they cannot convict of murder, if they should come to the conclusion that the mortal wound was inflicted in committing, or attempting to commit an offence, which of itself is less than a felony. *The People v. Rector*, 19 *Wen.* 569; *M. S. Sum.* 145, 175, 37. 46; *Palm.* 546, 2 *Roll. Rep.* 120.

[9] The case of *Huggins and Barnes* (2 *Strange*, 882) has been often referred to as to this mode of murder. It was this: *Huggins* was warden of the *Fleet Prison*, with power to execute the office by deputy, and appointed one *Gibbon*, who acted as deputy. *Gibbon* had a servant, *Barnes*, whose business it was to take care of the prisoners, and

So if a sheriff have a precept to hang a man for felony, and he beheads him, it is murder. *Co. P. C. Ibidem.*[10]

To these may be added the cases abovementioned, *viz.* if *A.* by malice forethought strikes at *B.* and missing him strikes *C.* whereof he dies, tho he never bore any malice to *C.* yet it is murder, and the law transfers the malice to the party slain; the like of poisoning, *sed de his supra cap.*[11]

particularly of one *Arne*: and *Barnes* put *Arne* into a new built room, over the common sewer, the walls of which were damp and unwholesome, and kept him without fire, chamber-pot, or other necessary convenience, for forty-four days, when he died. It appeared that *Barnes* knew the unwholesome situation of the room, and that *Huggins* knew the condition of the room, fifteen days at least before the death of *Arne*, as he had been once present at the prison, and seen *Arne* under such duress of imprisonment, and turned away; at which time *Barnes* shut the door of the room, in which *Arne* continued till he died. It was found that *Arne* had sickened and died by duress of imprisonment, and that during the time *Gibbon* was deputy, *Huggins* sometimes acted as warden. Upon these facts the court were clearly of opinion, that *Barnes* was guilty of murder. But they thought that *Huggins* was not guilty, as it could not be inferred, from merely seeing the deceased once during his confinement, that *Huggins* knew that his situation was occasioned by the improper treatment, or that he consented to the continuance of it: and they said, that it was material that the species of duress, by which the deceased came to his death, could not be known by a bare looking-in upon him. *Huggins* could not know the circumstances under which he was placed in the room against his consent, or the length of his confinement, or how long he had been without the decent necessities of life: and it was likewise material, that no application was made to *Huggins*, which perhaps might have altered the case. And the court seemed also to think, that as *Barnes* was the servant of *Gibbon*, and *Gibbon* had the actual management of the prison, the accidental presence of the principal would not amount to a revocation of the authority of the deputy. *Rex v. Huggins, and Barnes*, 2 Str. 882. 2 Lord Raym. 1574. Fast. 332. 1 East, P. C. 331, 332,

[10] With respect to the duty of officers in the execution of criminals, it has been laid down as a rule, that the execution ought not to vary from the judgment; for if it doth, the officer will be guilty of felony at least, if not of murder. 3 Inst. 52. 211; 4 Bl. Com. 179. And in conformity to this rule it has been holden, that if the judgment be to be hanged, and the officer behead the party, it is murder; 3 Inst. 52; 4 Blac. Com. 179. And that even the king cannot change the punishment of the law, by altering the hanging or burning into beheading, though, when beheading is part of the sentence, the king may remit the rest. 3 Inst. 52. But others have thought, that this prerogative of the crown, founded in mercy and immemorially exercised, is part of the common law: *Fost.* 270. *F. N. B.* 244, h. 19 *Rym. Feod.* 284. And that though the king cannot by his prerogative vary the execution so as to aggravate the punishment beyond the intention of the law, yet he may mitigate the pain or infamy of it: and, accordingly, that an officer, acting upon a warrant from the crown for beheading a person under sentence of death for felony, would not be guilty of any offence. *Fost.* 268; 4 Blac. Com. 405; 1 East, P. C. 335. But the rule may apply to an officer varying from the judgment of his own head, and without warrant or the colour of authority.

[11] Where a blow aimed at one person lighteth upon another and killeth him, this is murder, *Fost.* 261. Thus *A.*, having malice against *B.*, strikes at and misses him, but kills *C.*, this is murder in *A.*: and if it had been without malice and under such circumstances that if *B.* had died, it would have been but manslaughter, the killing of *C.* also would have been but manslaughter. *Dyer*, 128; *Kel.* 111, 112, 117; *Fost.* 261; 1 Hawk. c. 31, s. 42; *State v. Cooper*, 1 Green, N. J. R. Again, *A.*, having malice against *B.*, assaults him, and kills *C.*, the servant of *B.*, who had come in aid of his master: this is murder in *A.*; for *C.* was justified in attacking *A.* in defence of his master, who was thus assaulted. In another case, if *A.* give a poisoned apple to *B.*, intending to poison,

ber, and *B.*, ignorant of it, give it to a child, who took it and died; this is murder in *A.*, but no offence in *B.*; and this, though *A.*, who was present at the time, endeavoured to dissuade *B.* from giving it to the child. 2 *Plowden Com.* 474. So where *Plummer* and seven others, opposed the king's officers in the act of seizing wool. One of those persons shot off a fusee and killed one of his own party. The court held, in giving judgment upon a special verdict, that as the prisoner was upon an unlawful design, if he had in pursuance thereof discharged the fusee against any of the king's officers that came to resist him, in the prosecution of that design, and by accident had killed one of his own accomplices, it would have been murder in him. As if a man out of malice to *A.* shoot at him, but miss him and kill *B.*, it is no less a murder than if he had killed the person intended. *Kelyng*, 111; *Lord Raym.* 1581; 9 *St. Tr.* 112; *Higgins's case*; *Dyer*, 128; *Pl.* 60; *Crompt.* 101; 9 *Co.* 81, *Agnes Gore's case*; *D. Williams's case*, cited in the *Queen v. Mautridge*; *Kelyng*, 131, 132; 9 *St. Tr.* 61. In another case, the prisoner mixed poison in an electuary, of which her husband, and her father, and another, took part and fell sick. *Martin*, the apothecary, who had made the electuary, on being questioned about it, to clear himself, took part of it and died. On this evidence a question arose, whether *Agnes Gore*, the defendant, had committed murder; and the doubt was, because *Martin*, of his own will, without invitation or procurement of any, had not only eaten of the electuary, but had by stirring it so incorporated the poison with the electuary, that it was the occasion of his death. The judges resolved, that the prisoner was guilty of the murder of *Martin*, for the law conjoins the murderous intention of *Agnes* in putting the poison into the electuary to kill her husband, with the event which thence ensued; *quia eventus est qui ex causa sequitur, et dicuntur eventus quia ex causis eventus*, and the stirring of the electuary by *Martin*, without putting in the poison by *Agnes*, could not have been the cause of his death. 9 *Co.* 11; *Jenk. Cent.* 220; 3 *Inst.* 51; *Plowd. Com.* 574; 1 *Hawk. P. C. & Q.* 31, s. 3. Under the same head may be classed the case of one who gave medicine to a woman; and that of another who put skewers in her womb, with a view in each case to procure an abortion; whereby the women were killed. The case, at common law, was murder; though the original intent, had it succeeded, would not have been so, but only a great misdemeanor; for the acts were in their nature malicious and deliberate, and necessarily attended with great danger to the person on whom they were practised. *Com. v. Chauncey*; 2 *Ashmead*, 227. ante, 90.

If a man have a sudden quarrel, and fight with *A.*, by which his passions are strongly excited, and while his passions are thus excited, he without any real or supposed provocation kill *B.*, who is an utter stranger to the whole affair, and has not interfered in the quarrel, nor been in any way connected therewith, even in the party's own supposition, it will be murder. *U. S. v. Travers*, 2 *Wheeler's C. C.* 508, per *Story, J.* But, where the prisoner, having had a quarrel with his wife, pursued her, and aimed a blow at her with an axe, which fell on the head of his infant son, then in her arms, by which he was instantly killed, it being shown that the prisoner was ignorant of his child's position, and was at the time in the heat of blood, seeking to avenge himself on his wife for a supposed injury, it was held, that as the case was to be considered as if the wife had been the victim, the same grade of homicide would attach to the killing of the child as it would have done to that of the wife, if she had been killed. *Commonwealth v. Dougherty*, 7 *Smith's Laws*, 296. But in this, as in cases of malice prepense and express, if the blow intended for one would in law only have amounted to manslaughter, it will still be the same, though by mistake or accident it kill another. Thus, in an old case, a quarrel arising between some soldiers and a number of keelmen at Sandgate, a violent affray ensued, and one of the soldiers was very much beaten. The prisoner, a soldier who had before driven part of the mob down the street with his sword in the scabbard, on his return, seeing his comrade thus used, drew his sword, and bid the mob stand clear, saying he would sweep the street; and on their pressing on him he struck at them with the flat-side, and as they fled pursued them. The other soldier in the mean time had got away, and when the prisoner returned he asked whether they had murdered his comrade; and being several times again assaulted by the mob, he brandished his sword, and bid them keep off. At this time the deceased, who from his dress might be mistaken for a keelman, was going along about five yards from the prisoner; but before he passed the prisoner went up to him and struck him on the head with the sword, of which he presently died. This was holden manslaughter: it was not murder, because there was a previous provocation, and the blood was heated in the contest: nor was it in self-defence, because there was no inevitable necessity to excuse the killing in that

manner. *Foster*, 262; 1 *Hawk.* c. 31, s. 44; *Leach*, C. C. R. 151, S. C.; *Wharton's Am. Cr. L.* 231-3.

At the *Old Bailey*, in 1690, the prisoners with twenty more were hired by J. S. to remove his goods, in order to prevent a distress. The landlord with some assistants endeavoured to prevent them, and an affray happened. The constable ordered them to disperse, but could not prevail; as they were fighting, one of the company, to the jurors unknown, killed a boy who had no concern in the quarrel, as he was standing at his father's door.

These facts being found in a special verdict, *Holt* and *Polluxfen* were of opinion that it was murder in all the party. For though the removing of the goods might be lawful, yet the continuing of the party together after the constable had ordered them to be dispersed was unlawful; and besides, the great numbers that were thus assembled, and the unusual weapons they were armed with, did also make the assembly unlawful. But the majority of the judges held, that as the boy was totally unconcerned in the affray, the killing of him could not be imputed to the rest who were merely engaged in the general affray. That the boy could not be deemed an opposer of the party, so as to make him an object of their contention; and that they could no more be said to have abetted the killing of him, than if one of the company had killed a person looking out of a window. *The King against Hubson and others, Chappote, M. S. l. M. S. Sum. 187. Title, Accomplices and Accessories in Murder.*

CHAPTER XXXVIII.

OF MANSLAUGHTER, AND PARTICULARLY OF MANSLAUGHTER EXEMPT FROM CLERGY, BY THE STATUTE OF 1 JAC. 8.

MANSLAUGHTER, or simple homicide, is the *voluntary* killing of another without malice express or implied, and differs not in substance of the fact from murder, but only differs in these ensuing circumstances.

1. In the degree of the offense, murder being aggravated with malice presumed or implied, but manslaughter not, and therefore in manslaughter there can be no accessories before. 2. In the form of the indictment, the former being always *felonice ex malitia præcogitata interfecit & murdravit*, the latter only *felonice interfecit*. 3. In the point of clergy, murder being by the statute of 23 *H. cap.* 1. exempt from the benefit of clergy, but not manslaughter. 4. In the form of the pardon of murder, for tho at common law a pardon of all felonies had pardoned murder; yet by the statute of 13 *R. 2. cap.* 1. the pardon of murder must either be by the express word of *murder*, or else it must be a pardon of *felonica interfectio* with a special *non obstante* of the statutes of 13 *R. 2. H. 1. Jac.* [467] *Lucas's case.*(a)

But the pardon of manslaughter may be general by the words of *felonia* or *felonica interfectio*, and hence it is, that if a man indicted of murder obtains a pardon of felony, or *felonica interfectio* only, and be afterwards arraigned upon an indictment of murder, he must plead *quoud murdrum & interfectionem ex malitia præcogitata* not guilty, and as to the felony and interfection must plead his pardon;

(a) *Moor*, n. 1033. p. 752.

and then if the jury being charged to inquire of the plea of *not guilty*, find it to be only a simple felony and interfection without malice forethought, his pardon is to be allowd; and thus upon good deliberation it was done in the year 1668, at *Norwich*, Sir *Thomas Potte's* case, and is pursuant to the statute of 13 R. 2. which saith, "That before a pardon of felonies shall be allowed as to murder, it shall be inquired by good inquest, if he were slain by await or malice prepensed." And I remember very well in the case of *Rutaby T.* 1653, who was indicted of murder in *Durham*, the defendant pleaded a pardon of *felonica interfectio*, and a general *non obstante* of all statutes; and the attorney general demurred; it was ruled, 1. That the pardon was insufficient with only a general *non obstante*, unless murder had been containd in the body of the pardon by express words. 2. But tho the pardon was disallowed as to murder, yet the prisoner was remitted into *Durham* to be tried, whether guilty of murder, and being so found was executed; but had it been found only manslaughter, he should have been discharged, and altho his plea of the pardon to the indictment of murder was disallowd, yet it had stood good, if the conviction were of manslaughter: by the statute of 1 Jac. cap. 8. "Any person that shall stab or thrust any person, that hath not any weapon drawn; or hath not first stricken the party that shall so stab or thrust, if the party die within six months, the offender is ousted of clergy, provided it shall not extend to him, that kills *se defendendo*, or by misfortune, or in preserving the peace; or chastizing his child or servant.

This act, tho but temporary, is continued till some other [468] act of parliament shall be made touching the continuance or discontinuance thereof. 17 Car. I. cap. 4.

The use hath been in cases of this nature to prefer two indictments against offenders in this kind, *viz.* one of murder, another upon this statute, and put the prisoner to plead to both, and to charge the jury first with the indictments of murder, and if they find it not to be murder, then to charge them to inquire upon the other bill, because, if convict upon either, the offender is ousted of clergy.

The indictment to put the prisoner from his clergy must be specially formed pursuant to the statute, *viz.* that he did with a sword, &c. stab the party dead, he having no weapon drawn, nor having struck first, otherwise it will be but a common manslaughter, and the party will have his clergy.

The indictment need not conclude *contra formam statuti*, no more than in burglary or robbery, for the statute doth not make the offense to be felony, but ousts the prisoner of his clergy, where the crime is so circumstantiated as the statute expresth; this was agreed in the case of *Page* and *Harwood*. H. 23 Car. 1 B. R. (b)

But yet it doth not vitiate the indictment, tho it do conclude, *Et sic interfecit contra formam statuti*, as was adjudged *Trin.* 9 Jac.

(b) In this case, as reported in *Styles* 86, it is not agreed to be so, on the contrary it was denied *per Roll*, and doubted *per Bacon*.

B. R. Bradley and Banks; (c) and accordingly for the most part to this day the indictments upon this statute do conclude *contra formam statuti*, so it is good with or without such conclusion, but it is best to follow the common usage, because every man doth not readily observe the reason of the omission of that conclusion.

In the case of *Page and Harwood*, H. 23 Car. 1. before cited, these points were resolved in the king's bench, *viz.*

1. That no man is ousted of his clergy by this statute, but he that actually stabs, and therefore those, that are laid in the indictment to be present, aiding, and abetting in such a case, shall be admitted to the benefit of clergy; and therefore, tho the indictment of such a manslaughter be specially formed upon the sta- [469]
tute, and conclude *contra formam statuti*, yet it is a good indictment of manslaughter against them that were present, aiding, and abetting, and therefore upon such a special indictment of manslaughter upon the statute, the prisoner may be convict of simple manslaughter, and acquitted of manslaughter upon the statute, and the indictment serves for a common manslaughter, as well as a man upon an indictment of murder may be acquit of murder, and convict of manslaughter.

22 Martii, 14 Car. 1. At Newgate sessions *David Williams* was indicted specially upon this statute for the death of *Francis Marbury*, (d) *viz. Quod felonice, &c. unum malleum de ferro & ligno, anglice an hammer of wood and iron, è manu sua dextrâ erga & ad anteriorem partem capitis ipsius Francisci felonice violentè & in furore suo projecit, & cum malleo prædicto ipsum Franciscum in & super anteriorem partem capitis &c. percussit & pupugit, anglice did stab and thrust the said Marbury having no weapon drawn, nor struck first, whereof he presently died, & sic modo & formâ prædictâ interfecit &c. contra formam statuti &c.* The prisoner pleaded not guilty, and a special verdict was found, *viz.* that upon *St. David's* day the prisoner being a *Welshman* had a leek in his hat, and there was at the same time in waggery a *Jack-a-lent* in the street put up with a leek, and one *Nicholas Redman*, a porter, spake to the prisoner, and pointing to the *Jack-a-lent* said, *Look at your countryman*, and the prisoner being therewith enraged, threw an hammer at *Redman* to the intent feloniously to hit him, but missing him, the hammer did hit *Francis Marbury*, whereof he died, & sic prædictus *David præfatum Franciscum cum malleo prædicto pupugit & percussit, anglice did stab and thrust*, the said *Francis* then not having any weapon drawn, nor then having first stricken the said *David*; and it was judged by *Bramston, Jones*, and the recorder *Gardiner*, that *Williams* was guilty of manslaughter at the common law, *sed non contra formam statuti*, so that it seems they thought not this to be a stabbing within the statute, being done with the throwing of the hammer, or at least they took this killing of *Marbury*, which was [470]

(c) *Cro. Jac.* 283.

(d) *W. Jones*, 432.

not at all intended by *Williams*, to be out of the statute, tho it excused him not for manslaughter at common law.(e)

The words of the statute are *stab or thrust*, if the stabbing or thrusting were with a sword, or with a pikestaff, it is within the statute, so it seems, if it be a shot with a pistol, or a blow with a sword or staff, yet *quare*, for *Jones* justice denied it.

In *M. 5 Jac.* it was ruled, that if the party slain had a cudgel in his hand, it is a weapon drawn within this statute, and the prisoner was admitted to his clergy at *Newgate*; but it seems it must be intended of such a cudgel, as might probably do hurt, not a small riding-rod or cane.

In the year 1657.(f) at *Newgate* before *Glynn*, who then sat as chief-justice, a man was indicted upon this statute, and a special verdict found, that a bailiff having a warrant to arrest a man, pressed early into his chamber with violence, but not mentioning his business, nor the man knowing him to be a bailiff, nor that he came to make an arrest, snatched down a sword, that hanged in his chamber, and stabbed the bailiff, whereof he presently died: there was some diversity of opinion among the judges, whether this were within the statute, but at length the prisoner was admitted to his clergy, for tho this case was within the words of the statute, and not within the particular exceptions, yet it was held, that this case was never intended in the statute, for the prisoner did not know, but that the party came into rob or kill him, when he thus violently brake into his chamber without declaring his business.(g)[1]

(e) Lord chief justice *Holt* in *Mawgridge's case*, *Kel.* 131. concurs with this judgment, for that it was not such a weapon or act, as is within the statute of stabbing, but he is of opinion, that *Williams* ought to have been found guilty of murder, if the indictment had been so laid, for that there was not a sufficient provocation to lessen the offense to manslaughter.

(f) *Quare*, whether the case here meant be not *Buckner's case*, *M.* 1655. reported in *Styles* 467. but that, as it is there reported, was not the case of a bailiff, but of a creditor, who stood at the door with a sword undrawn to keep the debtor in, till they could send for a bailiff, and was killed by the debtor.

(g) See *Kel.* 136.

[1] There is no difference between murder and voluntary manslaughter, but that murder is upon malice aforethought, and manslaughter is upon a sudden occasion. 4 *Bl. Com.* 191. 1 *Hawk. c.* 31. s. 1. 1 *East, P. C.* 218.

The following are some of the more usual modes in which manslaughter occurs:

In fighting.—The character of the combat, the nature of the weapon used, if any, the relative strength and positions of the parties, and all the attendant and preceding circumstances must be considered in order to determine whether a killing in combat be murder, manslaughter, or no felony whatever. 3 *Inst.* 55. *Rex v. Kessell*, 1 *C. & P.* 437. 1 *East, P. C.* 243. *Rex v. Taylor*, 5 *Burr.* 2793. *Rex v. Anderson*, 1 *Russell*, 447. *Rex v. Ayers*, *R. & R.* 166. *Rex v. Rankin*, *R. & R.* 443. *R. v. Smith*, 8 *C. & P.* 160. *R. v. Lynch*, 5 *C. & P.* 324. *R. v. Kirkham*, 8 *C. & P.* 115. *State v. Scott*, 4 *Iredell*, 109. *State v. Ruthertwood*, 1 *Hawks.* 349. *Com. v. Daily*, 4 *Penna. L. J.* 158. *State v. McCants*, 1 *Spear*, 484.

When a third party interferes, and kills one of the combatants. 1 *Hawk. c.* 31. s. 35, 36. 55. 1 *East, P. C.* 291, 292. 12 *Co.* 87. *Kel.* 59. *Conner v. The State*, 4 *Yerger*, 137.

Even in an attempt to part them when more force is used than is necessary. *Rex v. Bourne*, 5 C. & P. 120.

So also aiming at one person and killing another. *Rex v. Conner*, 7 C. & P. 438.

Provocation by words will not reduce the killing to manslaughter. *Ante*, chap. 37. note.

But a personal indignity will. *Idem*.

Or finding a man in adultery with his wife. *Rex v. Manning*, T. Raym. 212. *People v. Ryan*, 2 Wheeler's C. C. 54.

Or a father seeing one committing an unnatural crime with his son. *Reg. v. Fisher*, 8 C. & P. 182.

Or an unwarrantable imprisonment of a man's person. *Rex v. Buckner*, Sty. 467. *Reg. v. Curvin*, R. & M. 132. *R. v. Thompson*, R. & M. 88. *R. v. Withers*, 1 East, P. C. 233.

Killing by excessive correction, if with an instrument not likely to kill, is manslaughter—if with a deadly weapon, murder. *Foster*, 262. *R. v. Conner*, 7 C. & P. 438. *Rex v. Turner*, Comb. 407, 408. *Rex v. Wigg*, 1 Leach, 378. n. *Anon.* 1 East, P. C. 261. *R. v. Leggitt*, 8 C. & P. 191. *R. v. Ray*, 1 East, P. C. 236. *R. v. Chessman*, 7 C. & P. 425.

Killing an officer attempting to make an irregular arrest may be manslaughter. *Jer. Arch. C. L.* 429. 1 Russ. on C. 592. *Ante*, chap. 37, note. *Com. v. Drew*, 4 Mass. 391. *Reg. v. Phelps*, 1 Car. & Mars. 180.

So also killing in prize fights or unlawful sports; the former under some circumstances may be murder; but if the sport is lawful and rightly conducted, the killing is, if accidental, only misadventure. *R. v. Perkins*, 4 C. & P. 537. *R. v. Hargrave*, 5 C. & P. 170. *R. v. Murphy*, 6 C. & P. 103. 4 Bl. Com. 183. *Foster*, 259. *sed vide infra*, 472. *Reg. v. Canniff*, 9 C. & P. 359.

And killing by wanton and heedless acts is manslaughter. *R. v. Martin*, 6 C. & P. 396. *R. v. Timmins*, 7 C. & P. 499. *R. v. Sullivan*, 7 C. & P. 641. *Fenton's case*, 1 Lewin, 179.

And by improper medical treatment which shows a criminal disregard of human life. *R. v. Long*, 4 C. & P. 423. *R. v. Senior*, R. & M. C. C. 346. *R. v. Webb*, 1 M. & Rob. 410. *R. v. Simpson*, Willock's Laws Medical Profession, Append. 227. *Com. v. Thompson*, 6 Mass. 124.

Or gross neglect in delivering medicines of which death is the consequence. *Testymond's case*, 1 Lew. 169.

Death ensuing from gross neglect of natural duty, in the case of children or infirm persons, is manslaughter. *R. v. Edwards*, 8 C. & P. 611. *R. v. Saunders*, 7 C. & P. 277. *R. v. Smith*, 8 C. & P. 153. *R. v. Davies*, per Patterson, Justice, Hereford Summer Assizes, 1831. *Burns' Justice*, 808, ed. 1845. *R. v. Marriott*, 8 C. & P. 425.

An indictment for manslaughter stated that the prisoners gave, administered, and delivered to one M. A. divers large and excessive quantities of spirits and water, wine and porter, and induced, procured, and persuaded him to drink them, the said quantities, &c. being likely to cause death, which they well knew. It then averred that M. A., by their persuasion, &c. drank, &c. and became greatly drunk and distempered, and while he was so, the prisoner assaulted him, and forced him to go into, and placed and confined him in a cabriolet, and drove and carried him about in it for two hours, and thereby greatly shook and knocked him about, by means whereof he became mortally sick, &c., and of the said large and excessive quantities, &c., and of the said drunkenness, &c., occasioned thereby, and of the said shaking, &c., and of the sickness and distemper occasioned by it, he instantly died. The deceased was a man in possession under the sheriff, and one of the prisoners, of whose goods he was in possession, assisted by his brother and a friend, plied the man with liquor, themselves drinking freely also, and when he was very drunk put him into a cabriolet and caused him to be driven about the streets; and about two hours after he had been put into the cabriolet he was found dead: *Held*, that, if it were essential to prove that the prisoners knew that the liquors were likely to cause death, the case would be one of murder and not of manslaughter, but that such allegation was not a material part of the indictment, but might be dismissed from the jury's consideration. *Held* also, that if the prisoners, when the deceased was drunk, put him into a cabriolet and drove him about in order to keep him out of possession, and by so doing accelerated his death, it would be manslaughter. *Reg. v. Packard*, 1 Car. & M. 286.

CHAPTER XXXIX.

TOUCHING INVOLUNTARY HOMICIDE, AND FIRST OF CHANCE-MEDLEY
OR KILLING PER INFORTUNIUM.

INVOLUNTARY homicide is the death or hurt of the person of a man against or besides the will of him that kills him.

And in these cases, to speak once for all, the indictment itself must find the special matter, or in case the indictment be of murder or manslaughter, and upon the trial it appears to the jury it was involuntary, (as by misfortune, or in his own defense) the jury ought to find the special matter, and so conclude, *Et sic per infortunium*, or *se defendendo*, and not generally, that it was *per infortunium*, or *se defendendo*, because the court must judge upon the special matter, whether it be murder, homicide, or *per infortunium*, or *se defendendo*, and the jury is only to find the fact, and leave the judgment thereupon to the court; and in such case the prisoner must not plead the special matter, and so justify, but must plead not guilty, and the special matter must be found by the jury, *Stamf. P. C. Lib. I. cap. 7. fol. 15. a. Lib. III. cap. 9. fol. 165. a.* for upon the special matter found, the court may give judgment against the conclusion of the verdict, as that the fact is manslaughter, tho the conclusion of the verdict be *per infortunium*, or *se defendendo*. 44 E. 3. Coron. 94.

This involuntary homicide is of two kinds, viz. either 1. When it is purely involuntary and casual, as the killing of a man *per infortunium*, or 2. When it is partly involuntary, and partly voluntary, but occasioned by a necessity, that the law allows, which is commonly called homicide *ex necessitate*, as killing a man in his own defense, or the like; *de quibus postea*.

Homicide *per infortunium* is, where a man is doing a [472] lawful act, and without intention of bodily harm to any person, and by that act death of another ensues, as if a man be shooting at butts or pricks, and by casualty his hand shakes, and the arrow kills a by-stander. 21 H. 7. 28. a. 6 E. 4. 7. b.

Or if a carpenter or mason in building casually let fall a piece of timber or stone, and kills another. 21 H. 7. B. Coron. 59.

But if he voluntarily let it fall, whereby it kills another, if he gives not due warning to those that are under, it will be at least manslaughter; *quia debitam diligentiam non adhibuit*.

So if a man be felling a tree in his own ground, and it fall and kill a person, it is chance-medley. 6 E. 4. 7.

But in all these cases, if it doth only hurt a man by such an accident, it is nevertheless a trespass, and the person hurt shall recover his damages, for tho the chance excuse from felony, yet it excuseth not from trespass. 6 E. 4. 7.

Regularly he that voluntarily and knowingly intends hurt to the person of a man, tho he intend not death, yet if death ensues, it ex-

cuseth not from the guilt of murder, or manslaughter at least; as if *A.* intends to beat *B.* but not to kill him, yet if death ensues, this is not *per infortunium*, but murder or manslaughter, as the circumstances of the case happen.

And therefore I have known it ruled, that if two men are playing at cudgels together, or wrestling by consent, if one with a blow or fall kill the other, it is manslaughter, and not *per infortunium*, tho Mr. *Dalton*, cap. 96, (a) seems to doubt it; and accordingly it was resolved *P. 2. Car. 2.* by all the judges upon a special verdict from *Newgate*, where two friends were playing at foils at a fencing school, one casually kild the other; resolved to be manslaughter. [1]

Sir *John Chichester*, and his man-servant, whom he very well loved, were playing together, the man had a bedstaff in his hand, and Sir *John* had his rapier in the scabbard, Sir *John*, according to the usual sport between them, bids his man guard his thrust or pass, which he was making at him with his rapier in the scabbard, the servant with the bedstaff brake the thrust, but withal [473] struck off the chape of the scabbard, whereby the end of the rapier came out of the scabbard, but the thrust was not so effectually broken, but the end of the rapier prickt the servant in the groin, whereof he died: Sir *John Chichester* was for this indicted of murder, and tried at the king's bench bar, where all this evidence was given; and it was ruled, 1. That it was not murder, tho the act itself was not lawful, because there was no malice or ill will between them. 2. That it was not barely chance-medley, or *per infortunium*, because altho the act, which occasioned the death, intended no harm, nor could it have done harm, if the chape had not been stricken off by the party kild, and tho the parties were in sport, yet the act itself, the thrusting at his servant, was unlawful, and consequently the death, that ensued thereupon, was manslaughter, and was accordingly found and adjudged, which I heard. 23 *Car. I.*, (b) 11 *H. 7.* 23. a. *Kelw.* 108, 136.

But if two play at barriers, or run a-tilt without the king's commandment, and one kill the other, it is manslaughter; but if it be by the king's command, it is not felony, or at most *per infortunium*. 11 *H. 7.* 23. *B. Coron.* 229. *Dalton*, cap. 96. *Co. P. C.* p. 56. (c)*

If *A.* come into the wood of *B.* and pull his hedges, or cut his

(a) *New Edit.* cap. 148. p. 479.

(b) *Aleyn* 12. This seems a very hard case, and indeed the foundation of it fails, for the pushing with a sword in the scabbard by consent seems not to be an unlawful act, for it is not a dangerous weapon likely to occasion death, nor did it do so in this case but by an unforeseen accident, and therein differs from the case of justing, (or prize-fighting) wherein such weapons are made use of, as are fitted, and likely to give mortal wounds.

(c) *Brooke*, after having taken notice of this as *Finex's* opinion, says, That other justices in the time of *Henry VIII.* denied this, and held it felony to kill a man in justing, or sporting after that manner, notwithstanding the king's command, for such command is against law.

[1] See *Foster*, 259; 1 *Hawk.* c. 29. s. 5; *Ward's case*, 1 *East*, *P. C.* 270.

* See post p. 475, note 4.

wood, and *B.* beat him, whereof he dies, this is manslaughter, because, tho it was not lawful for *A.* to cut the wood, it was not lawful for *B.* to beat him, but either to bring him to a justice of peace, or punish him otherwise according to law.

But if a school-master correct his scholar, or a master his servant, or a parent his child, and by struggling or otherwise, the [474] child or scholar, or servant die, this is only *per infortunium*, *Crompt. Just.* 28 *b.*

But this is to be understood, when it happens only upon moderate correction, for if the correction be with an unfit instrument, (*d*) or too outrageous, then it is murder, as it happened in a case at *Norwich* assizes 1670, where the master struck a child, that was his apprentice, with a great staff, of which he died, it was ruled murder. [2]

Several persons come to enter the house of *A.* as trespassers, *A.* shoots and kills one, this is manslaughter, otherwise it had been, if they had entered to commit a felony. *Crompt. de Pace*, fol. 29. *a.* *Harcourt's case.*

But in the case of *Levet* indicted for the death of *Frances Freeman*, the case was, That *William Levet* being in bed and asleep in the night in his house, his servant hired *Frances Freeman* to help her to do her work, and about twelve of the clock in the night the servant going to let out *Frances* thought she heard thieves breaking open the door, she therefore ran up speedily to her master, and informed him, that she thought thieves were breaking open the door,

(*d*) As with a bar of iron, or a sword, or a great cudgel, *Kel.* 64, 133.

[2] In all cases where the correction is inflicted with a deadly weapon, and the party dies of it, it will be murder; if with an instrument not likely to kill, though improper for the purpose of correction, it will be manslaughter. *Foster*, 262; *Reg. v. Connor*, 7 C. & P. 438; *R. v. Turner*, *Comb.* 407-8; *R. v. Wigg*, 1 *Leach*, 378, n. 1 *East*, 262; *R. v. Leggit*, 1 C. & P. 191. And though the correction exceeds the bounds of moderation, the court will pay a tender regard to the nature of the provocation, where the act is manifestly accompanied with a good intent, and the instrument not such as must in all probability occasion death; though the party were hurried to great excess. As was the case of a father (*Worcester, Sp. Ass.* 1775,) whose son had frequently been guilty of stealing, complaints of which had come to the father, who had often corrected him. At length, the son being charged with another theft, and resolutely denying it, though proved against him, the father, in a passion, beat his son with a rope, by way of chastisement for the offence, so much, that he died. The father expressed the utmost horror, and was in the greatest affliction for what he had done, intending only to have punished him with such severity as to have cured him of his wickedness. The learned judge who tried the father, consulted his colleagues in office, and the principal counsel on the circuit, who all concurred in opinion that it was only manslaughter, and so it was ruled. 1 *East's P. C.* 261. Persons on board a ship are necessarily subject to something like a despotic government, and it is extremely important that the law should regulate the conduct of those who exercise dominion over them. Therefore, in a case of manslaughter, against the captain and mate of a vessel, for accelerating the death of a seaman, really in ill health, but whom, they alleged, they believed to be a skulker, the question will be, in determining whether it is a slight or an aggravated case, whether the phenomena of the death were such as would excite the attention of reasonable and humane men; and, in such a case, if the deceased be taken on board after he was discharged from an hospital, it is important to inquire whether he was sent on board by the surgeon of the hospital as a person in a fit state of health to perform the duties of a seaman. *Reg. v. Leggett*, 8 Car. & P. 191.

the master rising suddenly, and taking a rapier ran down suddenly, *Frances* hid herself in the buttery lest she should be discovered. *Levet's* wife spying *Frances* in the buttery, and not knowing her cried out, *Here they be that would undo us: Levet* runs into the buttery in the dark; not knowing *Frances*, but thinking her to be a thief, and thrusting with his rapier before him hit *Frances* in the breast mortally, whereof she instantly died: this was resolved to be neither murder, nor manslaughter, nor felony: *vide* the case cited by justice *Jones*, *P.* 15. *Car.* 1. *B. R.* and *Croke*, *n.* 1.[3] (in *Cook's* case,(e) for killing a bailiff, that broke a window to execute a *Capias*, which was judged to be manslaughter;) where the book says it was not felony, *quære* whether it be not homicide by misadventure, for the party kild was in truth no thief, tho mistaken for one, and tho it be not homicide voluntary, yet it seems to be *per infortunium*.

If a man knowing that people are passing along the street throws a stone, or shoots an arrow over the house or wall, [475] with intent to do hurt to people, and one is thereby slain, this is murder, and if it were without such intent, yet it is manslaughter, and not barely *per infortunium*, because the act itself was unlawful; but if the man were tiling an house, and let fall a tile knowingly, and gave warning, and yet a person is kild, this is *per infortunium*, but if he gave not convenient warning, it is manslaughter, *quia non adhibuit debitam diligentiam*.(f)

If *A.* in his own park shoot at a deer, and the arrow glancing against a tree hits and kills *B.* this is homicide *per infortunium*, because it was lawful for him to shoot in his own park.

But if *A.* without the licence of *B.* hunt in the park of *B.* and his arrow glancing from a tree killeth a by-stander, to whom he intended no hurt, this is manslaughter, because the act was unlawful.

So if *A.* throw a stone at a bird, and the stone striketh and killeth another, to whom he intended no harm, it is *per infortunium*.

But if he had thrown a stone to kill the poultry or cattle of *B.* and the stone hit and kill a by-stander, it is manslaughter, because the act was unlawful, but not murder, because he did it not maliciously, or with an intent to hurt the by-stander.[4]

(e) *Cro. Car.* 538. *W. Jones* 429.

(f) This is upon supposition, that the house do not stand near an highway or place of resort, for then, tho he should cry out first, it is manslaughter. See *Hull's* case 1664. *Kel.* 40.

[3] "Possibly it might have better been ruled manslaughter at common law; due circumspection not having been used, but it was not manslaughter within the statute." *Foster*, 299. See 1 *East*, *P. C.* 274, 275; 1 *Hawk. P. C. c.* 28. s. 27.

[4] There are many cases in which a party causing the death of another, without positive intention of inflicting injury, is criminally responsible, though he is never chargeable with murder under such circumstances. The test of responsibility is whether the conduct of the accused was contrary to any law, or not being so forbidden, was so gross, negligent, or violent as necessarily to produce the belief that the act which remotely or immediately caused death was such an act, or was done in such manner as to involve moral impropriety. The conclusion of guilt is not to be hastily drawn nor inferred from remote circumstances, and it is only when a clear case is

By the statute of 33 H. 8. cap. 6. "No person not having lands, &c. of the yearly value of one hundred pounds *per annum* may keep or shoot in a gun upon pain of forfeiture of ten pounds." Suppose therefore such a person not qualified shoots with a gun at a bird, or at crows, and by mischance it kills a by-stander by the breaking of the gun, or some other accident, that in another case would have amounted only to chance-medley, this will be no more than chance-medley in him, for though the statute prohibit him to keep or use a gun, yet the same was but *malum prohibi-*
 [476] *tum*, and that only under a penalty, and will not enhance the effect beyond its nature.

A. having deer frequenting his corn-field out of the precinct of any forest or chace sets himself in the night-time to watch in a hedge, and sets *B.* his servant to watch in another corner of the field with a gun charged with bullets, giving him order to shoot, when he hears any bustle in the corn by the deer, the master himself improvidently rushes into the corn, the servant supposing it to be the deer shoots, and thereby kills his master in the night, this is neither petit treason, murder, nor manslaughter, but chance-medley, for the servant was misguided by his master's own direction, and was ignorant, that it was any thing else but the deer. This was my opinion in a case happening at *Peterborough* session; but it seemed to me, that if the master had not given such direction, that was the occasion of his mistake, it would have been manslaughter to have shot at a man, tho by mistaking it for the deer, because he did not *adhibere debitam diligentiam* to discover his mark, but shot directly at the person of a man, tho mistaking it for a deer.

A. drives his cart carelessly, and it runs over a child in the street, if *A.* have seen the child, and yet drives on upon him, it is murder; but if he saw not the child, yet it is manslaughter; but if the child had run cross the way, and the cart run over the child before it was possible for the carter to make a stop, it is *per infortunium*, and accordingly this direction was given by us at *Newgate* sessions in 1672, and the carter convict of manslaughter.

If a man or boy riding in the street whip his horse to put him into speed, and run over a child and kill him, this is homicide, and not *per infortunium*, and if he rid so in a press of people with intent to do hurt, and the horse had kild another, it had been murder in the rider, [5]

established that the party is liable for the consequences of an act which may be in itself legal. Various adjudications illustrate this kind of responsibility for the death of another. As an accidental killing by shooting, furious driving, taking an unruly horse into a crowd, carelessly laying poison for rats, want of caution towards drunken persons, careless navigation of vessels, firing guns in a populous place, &c., &c. *Foster*, 258, 263; 4 Bl. Com. 182-3; *R. v. Timmins*, 7 C. & P. 429; *R. v. Grant*, 6 C. & P. 629; *Assn. 1 East*, P. C. 261; *R. v. Walker*, 1 C. & P. 320; *R. v. Mustin*, 6 C. & P. 396; *R. v. Green*, 7 C. & P. 156; *R. v. Allen*, *idem*, 153; *Burton's case*, 1 Strange, 481; *Comm. v. York*, 7 Boston Law Rep. 517; 1 Russ. on Cr. 657.

[5] See 1 Geo. IV. c. 4. 7 & 8; Geo. IV. c. 75, as to accidents from furious driving of

But if a man or boy be riding in the street, and a by-stander whip the horse, whereby he runs away against the will of the rider, and in his course runs over and kills a child or man, it is chance-medley only, and in that case the jury ought not to find him *not guilty* generally, but the special matter; [477] but yet, because the coroner's inquest, which stood untraversed, had found the special matter, the court received the verdict of *not guilty* upon the indictment by the grand inquest of murder, and the party confessed the indictment by the coroner, and had his pardon of course, and this was said by *Lee* secondary to be the course at *Newgate*, 1 Sept. 16 Car. 2. *Richard Pretty's* case.

Tho the killing of another *per infortunium* be not in truth felony, nor subjects the party to a capital punishment, and therefore usually in such cases the verdict concludes, *quod interfecit per infortunium, & non per feloniam*, yet the party forfeits his goods, and tho he ought to have *quasi de jure* a pardon of course upon the certificate of the conviction, yet he is not to be discharged out of prison, but bailed till the next term or sessions to sue out his pardon of course, for tho it was not his crime, but his misfortune, yet because the king hath lost his subject, and that men may be the more careful, he forfeits his goods, and is not presently absolutely discharged of his imprisonment, but bailed, *ut supra*.

And so strict was the judicial law of the *Jews* in relation to the life of man, that even in this case the avenger of blood might kill the manslayer *per infortunium* before he got to the city of refuge, *Duet. xix. 5, 6.*[6]

stage-coaches, and accidents by unloading of boats. 4 Bl. Com. 200; 1 East, P. C. 231; 3 Wilson, 407-8; Foster, 262, 263, 259, 280, 299; Keil. 40.

[6] Homicide by misadventure is where a man is doing a lawful act, without intent to hurt another, and death casually ensues. Hale's Sum. 31; 1 East's, P. C. 221.

As where a labourer, being at work with a hatchet, and the head flies off and kills one who stands by; or when a third person whips a horse on which a man is riding, whereupon he springs out and runs over a child, and kills him; in which case the rider is guilty of homicide by misadventure, and he who gave the blow of manslaughter. 1 Hawk. c. 29, s. 3.

It is not sufficient that the act upon which death ensues be lawful and innocent in itself. It must be done in a proper manner, and with due caution to prevent mischief. Foster, 262; 1 East's P. C. 261.

A party causing the death of a child by giving it spirituous liquors in a quantity quite unfit for its tender age, is guilty of manslaughter. R. v. Martin, 3 C. & P. 211.

In the case of workmen throwing stones and rubbish from a house in the ordinary course of their business, by which a person underneath happens to be killed; if they deliberately saw danger, or betrayed any consciousness of it, from whence a general malignity of heart might be inferred, and yet gave no warning, it will be murder, on account of the gross impropriety of the act. If they did not look out, or not till it was too late, and there was even a small probability of persons passing by, it will be manslaughter. But if it had been a retired place, where there was no probability of persons passing by, and none had been seen about the spot before, it seems to be no more than accidental death; for though the act itself might breed danger, yet the degree of caution requisite being only in proportion to the apparent necessity of it, and there being no apparent call

for it in the instance put, the rule applies, *de non existentibus et non apparentibus eadem est ratio*. So, if any person had been seen on the spot, but due warning were given, it will be misadventure. *Hull's case*, 1664; *Kel.* 40; 1 *Russ.* 769. On the other hand, in London and other populous towns, at a time of day when the streets are usually thronged, it would be manslaughter, notwithstanding the ordinary caution used on other occasions of giving warning; for in the hurry and noise of a crowded street, few people hear the warning, or sufficiently attend to it, however loud. 1 *East's P. C.* 262.

Again, if a person driving a carriage happens to kill another: if he saw or had timely notice of the mischief likely to ensue, and yet wilfully drove on, it will be murder; for the presumption of malice arises from the doing of a dangerous act intentionally; there is the heart regardless of social duty. If he might have seen the danger, but did not look before him, it will be manslaughter, for want of due circumspection. But if the accident happened in such a manner that no want of due care could be imputed to the driver, it will be accidental death, and he will be excused. 1 *East's P. C.* 263. The mere calling out will not excuse the offender. *R. v. Walker*, 1 *C. & P.* 320.

A. was driving a cart with four horses, in the highway at Whitechapel, and, he being in the cart, and the horses upon a trot, they threw down a woman who was going the same way with a burthen upon her head, and killed her: *Holt*, C. J., *Tracy*, J., *Baron Bury*, and the Recorder *Lovel*, held this to be only misadventure. But, by Lord *Holt*, if it had been in a street where people usually pass, this had been manslaughter; but it was clearly agreed it could not be murder. *O. B. Sess. before M. T.* 1704; 1 *East's P. C.* 263.

To make the captain of a steam-vessel guilty of manslaughter, in causing a person to be drowned by running down a boat, the prosecutor must show some act done by the captain, and a mere omission on his part in not doing the whole of his duty is not sufficient. But if there be sufficient light, and the captain of a steamer is either at the helm or in a situation to be giving the command, and does that which causes the injury, he is guilty of manslaughter. *R. v. Gress*, 7 *C. & P.* 156. The captain and pilot of a steamboat were both indicted for the manslaughter of a person who was on board of a smack, by running the smack down. The running down was attributed, on the part of the prosecution, to improper steerage of the steamboat, arising from there not being a man at the bow to keep a look-out at the time of the accident. It was proved that there was a man on the look-out when the vessel started, about an hour previous. According to one witness, the captain and pilot were both on the bridge between the paddle-boxes; according to another, the pilot was alone on the paddle-box. *Held*, that under these circumstances there was not such personal misconduct on the part of either as to make them guilty of felony. *R. v. Allen and another*, 7 *C. & P.* 153.

The law does not require the utmost caution that can be used; it is sufficient that a reasonable precaution, what is usual and ordinary in the like cases, be taken; such as hath been found by long experience in the course of human affairs to answer the end; for such conduct shows that the party was regardless of social duty, and free from any manner of guilt. *Fost.* 264; 1 *East's P. C.* 266. And therefore upon that principle, Mr. Justice *Foster* denies *Rampton's case* (*Kel.* 41,) to be law; and indeed there is a *quære* put to it in the margin of the report. The prisoner had found a pistol in the street, which he had reason to believe was not loaded, having tried it with the rammer, which had gone down into the muzzle of the pistol; the rammer, in fact, being too short. He carried the pistol home, and his wife standing before him, he cocked it and touched the trigger; on which the pistol went off and killed the woman. This was ruled manslaughter. In truth the man had used the ordinary precaution adapted to the probability of danger in such cases: he had examined the pistol by the usual method of trial. And though it was doubtless an idle frolic, yet the heart was free from all sort of guilt, even the guilt of negligence; and therefore the act ought to have been excused. And the same learned judge determined accordingly in a case something similar.

Upon a Sunday morning, a man and his wife going to dine at a friend's house in the neighbourhood, he carried his gun with him, to divert himself on the way; but before dinner he discharged it, and set it up in a private place in his friend's house. After dinner he went to church, and in the evening returned home with his wife and neighbours, bringing his gun with him; which was put into the room where his wife was, she having brought it part of the way. He, taking it up, touched the trigger, and the gun went off, and killed his wife. It came out in evidence, that, while the man was at church, a person belonging to the family privately charged the gun, and went after some game; but before the service at church was ended, returned it loaded to the place from whence he had taken it; and where the defendant, who was ignorant of all that had passed,

found it to all appearance as he had left it. Mr. Justice *Foster* thought it unnecessary to inquire whether the man had examined the gun before he carried it home; but being of opinion, upon the whole evidence, that he had reasonable grounds to believe that it was not loaded, he directed the jury, that if they were of the same opinion, they should acquit him: and he was acquitted. *Fest.* 265.

A gentleman came to town in a chaise, and before he got out of it fired his pistols in the street, which by accident killed a woman. This was ruled manslaughter; the act was likely to breed danger, and manifestly improper. *Benton's case*, 1 Str. 481.

It has already been observed, that this kind of homicide is only when it happeneth upon a man's doing a lawful act; for if the act be done in the prosecution of a felonious intention, it will be murder. 1 *Russ.* 540. For it is a general rule in case of all felonies, that, whenever a man intending to commit one felony happens to commit another, he is as much guilty as if he had intended the felony which he actually commits. 1 *Hawk.* c. 29. s. 11. As, if A. shoot at the poultry of B., intending to steal them, and by accident kill a man, this is murder. *Fest.* 258, 259.

Further, if there be an evil intent, though that intent extendeth not to death, it is murder. Thus, if a man, knowing that many people are in the street, throw a stone over a wall, intending only to frighten them, or to give them a little hurt, and thereupon one is killed, this is murder; for he had an ill intent, though that intent extended not to death, and though he knew not the party slain. 3 *Inst.* 57.

Although this species of homicide is not properly a man's crime, but his misfortune, yet, because a human being is killed, and in respect of the great favour the law has to the life of man, and to the end that men should use all care, diligence, and circumspection, in all they do, that no hurt should come of their actions, a person convicted thereof, before the 9 *Geo.* IV. c. 31. s. 10. forfeited his goods; but by that statute he is exempted from all punishment. See *ante*, chap. 38. note. 3 *Burns' Justice*, 806. ed. 1845.

CHAPTER XL.

[478]

OF MANSLAUGHTER EX NECESSITATE, AND FIRST SE DEFENDENDO.

I COME to those homicides that are *ex necessitate*, and this necessity makes the homicide not simply voluntary, but mixed, partly voluntary and partly involuntary, and is of two kinds.

1. That necessity, which is of a private nature.
2. That necessity, which relates to the public justice and safety.

The former is that necessity, which obligeth a man to his own defense and safeguard; and this takes in these inquiries, 1. What may be done for the safeguard of a man's own life. 2. What may be done for the safeguard of the life of another. 3. What may be done for the safeguard of a man's goods. 4. What may be done for the safeguard of a man's house of habitation.

I. As touching the first of these, *viz.* homicide in defense of a man's own life, which is usually styled *se defendendo*.

It is generally to be observed, that in case of any indictment or charge of felony the prisoner cannot plead any thing by way of justification, as that he did it in his own defense, or *per infortunium*, but must plead *not guilty*; and upon his trial the special matter is to be found by the jury, and thereupon the court gives judgment.

Homicide *se defendendo* is of two kinds.

1. Such, as tho it excuseth from death, yet it excuseth not the

forfeiture of goods, nor is the party to be absolutely discharged out of prison, but bailed, and to purchase his pardon of course.

2. Such as wholly acquits from all kinds of forfeiture.

First, therefore, of common homicide *se defendendo*.

[479] Homicide *se defendendo* is the killing of another person in the necessary defence of himself against him that assaults him.[1]

In this case of homicide *se defendendo*, there are these circumstances observable.

1. It is not necessary that the party killed be the first aggressor or assailant, or of his party, tho commonly it holds.

There is a malice between *A.* and *B.* they appoint a time and place to fight, and meet accordingly, *A.* gives the first onset, *B.* retreats as far as he can with safety, and then kills *A.* who had otherwise killed him; this is murder, for they met by compact and design, and therefore neither shall have the advantage of what they themselves each of them created.

There is malice between *A.* and *B.* they meet casually, *A.* assaults *B.* and drives him to the wall, *B.* in his own defense kills *A.* this is *se defendendo*, and shall not be heightened by the former malice into murder or homicide at large, *Copston's* case cited *Crompt. de Pace* 27. *b.* and *Dalt. cap.* 98. (a) for it was not a killing upon the account of the former malice, but upon a necessity imposed upon him by the assault of *A.*

A. assaults *B.* and *B.* presently thereupon strikes *A.* without flight, whereof *A.* dies, this is manslaughter in *B.* and not *se defendendo*, 43. *Assiz.* 31. but if *B.* strikes *A.* again, but not mortally, and blows pass between them, and at length *B.* retires to the wall, and being pressed upon by *A.* gives him a mortal wound, whereof *A.* dies, this is only homicide *se defendendo*, altho that *B.* had given divers other

(a) *New Edit. cap.* 150. p. 484.

[1] *Foster* divides homicide in self-defence into two classes; the first he calls justifiable self-defence, the second self-defence culpable. In the former, the injured party may repel force by force in defence of his person, habitation, or property, against one who manifestly intendeth and endeavoureth by violence or surprise to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he findeth himself out of danger, and if in a conflict between them he happeneth to kill, such killing is justifiable. *Kel.* 128, 129. The right of self-defence in these cases is founded in the law of nature, and is not, nor can be, superseded by the law of society. For before civil societies were formed, for mutual defence and preservation, the right of self-defence resided in individuals; it could not reside elsewhere; and since in cases of necessity, individuals incorporated into society cannot resort for protection to the law of the society, that law with great propriety and strict justice considereth them, as still, in that instance, under the protection of the law of nature. In the latter—homicide, culpable but excusable, or homicide *se defendendo*, upon chance medley—as when a person engaged in a sudden affray, quits the combat before a mortal wound given, and retreats or flees as far as he can with safety, and then urged by mere necessity, kills his adversary for the preservation of his own life. *Foster*, 273-7. 1 *Hawkins*, c. 29. s. 13.

The general rule is that, in order to excuse a homicide, on the ground of self-defence, it must clearly appear that it was a necessary act, in order to avoid destruction, or some great bodily harm.

strokes, that were not mortal before he retired to the wall, or as far as he could. *Stamf. P. C. Lib. I. cap. 7. fol. 15. a. Dalt. cap. 98. Cromp. 28. a.*

But now suppose, that *A.* by malice makes a sudden assault upon *B.* who strikes again, and pursuing hard upon *A.* *A.* retreats to the wall, and in saving his own life kills *B.* some have held this to be murder, and not *se defendendo*, because *A.* gave the first assault, *Cromp. fol. 22. b.* grounding upon the book of 3 *E. 3. Itin. North. Coron. 287.* but Mr. *Dalton, ubi supra*, thinketh it to be *se defendendo*, (b) tho *A.* made the first assault, either with or [480] without malice, and then retreated; therefore the book of 3 *E. 3. Coron. 284, 287.* which occasioned the doubt, is to be examined; which is thus.

It seems to me, that if *A.* did retreat to the wall upon a real intent to save his life, and then merely in his own defense killed *B.* that it is *se defendendo*, and with this agrees *Stamf. P. C. Lib. I. cap. 7. fol. 15. a.* But if on the other side *A.* knowing his advantage of strength, or skill, or weapon, retreated to the wall merely as a design to protect himself under the shelter of the law, as in his own defense, but really intended the killing of *B.* then it is murder, or manslaughter, as the circumstance of the case requires, and that was the reason, why the judges demanded of the jury 3 *E. 3.* whether he killed *B.* of malice, or otherwise to save himself, and when the jury answered, *It was to save his life*, he was remitted to prison to have his pardon of course. 3 *E. 3. Coron. 284. 287.* [2]

2. In homicide *se defendendo*, there seems necessary some act to be done by the party killing, for if he be merely passive, this will make it only a killing *per infortunium*.

A. assaults *B.* who flies to the wall, or falls, holding his sword knife, or pike in his hand, *A.* runs violently, or falls upon the knife of *B.* without any thrust or stroke offered at him by *B.* and thereupon dies, this is death *per infortunium*, and some have said, that in this case *A.* is *felo de se, de quo antea, vide* [481] *Stamf. P. C. Lib. I. cap. 7. p. 16. & libros ibi.*

(b) The case here referred to in *Dalton* is the case of an affray, (which is likewise the case put by *Stawford*) of this he says there was a difference of opinions, but delivers no opinion of his own; but as to the case here put by our author of a malicious assault, which he afterwards mentions, he seems plainly to be of the contrary opinion, and to think it murder; nor do I see any thing in *Coron. 284, 287.* that could occasion any doubt about this matter, or any way relates to this case, for both those cases (which seem to be but one and the same) were of an affray, in which he that struck first, was the party killed, and the party killing struck not at all, till after he had fled as far as he could, and was necessitated to do it in his own defense; so that the reason assigned by our author for demanding the question of the jury is grounded on a mistake; that, which to me seems the reason of putting that question to the jury, is this, the jury had found the fact specially, but had not drawn any general conclusion from it, the question was therefore asked, that they might make the usual conclusion, *unde dicunt, quod predictus, A. (the defendant) se defendendo predictum B. (the deceased) interfecit, & non per feloniam aut malitiam præcogitatum*, which was done accordingly; and therefore in the first of those places, *viz. Coron. 284.* the usual conclusion being inserted, no notice is taken of the question put to the jury.

3. Regularly it is necessary, that the person that kills another in his own defense, fly as far as he may to avoid the violence of the assault before he turn upon his assailant; for tho in cases of hostility between two nations it is a reproach and piece of cowardice to fly from an enemy, yet in cases of assaults and affrays between subjects under the same law, the law owns not any such point of honour, because the king and his laws are to be the *vindices injuriarum*, and private persons are not trusted to take capital revenge one of another.[3]

But this hath some exceptions.

1. In respect of the person killing.

If a gaoler be assaulted by his prisoner, or if the sheriff or his minister be assaulted in the execution of his office, he is not bound to give back to the wall; but if he kills the assailant, it is in law adjudged *se defendendo*, tho he give not back to the wall;[4] the like of a constable or watchman, for they are ministers of justice, and under a more special protection in the execution of their office, than private persons. *Co. P. C. p. 56. 9 Co. Rep. 68. b. Mackally's case.*

But if the prisoner makes no resistance, but flies, yet the officer either for fear that he, or some other of his party will rescue the prisoner, strikes the prisoner, whereof he dies, this is murder, for here was no assault first made by the prisoner, and so it cannot be *se defendendo* in the officer.[5]

And here is the difference between civil actions and felonies.

If a man be in danger of arrest by a *Capias* in debt or trespass, and he flies, and the bailiff kills him, it is murder;[6] but if a felon flies, and he cannot be otherwise taken, if he be killed, it is no felony,

[3] *State v. Wells*, 1 Cox, 424. *U. S. v. Travers*, 2 Wheeler's C. C. 498. 507. *Haydon v. The State*, 4 Blackford, 547. *People v. Garretson*, 2 Wheeler's C. C. 348. *People v. Anderson*, *idem.* 408.

[4] 3 Inst. 56. 1 Hawk. c. 28. s. 11. c. 29. 16. MS. Sum. 36, 37. Foster, 321.

[5] So long as a party, liable to arrest, endeavours peaceably to avoid it he may not be killed; but whenever, by his conduct, he puts in jeopardy the life of any attempting to arrest him, he may be killed, and the act will be excusable. *State v. Anderson*, 1 Hill's S. C. R. 327. See *The State v. Rutherford*, 1 Hawks. 457. *Selfridge's Trial*, 160. *R. v. Haworth*, 1 Moody, C. C. 207. *R. v. Williams*, *ibid.* 387. *R. v. Langden*, R. & R. 228.

It has been said that perhaps the killing of dangerous rioters may be justified by any private persons who cannot otherwise suppress them, or defend themselves from them, inasmuch as every private person seems to be authorized by the law to arm himself for the preservation of the peace. 1 Hawk. P. C. c. 28. s. 14. and see Foster, 272. It was so resolved by all the judges in *Easter Term*, 39 Eliz. though they thought it more discreet for every one in such a case to attend and assist the king's officers in preserving the peace. And certainly, if private persons interfere to suppress a riot they must give notice of their intention. See *Rex v. Pinney*, 5 C. & P. 254. *Reg. v. Neale*, 9 C. & P. 431. The charge of TINDAL, C. J. to the Bristol Grand Jury, 1832. 5 C. & P. 261, and charge of KING, P. to the Philadelphia Grand Jury, 1844. 4 Penn. Law J. 29. The latter is a practical and accurate statement of the law on this subject.

[6] 1 Roll. R. 189. Foster, 271. *Rex v. Browning*, 1 East, P. C. 312. *Rex v. Borthwick*, 1 Doug. 207. M. S. Sum. 37. If the warrant was irregular and void, the killing would be only manslaughter. *Rex v. Stockley*, 1 East, P. C. 210. *Housia v. Barrow*, 6 T. R. 122, *R. v. Wincock*, 8 T. R. 454. *R. v. Hood*, Moody, C. C. 281.

and in that case the officer so killing forfeits nothing, but the person so assaulted and killed forfeits his goods.

2. In relation to the person killed.

If a thief assaults a true man either abroad or in his house to rob or kill him, the true man is not bound to give back, but may kill the assailant, and it is not felony. *Co. P. C. p. 56.*[7]

3. In respect of the manner of the assault.

If *A.* assault *B.* so fiercely, that *B.* cannot save his life [482] if he give back, or if in the assault *B.* fall to the ground, whereby he cannot fly, in such case if *B.* kill *A.* it is *se defendendo*, *Co. P. C. p. 56.* but now here will be occasion to resume the former debate, where the first assailer may be said to kill the assailed *se defendendo*. [8]

If *A.* assault *B.* and *B.* thereupon re-assault *A.* and *A.* really flies to avoid the assault of *B.* who pursues him, and then *A.* being driven to the wall turns again and kills *B.* it seems this may be *se defendendo*, as hath been said; for it appears *de facto*, that *A.* fled from the assault of *B.* till he could fly no farther.

But if *A.* assaults *B.* first, and upon that assault *B.* re-assaults *A.* and that so fiercely, that *A.* cannot retreat to the wall or other *non ultra* without danger of his life, nay, tho *A.* falls upon the ground upon the assault of *B.* and then kills *B.* this shall not be interpreted

[7] *Foster*, 273. *Kel.* 126. 128. 1 *Hawk. P. C. c. 28. s. 21. 24.* When a known felony is attempted upon the person, be it to rob or murder, the party assailed may repel force by force; and even his servant attendant on him, or any other person present, may interpose for preventing mischief, and if death ensue, the party so interposing will be justified. 1 *East, P. C. 271.* *Com. v. Riley, Thatcher's C. C. 471.* *Selfridge's case*, 160. *Commonwealth v. Daily*, 3 *Pa. L. J.* 153.

The danger must be actual and urgent, *U. S. v. Vigol*, 2 *Dallas*, 346. No contingent necessity will avail; and when the pretended necessity exists in the, as yet, unexecuted machinations of another, it forms no defence. *People v. McLeod*, 1 *Hill*, 377. *State v. Morgan*, 3 *Iredell*, 186.

In *Tennessee* it has been ruled, that if a man, though in no danger of serious bodily harm, through fear, alarm, or cowardice, kill another under the impression that great bodily injury is about to be inflicted on him, it is a case of homicide in self-defence. *Granger v. The State*, 5 *Yerger*, 459.

In *North Carolina*, the safer and better doctrine is, that the belief that a person designs to kill one, will not reduce the killing him below murder, unless he is making some attempt to execute his design, or, at least, is in an apparent situation to do so, and thereby induces the reasonable belief that he intends to do so immediately. *State v. Green*, 4 *Iredell*, 409.

The killing of a man on the highway is not justifiable homicide, unless there was an intention on the part of the person killed, to rob or murder, or do some dreadful bodily injury to the person killing; or, in other words, the conduct of the party must be such as to render it necessary on the part of the party killing, to do the act in self-defence. *Reg. v. Bull*, 9 *Car. & P.* 22.

A well-grounded belief that a felony is about to be perpetrated, will extenuate a homicide committed in prevention of it, though the defendant be but a private citizen; but not a homicide committed in pursuit, unless special authority be given. *State v. Rutherford*, 1 *Hawks*, 457. *Selfridge's Trial*, 160. *R. v. Haworth*, 1 *Mood. C. C.* 207. *R. v. Williams*, *ibid*, 387. *R. v. Lorgden*, *R. & R.* 223.

But the slayer, in such cases, must not only show that a homicide was actually committed, but that he avowed his object, and that the felon refused to submit, and that the killing was necessary to make the arrest. *State v. Roane*, 2 *Dev.* 58.

[8] 4 *Bl. Com.* 185. 3 *Inst.* 56. 1 *Hawk. P. C. c. 29. s. 14.*

to be *se defendendo*, (c) but to be murder, or simple homicide, according to the circumstances of the case, for otherwise we should have all cases of murders or manslaughters by way of interpretation turned into *se defendendo*.

The party assaulted indeed shall, by the favourable interpretation of the law, have the advantage of this necessity to be interpreted as a flight (d) to give him the advantage of *se defendendo*, when the necessity put upon him by the assailant makes his flight impossible; but he that first assaulted hath done the first wrong, and brought upon himself this necessity, and shall not have advantage of his own wrong to gain the favourable interpretation of the law, that *that* necessity, which he brought upon himself, should, by way of interpretation, be accounted a flight to save himself from the guilt of murder or manslaughter. [9]

If *A.* after the assault, had really and *bona fide* fled from [483] *B.* or that they had been parted by by-standers, that had given a kind of interruption to the affray, and a declining of any farther affray by *B.* and therefore when *B.* pursues him to kill him, and *A.* after his flight, upon necessity of saving his life, kills *B.* this is apparent to be *se defendendo*; but when it is done altogether without any interval of flight or parting, and *B.* that was first assaulted, gains the present advantage by his strength, courage or fortune, to preclude the flight of *A.* and then *A.* kills him, this seems to be manslaughter, and not *se defendendo*.

And it must be observed, that the flight to gain the advantage of *se defendendo* to the party killing, must not be a feigned flight, or a flight to gain advantage of breath, or opportunity to fall on a fresh, as fighting cocks retire to gain advantage, but it must be a flight from the danger, as far as the party can, either by reason of some wall, ditch, company, or as the fierceness of the assailant will permit. [10]

In *Fleet street* *A.* and *B.* were walking together, *B.* gave some provoking language to *A.* who thereupon gave *B.* a box on the ear, they closed; *B.* was thrown down, and his arm broken, he runs to his brother's house presently, which was hard by, *C.* his brother, taking the alarm, came out with his sword drawn and made towards *A.* who retreated ten or twelve yards, *C.* pursued him, *A.* drew his sword and made a pass at *C.* and killed him; *A.* being indicted at

(c) Because his fall not being voluntary, as a flight is, it does not appear, that he declined fighting, so that the party first assaulted cannot safely quit the advantage he has got.

(d) Not that the law esteems this necessity to be a flight, but the party not having opportunity of flying, the law does not require it of him; but excuses him in the same manner, as if he had fled.

[9] 1 *Hawk. c.* 29. s. 17. On this subject Mr. *East* says: "I think there is great difficulty in applying the distinction taken by Lord *Hale* and *Hawkins* against him who makes the first assault, to the case of mutual combat by consent, though upon a sudden occasion, when neither of the parties makes an attack till the other is prepared; because in these cases it matters not who gives the first blow; it forms no ingredient in the merits of the question." 1 *East, P. C.* 281-2.

[10] *Foster*, 277. 4 *Bl. Com.* 185.

Newgate sessions for murder, the court directed the jury upon the trial to find this manslaughter, not murder, because upon a sudden falling out; not *se defendendo*, partly because *A.* made the first breach of the peace by striking *B.* and partly because, unless he had fled as far as might be, it could not, by way of interpretation, be said to be in his own defense: and it appeared plainly upon the evidence, that he might have retreated out of danger, and his stepping back was rather to have an opportunity to draw his sword, and with more advantage to come upon *C.* than to avoid him; and accordingly, at last, it was found manslaughter 1671, at *Newgate*. [11]

II. I come to the second consideration, namely, what the offense is, if a man kill another in the necessary saving of [484] the life of a man assaulted by the party slain.

A. assaults the master, who flies as far as he can to avoid death, the servant kills *A.* in defense of his master; this is homicide *defendendo* of the master, and the servant shall have a pardon of course, 21 *H. 7.* 39. *a.* but if the master had not been driven to that extremity, it had been manslaughter at large in the servant, if he had no precedent malice in him. *Plowd. Com.* 100.

The like law had been for a master killing in the necessary defense of his servant, the husband in the defense of the wife, the wife of the husband, the child of the parent, or the parent of the child, for the act of the assistant shall have the same construction in such cases, as the act of the party assisted should have had, if it had been done by himself, for they are in a mutual relation one to another. [12]

If *A.* and *B.* and *C.* be of a company together, and walking in the field *C.* assaults *B.* who flies, *C.* pursues him, and is in danger to kill him, unless present help, *A.* thereupon kills *C.* in defense of the life of *B.* it seems that in this case of such an inevitable danger of the life of *B.* this occision of *C.* by *A.* is in nature of *se defendendo*, but then it must appear plainly by the circumstances of the case, as the manner of the assault, the weapon with which *C.* made the assault, &c. that the imminent danger of the life of *B.* be apparent and evident. [13]

And the reason seems to be, because every man is bound to use all possible lawful means to prevent a felony, as well as to take the felon, and if he doth not, he is liable to a fine and imprisonment, therefore if *B.* and *C.* be at strife, *A.* a by-stander, is to use all lawful means that he may, without hazard of himself, to part them; and the

[11] Before a person can avail himself of the defence, that he used a weapon in defence of his life, he must satisfy the jury that that defence was necessary; that he did all he could to avoid it; and that it was necessary to protect his own life, or to protect himself from such serious bodily harm, as would give him a reasonable apprehension that his life was in immediate danger. If he used the weapon, having no other means of resistance, and no means of escape, in such case, if he retreated as far as he could, he would be justified. *Reg. v. Smith*, 8 *C. & P.* 160. See *Reg. v. Bull*, 9 *C. & P.* 22.

[12] 4 *Bl. Com.* 182-184. 1 *Russ. on Cr.* 542. *Foster*, 274.

[13] This rule does not extend to felonies without force, nor to misdemeanors of any kind. 1 *Hawk. P. C. c.* 28. *s.* 23. 4 *Bl. Com.* 180. 1 *East, P. C.* 290.

very relation of acquaintance, and mutual society between *A.* *B.* and *C.* seems to excuse the fact of *A.* in the necessary safeguard of the life of *B.* from the crime of simple homicide; *tamen quære.*

If *A.* be travelling, and *B.* comes to rob him, if *C.* falls into the company, he may kill *B.* in defense of *A.* and therefore much more if he come to kill him, and such his intent be apparent, for [485] in such case of a felony attempted, as well as of a felony committed, every man is thus far an officer, that at least his killing of the attempter in case of necessity puts him in the condition of *se defendendo* in defending his neighbour; but of this more hereafter.

A. makes an assault upon *B.* a woman or maid with intent to ravish her, she kills him in the attempt, it is *se defendendo* because he intended to commit a felony. *Dalt. cap. 98. p. 250.*[14]

And so it is if *C.* the husband or father of *B.* had killed him in the attempt, if it could not be otherwise prevented; but if it might be otherwise prevented, it is manslaughter; therefore circumstances must guide in that case.[15]

III. I come to consider, what the offense is in killing him that takes the goods, or doth injury to the house or possession of another.

And herein there will be many diversities, as first, between a trespassable act and a felonious act, and between felonious acts themselves.

If *A.* pretending a title to the goods of *B.* takes them away from *B.* as a trespasser, *B.* may justify the beating of *A.* but if he beat him so that he die, it is neither justifiable, nor within the privilege of *se defendendo*, but it is manslaughter. *Dalt. cap. 98. p. 251.*[16].

A. is in possession of the house of *B.* *B.* endeavours to enter upon him, *A.* can neither justify the assault nor beating of *B.* for *B.* had the right of entry into the house, but if *A.* be in possession of a house, and *B.* as a trespasser enters without title upon him, *A.* may not beat him, but may gently lay his hands upon him to put him out, and if *B.* resists and assaults *A.* then *A.* may justify the beating of him, as of his own assault.

But if *A.* kills him in defense of his house, it is neither justifiable, nor within the privilege of *se defendendo*, for he entered only as a trespasser, and therefore it is at least common manslaughter: this was *Harcourt's* case *Crompt. 27. a.* who being in possession of a house by title, as it seems, *A.* endeavoured to enter and shot an arrow at them within the house, and *Harcourt* from within [486] shot an arrow at those that would have entered, and killed one of the company, this was ruled manslaughter, 5 *Eliz.*

[14] *M. S. Sum. 39.*

[15] *Foster, 274; Handcock v. Baker, 2 B. & P. 265.*

[16] *State v. Morgan, 3 Iredell, 186; Com. v. Drew, 4 Mass. 391; Claxton v. The State, 2 Humphrey, 181.*

and it was not *se defendendo*, because there was no danger of his life from them without.

But if *A.* had entered into the house, and *Harcourt* had gently laid his hands upon him to turn him out, and then *A.* had turned upon him, and assaulted him, and *Harcourt* had killed him, it had been *se defendendo*, and so it had been if *A.* had entered upon him, and assaulted him first, tho he intended not to kill him, yet if *Harcourt* had thereupon killed *A.* it had been only *se defendendo*, and not manslaughter, tho the entry of *A.* was not with intent to murder him, but only as a trespasser to gain the possession, 3 *E.* 3. *Coron.* 305. *Crompt.* 27 *b.* and it seems to me in such a case *Harcourt*, being in his own house, need not fly as far as he can, as in other cases of *se defendendo*, for he hath the protection of his house to excuse him from flying, for *that* would be to give up the possession of his house to his adversary by his flight. [17]

A. commits adultery with *B.* the wife of *C.* who comes up and takes them in the very act, and with a staff kills the adulterer upon the place; this is manslaughter, and neither murder, nor under the privilege of *se defendendo*: but if *A.* had been taken by *C.* in the very attempt of a rape upon the wife, and she crying out, her husband had come and killed *A.* in the act of his ravishment, it had been within the privilege of *se defendendo*, because it was a felony; the former case was adjudged manslaughter by the court, *B. R. M.* 23 *Car.* 2. (*d.*)

Now concerning felonies, as there is a difference between them and trespasses, so there is a difference among themselves in relation to the point of *se defendendo*.

If a man come to take my goods as a trespasser, I may justify the beating of him in defense of my goods, as hath been said; but if I kill him, it is manslaughter.

But if a man come to rob me, or take my goods as a felon, and in

(*d.*) *Manning's case*, *Raym.* 212.

When he was to be burnt in the hand, the court directed it to be done gently, because they said there could not be a greater provocation.

[17] As the killing in these cases is only justifiable on the ground of necessity, it cannot be justified unless all other convenient means of preventing the violence are absent or exhausted; thus a person set to watch a yard or garden, is not justified in shooting one who comes into it in the night, even if he should see him go into his master's hen-roost; for he ought first to see if he could not take measures for his apprehension; but if, from the conduct of the party, he has fair ground for believing his own life in actual and immediate danger, he is justified in shooting him. *R. v. Scully*, 1 *C. & P.* 319. Nor is a person justified in firing a pistol on every forcible intrusion into his house at night; he ought, if he have reasonable opportunity, to endeavour to remove him without having recourse to the last extremity. *Mead's case*, 1 *Lew.* 184.

And it would seem that in no case is a man justified in intentionally taking away the life of a mere trespasser, his own life not being in jeopardy; he is only protected from the consequences of such force as is reasonably necessary to turn the wrong-doer out. A kick has been held an unjustifiable mode of doing so; *Child's case*, 2 *Lew.* 214; throwing a stone has been held a proper mode. *Hinchcliffe's case*, 1 *Lew.* 161.

my resistance of his attempt I kill him, it is *se defendendo* at least, and in some cases not so much.

At common law, if a thief had assaulted a man to rob him, and he had kild the thief in the assault, it had been *se defendendo*, but yet he had forfeited his goods, as some have thought, 11 *Co. Rep.* 82 *b.* tho other books be to the contrary: 26 *Assiz.* 32.

But if *A.* had attempted a burglary upon the house of *B.* to the intent to steal, or to kill him, or had attempted to burn the house of *B.* if *B.* or any of his servants, or any within his house had shot and kild *A.* this had not been so much as felony, nor had he forfeited ought for it, for his house is his castle of defense, and therefore he may justify assembling persons for the safe guard of his house. 21 *H. 7.* 39 *a.* 11 *Co. Rep.* 82. *b.* 5 *Co. Rep.* 91. *b.* 26 *Assiz.* 23. 3 *E.* 3. *Coron.* 330.

But otherwise it is, as hath been said, in case of a trespassable entry into the house claiming a title, and not to commit felony.

But now by the statute of 24 *H. 8. cap.* 5. "If any person attempt any robbery or murder of any person in or near any common highway, cartway, horseway, or footway, or in their mansion houses, or do attempt to break any mansion-house in the night-time, and shall happen to be kild by any person or persons, &c. (tho a lodger or servant) they shall upon their trial be acquitted and discharged in like manner, as if he had been acquitted of the death of such person."

P. 15. Car. 1. Cooper's case.(e)

This statute was to remove a doubt, and was declarative and enacting, and puts the killing of a robber in or near the highway, &c. in the same condition with one, that intends to rob or murder in the dwelling-house, and exempts both from forfeiture, and hath settled the doubt.

And upon this statute it was, that when there was malice between *A.* and *B.* and they had fought several times, and after met suddenly in the street near *Ludgate*, and *A.* said he would fight him, *B.* declined it, and fled to the wall, and called others to witness it, and *A.* pursued him, and struck him first, and *B.* in his own defense kild him, he was acquit from any forfeiture by the statute of 24 *H. 8. cap.* 5. 15 *Eliz. Cromp.* 27. *b. Copston's case*: but upon

[488] this statute these things are observable.

1. It extends not to the case of a bare trespassable entry into a house, but only to such an entry or attempt as is intended to be for murder or robbery, &c. or some such felony, and therefore the cases of trespasses, either in houses or near highways, are left as before.

2. It seems, that it extends not to indemnify the killing of a felon, where the felony is not accompanied with force, for it speaks of *robbery*, therefore the killing of one that attempts to pick my pocket, is not within the act, for there is no such necessity; indeed, if any felon, after a felony committed, doth resist those, that endeavour to appre-

hend him, or fly, and be kild, this killing is no felony, but *that* is upon another account, for this statute hath relation only to killing *before*, or in the felony committed, not *after*. [18]

3. It speaks only of breaking the house in the *night-time*, so that it seems it extends not to a breaking the house in the *day-time*, unless it be such a breaking, as imports, with it apparent robbery, or an intention, or attempt thereof.

4. Tho the statute speaks not of burning of houses, yet he, that attempts the wilful burning of a house, and is kild in that attempt, is free from forfeiture, without the aid of this statute, as appears 26 *Aeriz.* 23.

By the judicial law, *Exod. xxii. 2, 3*. "If a thief be found breaking up, and he be smitten that he die, no blood shall be shed for him, but if the sun be risen upon him, there shall blood be shed for him, for he should make restitution, and if he have nothing, he shall be sold for his theft:" and by the *Roman* law of the twelve tables, *Fur manifesto furto deprehensus, si aut, cum faceret furtum, nox esset, aut inter-diu se telo, cum deprehenderetur, defenderet, impune occideretur:* (f) upon the latter of these laws the civilians and canonists have made many curious distinctions, *quas vide apud Covarruviam*, Tom. I. Par. 3. *de homicidio ad defensionem commisso*; (g) and upon the former the *Jewish* Rabbies have [489] made the like, *quas vide apud Selden de jure gentium*.

But as the laws of several nations, in relation to crimes and punishments differ, and yet may be excellently fitted to the exigencies and conveniences of every several state, so the laws of *England* are excellently fitted in this and most other matters to the conveniences of the *English* government, and full of excellent reason, and therefore I shall not trouble myself about other laws than those of *England*. (h)

IV. There remains yet one other particular, namely, the killing a malefactor, that doth not yield himself to justice upon pursuit.

If a person be indicted of felony and flies, or being arrested by warrant or process of law upon such indictment escapes and flies, and will not render himself, whereupon the officer or minister cannot take him without killing of him, this is not felony, neither shall the killer forfeit his goods, or be driven to sue forth his pardon, but upon

(f) *Dig. Lib. IV. tit. 2. ad leg. Aquil. l. 4. § 1. Agel. Lib. XI. cap. 18. vide supra cap. 1. p. 3 & 6.*

(g) p. 561. *Edit. Antwerp, 1614.*

(h) By the common law, *Qui latronem occiderit nocturnum vel diurnum, non tenetur, si aliter periculum evadere non possit, tenetur tamen, si possit. Bract. Lib. III. de corona, fol. 155. a.*

Vide LL. Witbred. Edit. Willk. p. 12. LL. Ina, l. 16. 20, 21. 35. LL. Ethelstani, l. 11. LL. Canuti, l. 59.

[18] 4 *Bl. Com.* 180. But, says Mr. *East*, if one pick my pocket, and I cannot otherwise take him than by killing him, this falls under the general rule concerning the arresting of felons. 1 *East, P. C.* 273.

his arraignment shall plead *not guilty*, and accordingly it ought to be found by the jury. 3 E. 3. Coron. 288.

But if he may be taken without such severity, it is at least manslaughter in him, that kills him, therefore the jury is to inquire, whether it were done of necessity or not. 22 Assiz. 55. Stamf. P. C. Lib. I. cap. 5. fol. 13. b.

And the same law it is, if *A.* commits felony and flies, or resists the people, that come to apprehend him, so that he cannot be taken without killing him, such killing is not felony, nor does the person, that did it, forfeit any thing, tho *A.* were not indicted, nor the person, that did it, had any warrant of any court of justice, for in such case the law makes every person an officer to apprehend a felon. 22 E. 3. Coron. 261.

And the same law it is, if he be taken, and in bringing to the goal he breaks away, and the people of the vill pursue and cannot take him, unless they kill him, those, that kill him, upon their arraignment shall be acquitted of the felony, but yet the township [490] shall be amerced for the escape, and the person kild shall forfeit his goods upon the flight found. 3 E. 3. Cor. 328. 340. and by some it hath been held he shall forfeit the issues of his lands, till the year and day be past. 3 E. 3. Coron. 290.

If *A.* be suspected by *B.* to commit a felony, but in truth he committed none, neither is indicted, yet upon the offer to arrest him by *B.* he resists or flies, whereby *B.* cannot take him without killing him, and *B.* kill him, if in truth there were no felony committed, or *B.* had not a probable cause to suspect him, this killing is at least manslaughter, but if there were a felony committed, and *B.* hath cause to suspect *A.* but in truth *A.* is not guilty of the fact, tho upon this account *B.* may justify the imprisonment of *A.* yet *quære* if *B.* kill *A.* in the pursuit, whether this will excuse him from manslaughter.

But if a felony be committed, but not by *A.* but by some other, and *B.* hath a warrant from a justice of peace to apprehend *A.* or that a hue and cry comes to *B.* the constable of *D.* to apprehend *A.* who endeavours to escape, or stands in resistance, so that he cannot be taken without killing him, it seems the killer is excused from felony, tho *A.* were not indicted; *vide pro hoc* 3 E. 3. Coron. 289. and the reason is because he is bound by law to execute his warrant, or pursue the party upon hue and cry and to apprehend him, and is indictable for a contempt if he doth not, and so it differs from the former case, for no man is bound to suspect another, but it is the act of his own judgment, and so he is merely his own warrant, and he may not adventure so far as the death of the party, unless he be sure he was the offender, tho he may imprison him, for thereupon he shall be brought to his trial; *sed de his vide* Stamf. P. C. Lib. I. cap. 5. Crompt. fol. 30.

And it is to be observed, that whether the party rescues himself after he is taken, and fly or resist, or whether he fly or resist before his taking, and be kild in the pursuit, it is all one, the killer forfeits

nothing; but the person kild forfeits his goods, tho he were kild before attainder, upon an inquisition either by the coroner, or petit jury finding his flight. 3 *E. 3. Coron.* 288. 328.

By the statute of 21 *E. 1. de malefactoribus in parcis*, if a parker, forester, or warrener, find any trespassers wandering in his park, forest, or warren, intending to do damage therein, and they will not yield to the forester after hue and cry made to stand to the king's peace, but fly or defend themselves, whereupon they are kild, the parker, forester, or warrener, or their assistants shall not lose life or limb for the same, but shall enjoy the king's peace, so it be not done upon any former malice or evil will; but to make good such justification by a parker, forester, or warrener, there are these things requisite: 1. It must be a legal forest, park, or warren, or chace, (for a chase includes warren) and not a bare warren, park, &c. in reputation, for if a man inclose a piece of ground, and put deer or conies in it, this makes it not a park or warren without a prescription time out of mind, or the king's charter. 2. If a man have a park within a forest, where he may hunt, and the forester kills the purloin-man, or his servant hunting in the purloin, this doth not excuse the forester from murder or manslaughter, as the circumstances of the case are. *Dyer* 327. a.

And note, that in all these cases of homicide by necessity, as in pursuit of a felon, in killing him that assaults to rob, or comes to burn or break a house, or the like, which are in themselves no felony, the matter may be specially presented by the grand inquest, (*quod vide* 3 *E. 3. Coron.* 305. 289. and several other places,) or by the coroner's inquest. And thus it was done in *Holme's* case, 26 *Eliz. Crompt.* 28. and in the case of a servant of justice *Croke*, who coming with the judge out of the circuit was assaulted in the highway, and he kild the assailant, and the matter presently specially found by the coroner's inquest, whereby he was discharged by the statute of 24 *H. 8. cap.* 5. and in these cases upon this special presentment the party shall be presently discharged without being put to plead, but then this acquittal by presentment is no final discharge, for he may be indicted and arraigned again afterwards, if the matter of the former indictment be false; but if in such a case the presentment of the grand inquest or coroner's inquest be simply of [492] murder or manslaughter, and thereupon he is arraigned and tried, and this special matter given in evidence, he shall be acquitted thereupon, for upon these special matters proved in evidence, he is not guilty, for it is no felony, and this acquittal is a perpetual discharge and bar against any other indictment for the same death; therefore this latter way is more advantageous in the conclusion for the party, than a special presentment. *Crompt. fol.* 28. *Holme's* case. [19]

[19] Lord Bacon says, "if divers be in danger of drowning, by the casting away of some boat, or barque, and one of them get to some plank, or on the boat's side to keep himself

above water, and another to save his life thrust him from it, whereby he is drowned; this is neither *se defendendo*, nor by misadventure, but justifiable." *Max. Reg. V.*

Later writers speak of this as homicide *se defendendo*.

The only case directly involving this doctrine is that of *U. S. v. Holmes, C. C. U. S. for Eastern District of Penn., March, 1842*—an indictment for manslaughter. The defendant was a mariner, and the deceased a passenger in a ship wrecked and abandoned at sea; the crew and passengers embarking in boats, and within twenty-four hours after the abandonment the danger of destruction by tempest being imminent, the prisoner, together with the remaining sailors, proceeded to throw overboard those passengers whose removal seemed necessary for the common safety, among whom was the deceased. Relief shortly after came; but the evidence conflicted as to whether the boat could have held out in its original crowded state even during that short period. The question, therefore, whether, with no prospect of aid, acting under the circumstances which surrounded the defendant at the time the act was committed, such necessity existed as would justify the homicide, was one of great doubt. But a new principle was introduced into the case by Judge Baldwin, who presided. Holding, that in such an emergency, there was no maritime skill required which would make the presence of a sailor of more value than that of a passenger, he maintained, that in such case, it being the stipulated duty of the sailor to preserve the passenger's life at all hazards, if a necessity arose in which the life of one or the other must be lost, the life of the passenger must be preferred. If, on the other hand, the crew was necessary, in its full force, for the management of the vessel, the first reduction to be made ought to take place from among the passengers. But under all circumstances, it was held, the proper method of determining who was to be the first victim out of the particular class, was by ballot. The defendant, under the charge of the court, was convicted. *U. S. v. Holmes, Pamphlet, Phila., 1842.*

Sir William Russell observes, that if the commission of treason may be extenuated by the fear of present death, and while the party is under actual compulsion, (1 *East, P. C.* 70.) there seems to be no reason why homicide may not also be mitigated upon the like consideration, of human infirmity; though in case the party might have recourse to the law for his protection from the threats used against him, his fears will certainly furnish no excuse for committing the murder. 1 *East, P. C.* 294. It must further be observed, that as the excuse of self-defence is founded on necessity, it can, in no case, extend beyond the actual continuance of that necessity by which alone it is warranted; 1 *East, P. C.* 293. for if a person assaulted does not fall upon the aggressor, till the affray is over, or when he is running away, this is revenge, and not defence. 4 *Bl. Com.* 293. 1 *Russ. on Cr.* 665. See *Foster*, 271. 277. 318.

CHAPTER XLI.

CONCERNING THE FORFEITURE OF HIM, THAT KILLS IN HIS OWN DEFENSE, OR PER INFORTUNIUM.

If a man kill another by misfortune, yet he shall forfeit his goods in strictness of law, in respect of the great favour the law hath to the life of a man, and to the end that men should use all care, diligence and circumspection in all they do, that no such hurt ensue by their actions.

But if the occasion or killing can by no means be attributed to the act of the person, but to the act of him, that is kild, there it seems, tho the instrument of the death is forfeited as a deodand, there follows no forfeiture of the goods of the person: for instance,

If *A.* shoots at rovers, as he may lawfully do, if *B.* after the arrow is delivered runs into the place, where the arrow is to fall, of his own accord, and so is kild, this seems to be such an *infortunium*, that affects not *A.* with the loss of goods, for it was not his act that

contributed to the death of *B.* but the wilful or improvident act of *B.* himself; *quære.*

If *A.* assaults *B.* and *B.* in his own defense kills *A.* yet [493] *B.* forfeits his goods.

If the coroner's inquest find the killing specially *se defendendo*, yet the court shall arraign him, and try him, whether it were *se defendendo*, before he shall have his pardon of course. 4 *H.* 7. 1 & 2.

But if *B.* having a pitch-fork in his hand, *A.* assaults *B.* so fiercely, that he runs upon the pitch-fork of *B.*, *B.* offering no thrust at all against *A.* (tho this be a very difficult matter of fact to suppose, yet if the fact be supposed to be so) it seems *B.* forfeits no goods, because it was the act of *A.* himself, and some have said rather, that in that case *A.* is *felo de se*, and forfeits his goods, *de quo supra*, 44 *E.* 3. 44. *Coron.* 94. the 3 *E.* 3. *Coron.* 286. saith his goods are forfeit in that case.

But where the killing of a man in his defense is in the law no felony, but the party upon his arraignment upon the special matter is to be found or judged simply not guilty, there is no forfeiture, but the party ought to be absolutely acquitted, unless he fled, and it be found, that *fugam fecit*, for *that* is a distinct forfeiture, altho the party be not guilty of the fact, and therefore always the jury is charged to inquire, whether the prisoner be guilty or not guilty, and if not guilty, whether he fled for the same, and if he fled, then to inquire also of his goods and chattles.

And the cases, where the prisoner is not to forfeit any goods or chattles, but is to be absolutely acquitted, if he kills in his own defense, are before remembered, and I here recollect them.

1. He that kills a thief, that attempts to rob him.

2. He that kills a person, that attempts to rob or kill him in or near the highway, or in the mansion of the killer, by the statute of 24 *H.* 8. cap. 5. and this, tho he hath not yet actually robbed. 3 *E.* 3. *Coron.* 330.

3. He that kills a person, that attempts wilfully to fire his house, or to commit burglary, tho he hath not actually broken or fired the house. 26 *Assiz.* 23. 29 *Assiz.* 23. if he came with that purpose.

4. An officer or bailiff, that in execution of his office kills a person, that assaults him, tho the officer gives not back [494] to the wall, for the officer is under the protection of the law, and the books tell us it is not felony in such case. *Co. P. C.* p. 65.

5. The same law is of a constable, that commands the king's peace in an affray, and is resisted.

6. He that kills a felon, that resists, or *justiciari se non permittit*, and the like of a constable or watchman, that is charged to take a person charged with felony, or attempts to take him upon hue and cry, if the person so charged resist or fly, and cannot be otherwise taken, tho perchance he be innocent, for the reason before given, and this either before or after the arrest.

7. If there be a great riot, or rebellious assembly, how far the

killing of such persons in suppressing of them is criminal is to be seen.

By the statute 1 *Mar. cap. 12*. "If any persons to the number of twelve or more shall intend, practise, or put in ure to overthrow pales, hedges, ditches, or inclosures of parks, or other grounds; banks of fish-ponds, conduit-heads, or pipes, or to pull down dove-cotes, barns; houses, mills, or burn stacks of corn, or abate rents or price of victual or corn, and being required by the justices of peace, sheriff of the county, mayors, bailiffs, or head officers of cities, by proclamation in the queen's name to retire to their homes, shall remain together one hour after such proclamation, or shall put in ure such things, they shall be adjudged felons.

"And if any persons above the number of two shall unlawfully assemble to put in ure the things aforesaid, that it shall be lawful for the sheriff, justices of peace, mayors, bailiffs, and every other person having commission from the queen to raise force in manner of war, to be arrayed to suppress and apprehend the rioters, and if the persons so unlawfully assembled after command and request by proclamation shall continue together, and not return to their habitations, and if any of them happen to be kild, maimed or hurt in or about the suppressing or taking them, the sheriff, justice, [495] mayor, &c. and their assistants, shall be discharged and unpunishable for the same against the queen and all other:"

this act was continued by the statute of 1 *Eliz. cap. 16*. during her life.(a)

And it seems, as to this manner of killing rioters, that resist the ministers of justice in their apprehending, it is no other but what the common law allows, or at least what the statute of 13 *H. 4. cap. 7*. implicitly allows to two justices of the peace, with the sheriff or under-sheriff of the county, by giving them power to raise the *posse comitatus*, if need be, and to arrest the rioters, and they are under the penalty of 100*l*. if they neglect their duty herein.

And with this agrees Mr. *Dalton*, *cap. 46. p. 115.*, (b) *cap 98. p. 249.*, (c) and *Crompt. de Pace 62. b.* "Nota, que viscount & justices de peace point prendre tants des homes in harneys, quant sont necessary & gins &c. & tuer les rioters, sils ne voilent eux rendre, come fuit pris in case de *Drayton Basset*, car le statute 13 *H. 4. cap. 7*. parle, quilz eux arrestant, & si les justices ou ascuns de leur company tue ascun des rioters, qe ne voil render nest offence in lui, come fuit auxi prise in le dit case de *Drayton Basset*;" (d) and note, that tho the statute of 1 *Eliz.* was then in force, yet *that* was not a case within that statute, nor depending on it.

And it seems the same law is for the constable of a vill in case a riot happens within a vill, he may assemble force within his vill to arrest the rioters, and if he or those assembled in his assistance come to arrest the rioters, and they resist, and be kild by the con-

(a) 1 *Geo. cap. 5*. a new act was made to the same purport, which is perpetual.

(b) *New Edit. cap. 182. p. 297.*

(d) See also *Crompt. 23 b.*

(c) *Cap. 150. p. 481.*

stable or any of his assistants, the constable and his assistants are dispunishable for the same, for he is enabled hereunto by the common law, as being an officer for the preservation of the peace, and may command persons to his assistance, and if they refuse, they are fineable for it.

And farther, the statute of 17 R. 2. cap. 8. commands and authorizes the king's ministers to use all their power [496] to take and suppress such riots and rioters, and a constable is the king's minister; and the statute of 13 H. 4. cap. 7. is no repeal of this statute, so that the killing of a rioter by a sheriff, justice of peace, or constable, when he will resist and not submit to the arrest, seems to be no felony at common law; nor makes any forfeiture, for they do but their office, and are punishable if they neglect it.

8. If the prisoners in goal assault the goaler, and he in his defense kills any of them, this is no felony, nor makes any forfeiture. 22 Assiz. 5. per Thorp, *adjudge per tout le council.**

* See ante p. 424, note 1.

CHAPTER XLII.

CONCERNING THE TAKING AWAY OF THE LIFE OF MAN, BY THE COURSE OF LAW, OR IN EXECUTION OF JUSTICE.

THIS kind of occision of a man according to the laws of the kingdom and in execution thereof ought not to be numbered in the rank of crimes, for it is the execution of justice, without which there were no living, and murders, burglaries, and all capital crimes would be as frequent and common, as petit trespasses and batteries.

The taking away of the life, therefore, of a malefactor according to law by sentence of the judge, and by the sheriff or other minister of justice pursuant to such sentence, is not only an act of necessity, but of duty, not only excusable, but commendable, where the law requires it.[1]

But because there are some cautions and considerations in this matter, I have added it to the close of this title of [497] homicide.

Regularly it is not lawful for any man to take away the life of another, tho a great malefactor, without evident necessity, (whereof before,) or without due process of law, for the deliberate, uncompelled extrajudicial killing of a person attaint of treason, felony, or murder, or in a *præmunire*, tho upon the score of their being such, is murder.(a)

(a) Coron. 203.

[1] Foster, 267; 4 Bl. Com. 178.

Therefore it is necessary, 1. That he, that gives sentence of death against a malefactor, be authorized by lawful commission or charter, or by prescription to have cognizance of the cause. 2. That he that executes such sentence be authorized to make such execution, otherwise it will be murder or manslaughter, or at least a great misprision in the judge that sentenceth, or in the minister that executeth.[2]

I. As touching the authority of the judge, I shall not at large discourse the jurisdiction of the judges or courts in this place; it will be more proper hereafter; but shall mention only some things, that may be seasonable for this place,

If he that gives judgment of death against a person, hath no commission at all, if sentence of death be commanded to be executed by such person, and it is executed accordingly, it is murder in him that commands it to be executed, for it was *coram non iudice*.

If a commission of the peace issue, this extends not to treason, neither can justices of peace hear and determine all treasons by force of this commission, for it extends only to felonies, (tho some treasons are by act of parliament limited to their cognizance, as hath been before observed) if they take an indictment of treason, and try and give judgment upon the party, this is most certainly erroneous, and possibly avoidable by plea, but I do not think it makes the justices guilty of murder in commanding the execution of such sentence, for they were not without some colour of proceeding therein, because all treason is felony, tho it be more, and the king may, if he pleases, proceed against a traitor for felony;

[498] and anciently a pardon of all felonies discharged some treasons. 1 *E. 3. Charter de Pardon* 13. 22 *Assiz.* 49. *Co. P. C.* p. 15. but it is a great misprision in such justices.

The justices of the common pleas cannot hold plea upon an indictment or appeal in capital causes, it will be at least erroneous, if not voidable by plea; but if they hold plea in appeal of death by writ, and give judgment therein for the party to be hanged, which is executed accordingly, I think it is an error, and a great misprision in them, but not felony, because they had colour to hold plea thereof by an original writ out of the chancery under the great seal.

Upon the same reason I take it; that if there be a writ sent to the sheriff, escheator, or *A. B.* and *C.* to hear and determine felonies, whereas it ought to be a commission, 42 *Assiz.* 12, 13. and they proceed thereupon to a judgment and execution in case of felony, it is a great misprision, but I think it makes not the judge nor executioner guilty of murder; the same law I take to be in *Lacie's* case, *quod vide Co. P. C.* p. 48. 5 *Co. Rep.* 106. a *Constable's* case. The commissioners upon the statute of 28 *H. 8.* had given judgment of death against him that struck at sea, and the party died at

[2] 3 *Inst.* 52. 211; *Foster*, 270; *F. N. B.* 244 A; 19 *Rym. Fed.* 284; 1 *East*, *P. C.* 335.

land; and the same law I take to be, where he that hath the franchise of *Infangthief*, gives judgment of death against a felon not within his jurisdiction. 2 R. 3. 10. b: the case of the abbot of *Crowland*; it might be a cause of a seizure of the liberty, but makes not the steward guilty of murder.

And what I have said of a proceeding in capitals without the strict extent of their commission may be said of the like proceeding, where, in strictness of law, the commission happens to be determined.

A commission of gaol-delivery issues to *A. B. &c.* they sit one day, and forget to adjourn their commission, or the clerk forgets to enter the adjournment, a felony is committed the next day, and they proceed in sessions, and take an indictment, and give judgment of death against the malefactor, this judgment is erroneous, and the clerk of assizes shall never be permitted to amend the record, and enter an adjournment, this judgment is erroneous, and shall be reversed; but it makes not the judges guilty of murder or homicide, tho in strictness of law their commission was determined by the [499] first day's session without adjournment.

King *James* issued out several commissions of gaol-delivery, &c. the justices went their circuit, the king died, yet they proceeded, and before notice of the king's death condemned and executed many prisoners; it is held these proceedings were good, and the commissions stood till notice of the king's death, *M. 3. Car. C. B.* Sir *Randolph Crew's* case, (b) tho, in strictness of law, their commissions were determined by the king's death; but suppose they were both in law and fact determined, the judgments that happened upon sessions begun after the king's death would be erroneous, but the judges had not been criminal in commanding the execution of their sentence before notice; for if *ignorantia juris* doth in some cases excuse a judge, much more doth *ignorantia facti*.

If a commission of gaol-delivery issue to *A. B. and C.* in the county of *D.* and afterward a second commission of gaol-delivery in the same county issue to *E. F. and G.* and there is notice given to the former commissioners, but no session by virtue of the second commission, whereupon the former proceed notwithstanding that notice *in pays*, (as conceiving it insufficient, unless either a writ of *Supersedeas* had been sent them, or at least a session by the second commission) and they proceed in cases capital, this makes them not guilty of felony, 34 *Assiz.* 8. because tho the second commission be effectual for them to proceed without any actual revocation by *Supersedeas*, or otherwise of the former, yet the former is not actually determined, till a *Supersedeas* or a session by virtue of the second commission, upon an extrajudicial notice, or a notice *in pays*, the first commissioners may, if they please, forbear any further session, but they are not bound to take notice of rumours and reports; the like in case of a sheriff, *M. 26. Eliz. Moore* 333. 5 *E.* 4.

If in the time of peace a commission issue to exercise martial law,

and such commissioners condemn any of the king's subjects (not being listed under the military power,) this is without all [500] question a great misprision, and an erroneous proceeding, and accordingly adjudged in parliament in the case of the earl of Lancaster, *Parl. 1 E. 3. part 1. de quo supra, p. 344.*

And in that case the exercise of martial law in point of death in time of peace is declared murder. *Co. P. C. p. 52.*

But suppose they be listed under a general or lieutenant of the king's appointment under the great seal, and modelled into the form and discipline of an army, either in garrison or without, yet as long as it is *tempus pacis* in this kingdom, they cannot be proceeded against as to loss of life by martial law; and the same for mariners that are within the body of the kingdom, but their misdemeanors, at least if capital, are to be punished according to the settled laws of the kingdom, 3 *Car. cap. 1.* the petition of right; yea, and it seems as to mariners and soldiers at sea, when in actual service in the king's ships, they ought not to be put to death by martial law, unless it be actually in time of hostility; and this appears by the statute of 28 *H. 8.* that settled a commission to proceed criminally in cases of treason and felony, and by the late act of 13 *Car. 2. cap. 9.* settling special orders under pain of death by act of parliament; (c) but indeed, for crimes committed upon the high sea, the admiral had at common law a jurisdiction even unto death, *secundum leges maritimas*; but this was a different thing from martial law.

And this appears also by the statute of 13 *R. 2. cap. 2.* the constable and marshal, who are the *judices ordinarii* in cases belonging to the martial law, are yet thereby declared to have no jurisdiction within the realm, but of things that touch war, which cannot be discussed nor determined by the common law.

It must therefore be a time of war, that must give exercise to their jurisdictions, at least in cases of life.

And thus far concerning the judicial sentence of death, where and when it is homicide criminally, and when not.

II. Now a few words concerning the officer executing such sentence, and where and when he is culpable in so doing.

Wheresoever the judge hath jurisdiction of the cause, the [501] officer executing his sentence is not culpable, tho the judge err in his judgment, but if the judge have no manner of jurisdiction in the cause, the officer is not altogether excusable, if he execute the sentence.

In the great courts of justice, as of *oyer* and *terminer*, gaol-delivery, and of the peace, regularly, the sheriff of the county, or those that he substitutes, as under-sheriff, gaoler, or executioner, are the ordinary ministers in execution of malefactors, and they are to pursue the sentence of the court, [3] and therefore, 1. If he vary from

(c) And this appears also from the annual statutes for punishing mutiny or desertion. 3 *Geo. 1. cap. 2. & multos alios.*

[3] See this rule explained, *Foster, 267, sec. 9.*

the judgment, as where the judgment is to be hanged, if he behead the party, it is held murder.(d) 2. It must be done by the proper officer; viz. the sheriff or his substitute, if another doth it of his own head, it is held murder; *vide Co. P. C. p. 52.*[4]

The use heretofore was, and regularly should be so still, that if sentence of death be given by the lord high steward, a warrant under the seal of the lord steward, and in his name should issue for the execution, and the like by three at least of the commissioners of *oyer and terminer*, where sentence of death is given by them. *Co. P. C. p. 31.*

But use hath obtained otherwise before commissioners of goal-delivery, for there is no warrant under the seal of the justices for execution, but only a brief abstract or calendar left with the sheriff or gaoler; and I remember Mr. Justice *Rolle* would never subscribe a calendar, but after judgment given would command the sheriff in court to do execution, and for not doing it, he fined *Varney* the sheriff of *Warwickshire* 2000*l.*

If a prisoner be removed into the king's bench by *Habeas Corpus*, or taken upon an indictment of felony in *Middle-* [502] *sex*, and be committed to the marshal, and upon his arraignment be found guilty, and hath judgment to die, the court may send the person to *Newgate*, and command the sheriff of *Middlesex* to do execution, but if he be remitted to the marshal, (as regularly he ought to be,) then the marshal is the proper officer of the court to do execution, and he may execute the offender in *Middlesex*, wherever the offense was committed,(e) and the court may *ore tenus*, or by their order, command the sheriff of *Middlesex* to be assisting, but the entry upon the roll ought to be, *Et præceptum est marescallo, &c. quod faciat executionem periculo incumbente*; and thus it was done *H. 24. Car. 2.* upon a conviction of murder committed in *Kent* upon a trial at the king's bench bar, upon search and producing of many antient and late precedents, for regularly, he that is the

(d) Of this opinion was also lord *Coke*, *Co. P. C. p. 52. 211.* notwithstanding it had been practised otherwise in some instances, as in the case of queen *Ann Boleyn*, and queen *Katherine Howard*, in the time of *Henry VIII.* the duke of *Somerset* in the time of *Edward VI.* and the lord *Audley* in the time of *Charles I.* upon the authority of which cases the lady *Alice Lisle* was beheaded for treason. *1 Jac. II. See State Tr. Vol. IV. p. 129.*

So in the cases of *Ashton*, 19 Jan. 1690, at the *Old Baily*, (*State Tr. Vol. IV. p. 483.*) and *Matthews* the printer, Octob. 30, 1719, at the *Old Baily*, who were both sentenced for high treason, and were hanged till they were dead, without any quartering or beheading, altho this was not only different from, but contrary to the sentence in high treason, which orders, that they shall be hanged, but not till they are dead: but as lord *Coke* says in the place above-mentioned, *Judicandum est legibus non exemplis*; and indeed, since the judgment is the warrant for the execution, it should seem that every execution, which is not pursuant to the judgment, is unwarrantable.

(e) See *Althoes* case *supra* in *notis p. 464.* who were executed in *Surrey* for a fact committed in *Pembrokeshire* in *Wales*: see also the case of *Fitz-Patrick* and *Brodney*, *State Tr. Vol. I. p. 374*, who were executed in *Middlesex* for a fact in *Wiltshire*, and the case of *Layser*, *State Tr. Vol. VI. p. 332.* who was executed in *Middlesex* for a fact in *Essex*.

immediate minister of the court, ought to make execution, and such is the marshal to the court of king's bench, especially where the persons are committed to his custody, and this is done without any writ, but only by the command of the court *ore tenus*.

And thus far concerning the death or killing of a man, where it is not, and where it is punishable, and the several degrees thereof.[5]

Foster, 267.

[503.]

CHAPTER XLIII

OF LARCINY, AND ITS KINDS.

ALTHO the offenses of burglary and arson are of an higher nature than larciny, yet because there be some things that fall under the consideration of larciny, that are necessary to be known previously to the consideration of burglary, &c. I shall begin with this.

Larciny or theft, under the various laws of several countries, hath been under various degrees of punishment: in some countries the punishment was triple or fourfold restitution, as among the *Jews*, (a) in others deportation or banishment, or condemning to several employments, as among the *Romans*. (b)

And in *England*, in antient time, the punishment of theft was not fixed or settled, and altho *Hoveden* and *Simon Dunelmensis* tell us, that *firmissimâ lege statuit Henricus primus, quod fures latrocinio deprehensi suspendantur*; yet in the time of *Henry II.* they were otherwise punished; *quod vide apud Selden, Jur. Ang. p. 83.* But the same law, touching the punishment of grand larciny with death, seems to have been fixed and settled ever since the time of *Henry II.* and *Bracton*, that wrote in the time of *Henry III.* takes it as a thing settled and commonly practised in his time: *vide ipsum. Lib. III. cap. 32. p. 151. b. (*)*

Now touching the kinds of larcinies they are two, *viz.* either simple larciny, or larciny accompanied with violence or putting in fear, which is called robbery.

Simple larciny or theft is of two kinds, *viz.*

Grand larciny, when it is above the value of twelve-pence.

Petit larciny, when only of the value of twelve-pence, or under.

The nature of the offense is the same in both, but the degrees of their punishment differ, as shall be said.

(a) *Vide supra, p. 9.* (b) *Vide supra, p. 11.* (*) *Vide supra, p. 12. & notas ibidem.*

[5] In *McLeod's* case, the Supreme Court of the State of *New York* held that a subject of *Great Britain*, who, under directions from the local authorities of *Canada*, commits homicide, within the State of *New York*, in time of peace, may be prosecuted in the State courts as a murderer; even though his sovereign subsequently approve his conduct, by avowing the direction, under which he did it as a lawful act of government. *The People v. McLeod*, 1 *Hill*, 377.

And therefore what is said concerning grand larciny here is applicable to petit larciny, except as to the point of punishment, for the punishment of grand larciny is death and loss of goods, the punishment of petit larciny is loss of goods and whipping, but not death. [504]

Simple larciny is defined by *Bracton*(c) and *Britton*(d) to be *fraudulenta contractatio rei alienæ cum animo furandi invito domino, cujus res illa fuerit*: by my lord *Coke* to be the felonious and fraudulent taking and carrying away by any man or woman of the mere personal goods of another, neither from the person, nor by night, in the house of the owner. *Co. P. C. p. 107.*[1]

I shall pursue his method in that chapter with such additions as shall be requisite.

The indictment runs *vi & armis felonice furatus fuit, cepit & asportavit* in case of dead chattels, *cepit & abduxit* in case of a horse, *cepit and effugavit* in case of sheep, cows, &c. wherein the words *felonice furatus fuit, cepit*, are essential to the crime.

This description gives us these heads of inquiry.

1. What a taking. 2. What a carrying away. 3. What a felonious taking and carrying away. 4. What the personal goods. 5. What the goods of another. 6. What or who may be said a taker.

(c) *Lib. III. de corona, cap. 32. fol. 150. b.*

(d) *Cap. 15. p. 22. See also Fleta, Lib. I. cap. 28. p. 54.*

[1] "Larceny, theft, or stealing, is the fraudulently taking any thing of marketable, saleable, assignable or available value, belonging to or being the property of another, with the intent on the part of the person so taking the same fraudulently and without right to appropriate the same to or dispose of, conceal or destroy the same for his own use and benefit, or to the use and benefit of any other person than the owner of, or person interested in the same or entitled to the possession thereof, and to deprive, defraud, or despoil the owner thereof or person interested therein or entitled to possession thereof, of the same, or of the value thereof, or of his property or interest therein, or of the benefit he might derive therefrom, against the will of such owner or person interested, and without, at the time of taking, having an intention then or thereafter *bona fide* to make compensation or indemnity therefor, or a restoration thereof, to such owner thereof, or person interested therein or entitled to possession thereof." *Penal Code of Mass. 2.* This definition of larceny is given by the *Mass. Commissioners*, and is intended to characterize the crime precisely as at the common law. It is thought to be comprehensive and accurate.

The *English commissioners*, in their first report on *Crim. Law*, p. 16, have given six different definitions of this crime from as many different sources.

1. *Blackstone*. "Theft is the felonious taking and carrying away the goods of another."

2. *Eyre, Ch. Just.* "Larceny is the wrongful taking of goods with intent to despoil the owner of them *lucri causa*."

3. *Grose, J.* in delivering the opinion of the twelve judges. "The felonious taking of the property of another without his consent and against his will, with intent to convert it to the use of the taker."

4. *Pulton*. "Larceny is the fraudulent taking away of another man's goods above the value of twelve pence, without the knowledge of him whose the goods be."

5. *Lombard*. "Larceny is the fraudulent and felonious taking of another man's goods (removal from his body and person) without his will, to the end to steal them."

6. *Dalton*. "Larceny is the fraudulent and felonious taking away of another man's personal goods (removed from his body and person) in the absence of the owner, without his knowledge."

These regularly are the ingredients into this crime of felony, and must be severally considered.

I. What shall be said a taking.

If *A.* delivers a horse to *B.* to ride to *D.* and return, and he rides away *animo furandi*, this is no felony, [2] the like of other goods. (e) *Co. P. C. p. 107. 28 Eliz. Butler's case.*

So if a man deliver goods to a carrier to carry to *Dover*, he carries them away, it is no felony, [2] but if the carrier have a bale or trunk with goods delivered to him, and he break the bale or trunk, [505] and take and carry away the goods *animo furandi*, or if he carry the whole pack to the place appointed, and then carry it away *animo furandi*, this is a felonious taking by the book of 13 *E. 4 9. Co. P. C. p. 107.*

But that must be intended, when he carries them to the place, and delivers or lays them down; for then his possession by the first delivery is determined, and the taking afterwards is a new taking: *vide 21 H. 7. 14.*

Before the statute of 21 *H. 8. cap. 7.* if a man had delivered goods to his servant to keep or carry for him, and he carrieth them away *animo furandi*, this had not been felony, (f) but by that statute it is made felony, if of the value of forty shillings; but the offender shall at this day have his clergy; (g) but yet if an apprentice (h) doth this, or if a man deliver a bond to his servant to receive money, or deliver

(e) Upon this principle it was doubted, whether a person hiring lodgings was guilty of felony in stealing the goods he had hired with his lodgings. See *Kel. 24 & 81.* but this doubt is removed by 3 & 4 *W. & M. cap. 9.* whereby it is declared to be felony.

(f) This was a disputed point (see 3 *H. 7. 12 b.*) for which reason the statute of 21 *H. 8. cap. 7.* was made to settle the doubt that was at common law; for in the beforementioned case, 21 *H. 7. 14.* it is said to be felony, if he was intrusted with the keeping only within the house, stable, &c. because then the things are adjudged in the master's possession; but if he be intrusted to carry the things out of the house, &c. elsewhere, then it is not felony.

(g) By 27 *H. 8. cap. 17.* Clergy was taken away, restored again by 1 *E. 6 cap. 12.* and again taken away by 12 *Ann. cap. 7.* from offenses committed in any dwelling-house or out-house, excepting in the case of apprentices under the age of fifteen years. See note, *ch. 44.*

(h) The statute also excepts all servants within the age of eighteen years, this act, which was repeal'd by the general words of 1 *Mar. cap. 1.* is revived by 5 *Eliz. cap. 10.*

[2] Bailees without hire cannot, at the common law, commit larceny. 2 *East, P. C. 681. 684. Rose. on Crim. Ev. 478. Leigh's case, 2 East, P. C. 694. Gorman's case, 2 Overton's Rep. 68.*

Carriers, for hire, cannot, by the common law, commit larceny. *Fletcher's case, 4 Carr. & Pay. 545. Pratley's case, 5 Id. 533. Maddox's case, Russ. & Ry. 92.* This rule is now, however, much broken in upon, and altered by judicial decision and legislation. See *Com. v. Brown, 4 Mass. R. 580. Mass. Rev. Stat. c. 126. s. 30.*

In the case of a theft by a carrier, who, having a lien, and consequently a right of possession, stepped out of the character in which he exercises such possessory right and removes the thing or a part of it, and disposes of it, in violation of his trust, with intent to steal it, this is held, in the jurisprudence both of England and this country to be a stealing of the thing, or such part, from the proprietor, notwithstanding the carrier, both on account of his lien and his charge of the thing and responsibility for its value, is both a proprietary and possessory owner of it. *Report of the Penal Code of Mass. p. 11.* See also *Com. v. Williams, 1 Virg. Cas. 14. Com. v. Hays, Idem. 122. Thompson v. Com. 2 Virg. Cas. 135. Angel v. Com. Id. 228. The State v. Somerville, 21 Maine R. 14. Com. v. Morse, 14 Mass. R. 217. acc. Norton v. The People, 8 Cow. R. 137. contra Poole v. Simmonds, 1 N. H. Rep. 289.*

him goods to sell, and he accordingly sells and receives the money, and carries it away *animo furandi*, this is neither felony at common law, nor by this statute. *Co. P. C. p. 105. 26 H. 8. Dy. 5. a. b.*

A. a servant of *B.* receives the rents of *B.* and *animo furandi* carries it away, this is not felony at common law, because *A.* had it by delivery; nor by the statute, because he had it not by the delivery of his master or mistress. *Dalt. cap. 102. (i)*

A. delivers the key of his chamber to *B.* who unlocks the chamber, and takes the goods of *A.* *animo furandi*, this is felony, because the goods were not delivered to him, but taken by him. *13 E. 4. 9. b.*

He, that hath the care of another's goods hath not the possession of them, and therefore may, by his felonious em- [506] bezzling of them, be guilty of felony; as the butler that hath the charge of the master's plate; the shepherd that hath the charge of his master's sheep. *3 H. 7. 12. b. 21 H. 7. 15. a. Co. P. C. p. 108.*

The like law for him that takes a piece of plate set before him to drink in a tavern, &c. for he hath only a liberty to use, not a possession by delivery. *13 E. 4. 9.*

And so it is of an apprentice, that feloniously embezzels his master's goods or money out of his shop, it is felony. *Dalt. cap. 102.*

If *A.* comes to *B.* and by a false message or token receives money of him, and carries it away, it is no felony, but a cheat punishable by indictment at common law, or upon the statute of *33 H. 8. cap. 1.* by setting in the pillory.

If *A.* finds the purse of *B.* in the highway, and takes it and carries it away, and hath all the circumstances that may prove it to be done *animo furandi*, as denying it or secreting it, yet it is not felony, [3] the like, in case of taking of a wreck or *treasure-trove*, *22 Assiz. 99.* or a waif or stray.

But yet this taking of *treasure-trove*, waif, or stray must be where the party that takes them, really believes them to be such, and colours not a felonious taking under such a pretense, for then every felon would cover his felony with that pretense.

Where a man's goods are in such a place, where ordinarily they are or may be lawfully placed, and a person takes them *animo furandi*, it is felony, and the pretense of finding must not excuse.

If a man's horse be going in his ground, or upon his common, and he takes it *animo furandi*, it is no finding, but a felony.

So it is if the horse stray into a neighbour's ground or common, it is felony, in him that so takes him; but if the owner of the ground takes it *damage feasant*, or the lord seises it as a stray, tho perchance he hath no title so to do, this is not *felleo animo*, and therefore cannot be felony.

If the sheep of *A.* stray from the flock of *A.* into the flock of *B.* and *B.* drives them along with his flock, or by pure [507] mistake shears him, this is not a felony, but if he know it to

(i) *New Edit. cap. 155. p. 496.*

[3] *2 Russ. on Crimes, 12. 5 Am. Ed. 1845. note (gg.)*

be another's, and marks it with his marks, this is an evidence of a felony.[4]

A man hides a purse of money in his corn-mow, his servant finding it took part of it, if by circumstances it can appear he knew his master laid it there, it is felony; but then the circumstances must be pregnant, otherwise it may be reasonably interpreted to be a bare finding, because an unusual place for such a *depositum*.

A. hath a design to steal the horse of *B.* enters a plaint of replevin in the sheriff's court for the horse, and gets him deliver'd to him, and then rides him away; this is taking and stealing, because done *in fraudem legis*,^(k) *P. 15 Eliz. B. R. Co. P. C. p. 108.*

A. hath a mind to get the goods of *B.* into his possession, privately delivers an ejectment, and obtains judgment against a casual ejector, and thereby gets possession, and takes the goods, if it were *animo furandi*, it is larciny.[5].

If *A.* steals the horse of *B.* and afterwards delivers it to *C.* who was no party to the first stealing, and *C.* rides away with it *animo furandi*, yet *C.* is no felon to *B.* because tho the horse was stolen from *B.* yet it was stole by *A.* and not by *C.* for *C. non cepit*, neither is he a felon to *A.* for he had it by his delivery.

But if *A.* steal the horse of *B.* and after *C.* steal the same horse from *A.* in this case *C.* is a felon both as to *A.* and as to *B.* for by the theft by *A.* *B.* lost not the property, nor, in law, the possession of his horse or other goods, and therefore in that case *C.* may be appeal'd of felony by *B.* or indicted of felony, *quod cepit & asportavit* the horse of *B.* 4 *H. 7. 5. b. 13 E. 4. 3. b.*

And that is the reason, that if *A.* steals the goods of *B.* in the county of *C.* and carry them into the county of *D.* *A.* may be indicted for larciny in the county of *D.* for the continuance of the asportation is a new caption; but if he be indicted of robbery, [508] it must be in the county of *C.* where the force and putting in fear was, *de quo postea.* 4 *H. 7. 5. b.*

II. The words of the indictment are not only *cepit*, but *cepit & asportavit*, or *abduxit* or *effugavit*.*

If *A.* comes into the close of *B.* and take his horse with an intent to steal him, and before he gets out of the close is apprehended, this is a felonious taking and carrying away, and is larceny. *Co. P. C. p. 108, 109.* Justice *Dalison's* reports.

So if a guest lodge in an inn, and take the sheets of the bed with an intent to steal them, and carries them out of his chamber into the hall, and going into the stable to fetch his horse is apprehended, this

(k) See also *Kel. 42.*

[4] *Reg. v. Reed*, 1 *Carr. & M.* 306.

[5] To constitute the crime of larceny, the taking must be *invito domino*, against the will of the owner, and the property in his actual or constructive possession. *Hile v. The State*, 9 *Yerger*, 198; and there must be a criminal intention on the part of the taker, or an indictment for larceny cannot be sustained. *The State v. Hawkins*, 8 *Porter*, R. 461. *Wharton's Crim. Law*, 394-398, where the American authorities are fully collected. 2 *Russell on Crimes*, 19. 5th. *Am. Ed.* 1845, and see note (7) *post. p. 508.*

* *Vide* note [7] *post. p. 508.*

is felony, and a felonious taking and carrying away, 27 *Assiz.* 39. *Co. P. C.* p. 108. and accordingly it was ruled 16 *Car.* 2. *B. R.* upon a special verdict found in *Cambridgeshire*, (l) *A.* comes into the dwelling-house of *B.* nobody being there, and breaks open a chest and takes out goods to the value of five shillings, and lays them on the floor of the same room, and is apprehended before he can remove them, [6] he was indicted upon the statute, and ousted of his clergy by the advice of all the judges, except one; for the taking out of the chest was felony by the common law, and the statute of 39 *Eliz. cap.* 15. alters not the felony, but ousts only the clergy. *Ex libro Bridgeman.*

A. hath his keys tied to the strings of his purse, *B.* a cut-purse takes his purse with money in it out of his pocket, but the keys, which were hanged to his purse-strings, hanged in his pocket, *A.* takes *B.* with his purse in his hand, but the string hanged to his pocket by the keys, it was ruled this was no felony, for the keys and purse strings hanged in the pocket of *A.* whereby *A.* had still in law the possession of his purse, so that *licet cepit non asportavit*, 40 *Eliz. Wilkinson's case* cited *M. 8. Jac. C. B. (m)* 2 *East, P. C.* 556.

III. As it is *cepit* and *asportavit*, so it must be *felonicé* or *animo furandi*, otherwise it is not felony, [7] for it is the mind that makes

(l) *Simpson's case*, *Kel.* 31.

(m) See *Crompt. Justice* 35 a.

[6] *Simpson's case*, *Kel.* 31. *State v. Wilson*, *Coxe's N. J. Rep.* 439. *Amter's case*, 6 *C. & Pay.* 344. 2 *East's P. C.* 555. *Rosc. Cr. Ev.* 470. *Walsh's case*, *Moody*, 14.

[7] *What amounts to a felonious taking.*—If a person picks up a thing, when he knows that he can immediately find the owner, and instead of returning it to the owner, converts it to his own use, this is a larceny. *Rex v. Pope*, 6 *Car. & P.* 346.

If a party finding property knows the owner, or if there be any mark upon it by which the owner can be ascertained, and instead of returning it, converts it to his own use, such conversion will constitute a felonious taking. *Anon. 2 Russ. C. & M.* 102. *Rex v. James*, *id.*

A. went to a shop and asked a boy there to give him change for a half-crown; the boy gave him two shillings, and sixpenny worth of copper. The prisoner held out a half-crown, which the boy touched, but never got hold of it, and the prisoner ran away with the two shillings and the copper:—*Held* a larceny of the two shillings and the copper. *Rex v. Williams*, 6 *Car. & P.* 390.

A. the owner of a boat was employed by *B.* the captain of a ship, to carry a number of wooden staves ashore in his boat; *B.'s* men were put into the boat, but were under the control of *A.* who did not deliver all the staves, but took one of them away to the house of his mother:—*Held*, that this was a bailment of the staves to *A.* and not a charge only; and that a mere non-delivery of the staves would not have been a larceny in *A.* but that if *A.* separated one of the staves from the rest, and carried it to a place different from that of its destination with intent to appropriate it to his own use, that was equivalent to a breaking of bulk, and therefore would be sufficient to constitute a larceny. *Rex v. Howell*, 7 *Car. & P.* 325.

If *A.* asks *B.* who is not his servant, to put a letter in the post, telling him it contains money, and *B.* breaks the seal and abstracts the money before he puts the letter into the post, he is guilty of larceny. *Rex v. Jones*, 7 *Car. & P.* 151. But if a person, from idle curiosity, either personal or political, opens a letter addressed to another person, and keeps the letter, this is no larceny, even though a part of his object may be to prevent the letter from reaching its destination. *Reg. v. Godfrey*, 8 *Car. & P.* 563.

To constitute a larceny, by a party to whom goods have been delivered on hire, there

the taking of another's goods to be a felony, or a bare trespass only but because the intention and mind are secret, the intention must be judged by the circumstances of the fact, and tho these cir-
 [509] cumstances are various, and may sometimes deceive, yet

must not only be an original intention to convert them to his own use, but a subsequent actual conversion; and a mere agreement by the hirer to accept a sum offered for the goods is not such conversion if the party who makes the offer does not intend to purchase unless his suspicions as to the honesty and right of the vendor to sell are removed. *Reg. v. Brooks*, 8 Car. & P. 295.

A person by false pretences induced a tradesman to send by his servant to a particular house, goods of the value of 2s. 10d. with change for a crown piece. On the way he met the servant, and induced him to part with the goods and change a crown piece, but which afterwards was found to be bad. Both the tradesman and servant swore that the latter had no authority to part with the goods or change without receiving the crown piece in payment; though the former admitted that he intended to sell the goods, and never expected them back again:—*Held* that the offence amounted to larceny. *Rex v. Small*, 8 Car. & P. 46.

On an indictment for larceny it appeared that a landlord went to his tenant (who had removed all his goods) to demand rent amounting to £12 10s. taking with him a receipt ready written and signed; the tenant gave him £2, and asked to look at the receipt. It was given to him, and he refused to return it, or to pay the remainder of the rent. It was proved by the landlord that at the time he gave the prisoner the receipt, he thought the prisoner was going to pay him the rent, and that he should not have parted with the receipt unless he had been paid all the rent; but that when he put the receipt into the prisoner's hands he never expected to have the receipt again; and that he did not want the receipt again, but wanted his rent to be paid: *Held* a larceny, and that the fact of the tenant giving the £2 made no difference. *Reg. v. Rodney*, 9 Car. & P. 784.

An ostler assisted in removing from a wagon which stopped at the inn where he was employed, a quantity of hay which had been taken by the waggoner from his master's stables and put into the wagon, such hay not being allowed for the horses on the journey:—*Held*, that the ostler was properly indicted for receiving, because as the hay was not always allowed by the master for the horses, the moment it was removed by the waggoner from the stable to the wagon *animo furandi*, the larceny was complete. *Reg. v. Gruncell*, 9 Car. & P. 365:

A person hired to drive cattle to a particular place, who sells the same, and absconds with the money, is guilty of stealing, though the intention to sell be not conceived till after taking possession of the cattle. *Reg. v. Jackson*, 2 M. C. C. R. 32.

A prisoner was employed as master of a coal vessel. The custom of the trade was that he should receive two-thirds of the freight—he took the whole:—*Held*, that he was not a joint proprietor with the master, and that he was properly convicted of stealing the master's third. *Anon.* 2 Lewin, C. C. 258. *S. P. Holmes' case*, *id.* 256.

If a person not being the servant of the party who intrusts him, receive a parcel containing notes to take to a coach-office, and abstract the notes on his way there, and apply them to his use, he is guilty of larceny. *Reg. v. Jenkins*, 9 Car. & P. 28.

To constitute felony, breach of trust is not sufficient; there must be a felonious taking, but that is satisfied by an act not warranted by the purpose for which the property was delivered. *Cartwright v. Green*, 8 Ves. jun. 402.

To obtain property by fraud, and under a preconcerted plan to rob is felony, but the *animus furandi* must be found by the jury. *Rex v. Horner*, 1 Leach, C. C. 270.

A banker's clerk enters a fictitious sum in the ledger to the credit of a customer, and tells him he has paid the sum to his account, and on the faith of it obtains from the customer his check on the bankers, which the prisoner pays to himself by bank notes from the till, and enters in the waste-book a true account of the check-drawer and notes as paid, "to a man." This was held a felonious taking of the notes from the till. *Rex v. Hammon*, 4 Taunt. 304. 2 Leach, C. C. 1083.

The assent of a prosecutor to give facility to the commission of a larceny for the purpose of detecting the offenders, does not do away the felony, although the property was not taken against his will. *Rex v. Eggington*, 2 Leach, C. C. 913. 2 East, P. C. 494. 666. 2 B. & P. 508.

The owner of goods, knowing of an intention in the prisoners to steal them, they hav-

regularly and ordinarily these circumstances following direct in this case.

If *A.* thinking he hath a title to the horse of *B.* seiseth it as his own, or supposing that *B.* holds of him distrains the horse of *B.*

ing plotted so to do with his servant, desired the servant to carry on his business with a view to the detection of the thieves; in consequence of which the servant, with the consent of his master, agreed with the prisoners to open the outer door to them, and let them into the house, when they broke open inner apartments, and took the goods: *Held*, by a majority of the judges, to be larceny; one doubting, because of the owner's assent and partial encouragement of the felony by means of his servant. *Ib.*

If a man steals goods in one county, and carry them into another, it will be larceny in the latter, though the goods are not carried into the latter county until long after the original theft. *Rex v. Parkin*, 1 *R. & M. C. C. R.* 45; 2 *Russ. C. & M.* 174. See *infra*.

An indictment for robbing a mail-bag of letters must be laid in the county where the mail was actually taken, in order to bring the case within the statute; and cannot be laid in the county where the prisoner was in possession of it only; the jury finding that the letters had been taken from the bag into some other county through which the mail had passed. *Rex v. Thomas*, 2 *East, P. C.* 605. 2 *Leach, C. C.* 634.

To make a taking felonious, it is not necessary that it should be done *lucri causa*; taking with an intent to destroy will be sufficient to constitute the offence of larceny, if done to serve the prisoner or another person, though not in a pecuniary way. *Rex v. Cabbage*, *R. & R. C. C.* 292. 2 *Russ. C. & M.* 94.

If a man steals his own goods from his own bailee, though he has no intent to charge the bailee, but his intent is to defraud the king; yet if the bailee had an interest in the possession, and could have withheld it from the owner, the taking is a larceny. *Rex v. Wilkinson*, *R. & R. C. C.* 470. 2 *Russ. C. & M.* 156.

If a part-owner of property steal it from the person in whose custody it is, and who is responsible for its safety, he is guilty of larceny. *Rex v. Bramley*, *R. & R. C. C.* 478. 2 *Russ. C. & M.* 155.

To constitute larceny the felonious intention must exist in the mind at the time the property was obtained; for if it be obtained by fair contract, and afterwards fraudulently converted, it is no felony. *Rex v. Charlewood*, 1 *Leach, C. C.* 409. 2 *East, P. C.* 689.

If, however, a fraudulent conversion takes place after the privity of contract is determined, it is felony. *Ib.*

Obtaining a post-chaise by hiring with a felonious intent to convert it to the use of the hiree, is felony, although the contract of hiring was not for any definite time. *Rex v. Semple*, 1 *Leach, C. C.* 420. 2 *East, P. C.* 691.

If a man who is hired to drive cattle, sell them, it is larceny; for he has the custody only, and not the right to the possession; his possession is the owner's possession, though he is a general drover; at least if he is paid by the day. *Rex v. McNamie*, 1 *M. C. C. R.* 368.

The prisoner went into a shop in *London*, and purchased jewelry, and said he would pay in cash; and the seller agreed to deliver the goods at a coach-office belonging to an inn where the prisoner stated that he lodged. The seller made out an invoice and took the goods there, when the prisoner said he had been disappointed in receiving some money he expected by letter. Just afterwards, a two-penny post letter was put in his hands, which he opened in the presence of the seller, and said he had to meet a friend at *Tom's Coffee-house* at seven, who could supply the money. The goods were left at the coach-office, and the seller went home. The prisoner had taken a place in the mail, but he countermanded that, and absconded with the goods. The seller swore that he considered the goods sold if he got his cash, but not before. It was left to the jury to say whether the prisoner had any intention of buying and paying for the goods, or whether he gave the order merely to get possession of them to convert them to his own use. The jury found the latter, and the prisoner was convicted; and the conviction was held right by the twelve judges. *Rex v. Campbell*, *Car. C. L.* 280; *R. & M. C. C. R.* 179.

Getting goods delivered into a hired cart, on the express condition that the price shall be paid for them before they are taken from the cart, and then getting them from the cart without paying the price, will be larceny, if the prisoner never had any intention of paying, but had *ab initio* the intention to defraud. *Rex v. Pratt*, *R. & M. C. C. R.* 250.

Taking goods, though prisoner has bargained to buy, is felonious, if by the usage, the

without cause, this regularly makes it no felony, but a trespass, because there is a pretense of title; but yet this may be but a trick to colour a felony, and the ordinary discovery of a felonious intent

price ought to be paid before they are taken, and the owner did not consent to their being taken, and the prisoner, when he bargained for them, did not intend to pay for them, but meant to get them into his possession and dispose of them for his own benefit without paying for them. *Rex v. Gilbert, R. & M. C. C. R. 185.*

If a person, having ordered a tradesman to bring goods to his house, look out a certain quantity, and ask the price of them separate from the rest, and then by sending the tradesman home on pretence of wanting other articles, take the opportunity of running away with the goods so looked out, with intent to steal them, it is larceny, for as the sale was not completed, the possession of the property still remained in the tradesman. *Rex v. Shurpless, 1 Leach, C. C. 92; 2 East, P. C. 675.*

Where property, which the prosecutor had bought, was weighed out in the presence of his clerk, and delivered to his carman's servant to cart, who let other persons take away the cart and dispose of the property for his benefit jointly with that of the others. The carman's servant, as well as the others, are guilty of larceny at common law. *Rex v. Harding, R. & R. C. C. 125; 1 Russ. C. & M. 200.*

Where the owner sends goods by his servant to be delivered to A., but B. fraudulently procures the delivery to himself by pretending to be A., he is guilty of felony. *Rex v. Wilkins, 2 East, P. C. 673, 1 Leach, C. C. 520.*

Getting a parcel from a carrier's servant, by falsely pretending to be the person to whom it is directed, if it be taken *animo furandi*, it is larceny, for the servant has no authority to part with it but to the right person. *Rex v. Longstreth, R. & M. C. C. R. 137.*

Fraudulently obtaining a chest of tea from the India House, though by means of a regular request, note, and permit, was holden to be a larceny. *Rex v. Hench, 2 Russ. C. & M. 120; R. & R. C. C. 163.*

Where the prisoner having offered to accommodate the prosecutor with gold for notes, the latter put down a number of bank-notes for the purpose of their being exchanged, which the prisoner took up and ran away with: *Held*, a larceny if the jury believed that he intended to run away with them at the time, and not to return the gold. *Rex v. Oliver, 2 Russ. C. & M. 122.*

To obtain a bill of exchange from an indorsee under a pretence of getting it discounted, is felony, if the jury find that the indorsee did not intend to leave the bill in the prisoner's possession without the money, and that he undertook to discount with a preconcerted design to convert its produce to his own use. *Rex v. Aickels, 1 Leach, C. C. 294; 2 East, P. C. 675.*

Where two planned to rob the prosecutrix of some coats, and one got her to go with him that he might get some money to buy them of her, and she left the coats with the other, who immediately absconded with them: *Held*, that the receipt by the one amounted to a felonious taking of the coats by both. *Rex v. County, 2 Russ. C. & M. 127-175.*

If a bureau be delivered to a carpenter to repair, and he discover money in a secret drawer of it, which he unnecessarily as to its repairs breaks open, and converts the money to his own use, it is a felonious taking of the property, unless it appear that he did it with intention to restore it to its right owner. *Curtwright v. Green, 2 Leach, C. C. 952. 8 Ves. jun. 405.*

A person purchased at public auction a bureau, in which he afterwards discovered, in a secret drawer, a purse containing money, which he appropriated to his own use. At the time of the sale, no person knew that the bureau contained any thing whatever: *Held*, that if the buyer had express notice, that the bureau alone and not its contents, if any, was sold to him; or if he had no reason to believe that any thing more than the bureau itself was sold, the abstraction of the money was a felonious taking, and he was guilty of larceny in appropriating it to his own use. But that if he had reasonable ground for believing that he bought the bureau with its contents, if any, he had a colourable property, and it was no larceny. *Merry v. Green, 7 Mea. & W. 623.*

If a parcel be accidentally left in a hackney-coach, and the coachman, instead of restoring it to the owner, detain it, open it, destroy part of its contents, and borrow

is, if the party doth it secretly; or being charged with the goods denies it.

If *A.* takes away the goods of *B.* openly before him or other person (otherwise than by apparent robbery) this carries with it an

money on the rest, he is guilty of felony. *Rex v. Wynne*, 1 *Leach*, C. C. 413; 2 *East*, P. C. 664-697; *S. P. Rex v. Sears*, 1 *Leach*, C. C. 415 n.

A servant clandestinely taking his master's corn, though to give to his master's horses, is guilty of larceny. *Rex v. Morfit*, R. & R. C. C. 307; 2 *Russ. C. & M.* 94; *S. P. Reg. v. Usborne*, 5 *Jur.* 200; *Reg. v. Careswell*, 5 *Jur.* 251, *contra*; *Reg. v. Cole*, *Id.* n.

Pulling wool from the bodies of live sheep and lambs, *animo furandi*, is larceny. *Rex v. Martin*, 1 *Leach*, C. C. 171; 2 *East*, P. C. 618.

So it is larceny to take the milk from a cow. *Ib.*

The prisoner having lifted up a bag from the boot of a coach, was detected before he had got it out; and it did not appear that it was entirely removed from the space it at first occupied in the boot, but the raising it from the bottom had completely removed each part of it from the space that specific part occupied: *Held*, that it was a complete asportation. *Rex v. Walsh*, 1 R. & M. C. C. R. 14; 2 *Russ. C. & M.* 96.

To remove a package from the head to the tail of a wagon with a felonious intent to take it away, is a sufficient asportation to constitute a larceny; but merely to alter the position of a package on the spot where it lies, is not. *Rex v. Coslet*, 1 *Leach*, C. C. 236; 2 *East*, P. C. 556. See *Rex v. Cherry*; 1 *Leach*, C. C. 236 n; 2 *East*, P. C. 556.

If a warehouseman has several bags of wheat delivered to him for safe-custody, and he take the whole of the wheat out of one bag, it is no less a larceny than if he had severed a part from the residue of the wheat in the same bag, and had taken only that part, leaving the remainder of the wheat in the bag. *Rex v. Brazier*, R. & R. C. C. 337; 2 *Russ. C. & M.* 134.

What does not amount to a taking.—*A.*, in consequence of seeing an advertisement, applied to *B.* to raise money for him. *B.* said he would procure him £5000, and produced from his pocket-book 10 blank 6s. bill-stamps, across each of which *A.* wrote, "Accepted, payable at Messrs. *P. & Co.* 189 *F. street*, *London*," and signed his name. *B.*, who was present, took up the stamps, and nothing was said as to what was to be done with them. Afterwards bills of exchange for £500 each were drawn on these stamps; and *B.* put them into circulation: *Held*, that these stamps, with the acceptances thus written upon them, were neither "bills of exchange," "orders for the payment of money," or "securities for money;" and *held* also, that a charge of larceny against *B.* for stealing the stamps, and for stealing the paper on which the stamps were, would not be sustained, as this was no larceny. *Rex v. Hart*, 6 *Car. & P.* 106.

Stealing by the wife of a member of a friendly society, money of the society, deposited in a box in the husband's custody, kept locked by the stewards, is not larceny. *Rex v. Millitt*, 1 *M. C. C. R.* 375.

Clandestinely taking away articles to induce the owner (a girl) to fetch them, and thereby to give the prisoner an opportunity to solicit her to commit fornication with him, is not felonious. *Rex v. Dickenson*, R. & R. C. C. 420; 2 *Russ. C. & M.* 98.

If a larceny be committed out of the kingdom, though within the king's dominions, (e. g. in *Jersey*) bringing the things stolen into this kingdom, will not make it larceny here. *Rex v. Prowes*, *M. C. C. R.* 349. *S. P.*; *Reg. v. Madge*, 9 *Car. & P.* 29; see *infra*.

A. delivered his watch to *B.* to be repaired, instead of repairing it he sold it, and *A.* being informed of this, told *B.* that he would either have his watch or the money: *Held*, no felony. *Rex v. Levy*, 4 *Car. & P.* 241.

Where a person gave his servant a £5 note to get changed, and he got the note changed and made off with the change: *Held* to be no larceny, but an embezzlement. *Rex v. Sallens*, *Car. C. L.* 319; *R. & M. C. C. R.* 129.

A. had consigned three trusses of hay to *B.* and had sent them by the prisoner's cart; the prisoner took away one of the trusses, which was found in his stable not broken up. *Held* no larceny, as the prisoner did not break up the truss. *Rex v. Pratley*, 5 *Car. & P.* 533.

If a poacher take a gun by force from a gamekeeper under the impression that it may

evidence only of a trespass, because done openly in the presence of the owner, or of other persons that are known to the owner.

If *A.* leaves his harrow or his plow-strings in the field, and *B.* having land in the same field useth it, and having done, either return-

be used against him, it is no felony, though he state afterwards that he will sell the gun, and it be not subsequently heard of. *Rex v. Holloway*, 5 *Car. & P.* 624.

It is not an indictable offence to take away a chattel, unless such a degree of force be used as will make it an offence against the public, and the indictment must show that fact. *Rex v. Gardiner*, 1 *Russ. C. & M.* 52.

To obtain from a person his note of hand by threatening with a knife held to his throat to take away his life, was not a felonious stealing of the note within *stat. 2. Geo. 2. c. 25*; for it never was of value to or in the peaceable possession of such person. *Rex v. Phipse*, 2 *Leach*, *C. C.* 673; 2 *East*, *P. C.* 599.

If a person be induced to play at hiding under the hat, and stake down his money voluntarily on the event, meaning to receive the stake if he wins, and to pay it if he loses, the taking up of the stake so deposited by him on the table, is not a felonious taking, although the taker was made to appear to win the money by fraudulent conspiracy and collusion. *Rex v. Nicholson*, 2 *Leach*, *C. C.* 610; 2 *East*, *P. C.* 669.

Where a prisoner took a packet of diamonds to a pawnbroker, with whom he had previously pledged a broach; and having agreed with the shopman for the amount of the loan, sealed them up and received the amount, deducting the amount for which the broach was pledged; but instead of giving the packet of diamonds to the shopman, gave him a packet of similar appearance, containing only glass: *Held*, that it was not larceny, but only a fraud. *Rex v. Meilheim*, *Car. C. L.* 281.

If a pawnbroker's servant, who has a general authority from his master to act in his business, delivers up a pledge to the pawner on receiving a parcel from the pawner, which he supposes contains valuables he has just seen in the pawner's possession in a similar parcel, the receipt of the pledge by the pawner is not a larceny. *Rex v. Jackson*, *R. & M. C. C. R.* 119.

Where a letter enclosing a check was directed to "James Mucklow, St. Martin's Lane, Birmingham," and no person of that name lived there, but the prisoner lived about ten yards from St. Martin's Lane and another James Mucklow lived in New Hall street, and the prisoner, in consequence of a message left by the postman, got the letter from the post-office and appropriated the check to his own use: *Held*, that it was not a felonious taking. *Rex v. Mucklow*, *Car. C. L.* 280; *R. & M. C. C. R.* 160.

A prisoner cannot be found guilty of stealing goods if it appear that he could not otherwise get them than by the delivery of the prosecutor's wife, in which case it may be presumed that he received them from her. *Rex v. Harrison*, 1 *Leach*, *C. C.* 47; 2 *East*, *P. C.* 559.

Where a jury found that one who assisted in taking another's goods from a fire in his presence, but without his desire, and who afterwards concealed and denied having them, yet took them honestly at first, and that the evil intention to convert them came on the taker afterwards, it was *held* no larceny. *Rex v. Leigh*, 2 *East*, *P. C.* 694; 1 *Leach*, *C. C.* 411. n.

If the owner parts with possession of goods for a special purpose, and the bailee, when that purpose is executed, neglects to return them, and afterwards disposes of them, if he had not a felonious intention when he originally took them, his subsequent withholding and disposing of them will not constitute a new felonious taking, or make him guilty of felony. *Rex v. Banks*, *R. & R. C. C.* 411; 2 *Russ C. & M.* 132.

Seemle, that if a master of a foreign vessel, captured by a British ship and carried into port, takes goods from the vessel after she has been condemned as a prize, it is not a larceny unless there is evidence that he took them for the purpose of converting them to his private use. *Rex v. Van Mayen*, *R. & R. C. C.* 118. 2. *Russ. C. & M.* 199.

If a tradesman sell a stranger goods, enter them to his debit, and makes out a bill of parcels for them as goods sold, and the goods are delivered to the purchaser by the servant of the seller, who receives bills for them, it is not felony, although the tradesman sold them for ready money, never intending to give the stranger credit, and it appear that he had taken the apartments to which he ordered them to be sent for the purpose of obtaining them fraudulently. *Rex v. Parker*, 2 *Leach*, *C. C.* 614. 2 *East*, *P. C.* 671.

Where the prisoner obtained possession of a hat from the maker, which had been

eth them to the place where they were, or acquaints *B.* with it, this is no felony, but at most a trespass.

If *A.* and *B.* being neighbours, and *A.* having an horse on the common, and *B.* having cattle there; that he cannot readily find;

ordered by a third person, by sending a boy for it in the name of such person. *Held*, it did not amount to larceny. *Rex v. Adams*, 2 Russ. C. & M. 113. R. & R. C. C. 225.

Where goods in a shop were tied to a string which was fastened by one end to the bottom of the counter, and a thief took up the goods and carried them away towards the door, as far as the string would permit: *Held*, that being no severance there was no asportation, and consequently it was not a felony. *Anon.* 2 East, P. C. 556. 1 Leach, C. C. 321. n.

Where the prisoner set up a long bale upon end, in a wagon, and cut the wrapper all the way down, with intent to remove the contents, but was apprehended before he had taken any thing out of it: *Held*, that there was not a sufficient asportation to constitute a larceny. *Rex v. Cherry*, 1 Leach, C. C. 236. n. 2 East, P. C. 556.

If a master and owner of a ship steal some of the goods delivered to him to carry, it is not larceny in him, unless he take the goods out of their packages. *Rex v. Madox*, R. & R. C. C. 92. 2 Russ. C. & M. 135.

Nor if larceny, would it have been a capital offence within *stat. 24. Geo. 2. C. 45. Ib.*

If one employed to carry goods for hire, appropriate them to his own use, but does not break bulk, this is no larceny, although the person so employed was not a common carrier, but was only employed in this particular instance. *Rex v. Fletcher*, 4 Car. & P. 544.

Where a person received a check from Sir *T. P.* to buy Exchequer-bills, and he carried it to the banker's, got the cash, and embezzled part, on being indicted for stealing: *Held* first, that as there was no fraud to induce Sir *T. P.* to deliver the check, it was not larceny, although the prisoner intended to misapply the property when he took it, and misapplied accordingly. Secondly, that as Sir *T. P.* never had possession of the money received at the banker's, but by the hands of the prisoner, the indictment could not be supported. *Rex v. Walsh*, R. & R. C. C. 215. 2 Leach, C. C. 1054. 4 Taunt. 258. But see 7 & 8 Geo. 4. c. 29.

A. was indicted at common law, for simple larceny, in stealing in *Middlesex* a quantity of lead. It appeared that the lead was stolen from the roof of the church of *Iver*, in *Buckinghamshire*. The prisoner was indicted at the central criminal court which has jurisdiction in *Middlesex*, (under 4 & 5 Will. 4. c. 36.) but not in *Buckinghamshire*. *Held*, that he could not be convicted there on the ground that the original taking not being a larceny, but created by statute a felony, the subsequent possession could not be considered a larceny. *Rex v. Millar*, 7 Car. & P. 665.

A drover of cattle was employed by a grazier in the country, to drive eight oxen to *London*, his instructions were, that if he could sell them on the road he might: and those he did not sell on the road he was to take to a particular salesman in *Smithfield* market, who was to sell them for the grazier. The drover sold two on the road, and instead of taking the remaining six to the salesman, drove them himself to *Smithfield* market, and sold them there, and received the money, which he applied to his own use: *Held*, that he could not be convicted either of larceny or embezzlement. *Reg. v. Goodbody*, 8 Car. & P. 665.

Where in a case of ring-dropping the prisoners prevailed on the prosecutor to buy the share of the other party, and the prosecutor was prevailed on to part with his money—intending to part with it forever, and not with the possession of it only: *Held*, that this was not a larceny. *Reg. v. Willson*, 8 Car. & P. 111.

A. was treating *B.* at a beer-house, and *A.* wishing to pay, put down a sovereign, desiring the landlady to give him change; she could not do so, and *B.* said he would go out and get change. *A.* said, "You wont come back with the change." *B.* replied, "Never fear." *A.* allowed *B.* to take up the sovereign, and *B.* never returned either with it or the change: *Held* no larceny, as *A.* having permitted the sovereign to be taken away, for the purpose of being changed, he could never have expected to receive back the specific coin, and had, therefore, divested himself of the entire possession of it. *Reg. v. Thomas*, 9 Car. & P. 741.

It is not larceny for miners, employed to bring ore to the surface, and paid by the

takes up the horse of *A.* and rides about to find his cattle, and having done, turns off the horse again in the common, this is no felony, but at most a trespass.

So if my servant, without my privity, takes my horse, and rides abroad ten or twelve miles about his own occasions, and returns again, it is no felony, but if in his journey he sells my horse, as his own; this is declarative of his first taking to be felonious, and *animo furandi*. [8]

But in cases of larceny the variety of circumstances is so great, and the complications thereof so mingled, that it is impossible to prescribe all the circumstances evidencing a felonious intent, or the contrary, but the same must be left to the due and attentive consideration of the judge and jury, wherein the best rule is, *in dubiis*, rather to incline to acquittal than conviction.

IV. It must be of goods personal, for otherwise no felony can be committed by taking them. [9]

1. Therefore of chattles real no felony can be committed, [510] and therefore the taking away of a ward cannot be felony, nor of a box or chest of charters, that concern land. 10 *E.* 4. 14. *b.*(*n.*) [10.]

(*n.*) Nor can felony be committed of bonds, notes, or other writings, that are securities for a debt, because they derive their value from *choses en action*, which cannot be stolen. *Dalt. New Edit.* p. 501. 8 *Co. Rep.* 33. but by a late statute 2 *Geo. II. cap.* 25. the stealing of bonds, bills, notes, &c. is made felony with or without the benefit of the clergy, in the same manner as if the offender had stolen goods of the like value, with the money secured by such bonds, &c.

owners, according to the quantity produced, to remove from the heaps of other miners ore produced by them, and add it to their own, in order to increase their wages, the ore still remaining in the possession of the owners. *Rex v. Webb*, 1 *M. C. C. R.* 431. The cases of *Rex v. Petrie*, 1 *Leach*, *C. C.* 294. 2 *East*, *P. C.* 740, and *Rex v. Farley*, 2 *East*, *P. C.* 740, relate to petty larceny, which is not now a distinct offence in England.

[8] In *Cramp's case*, 1 *Car. & Pay.* 658. where one took a horse and rode it away, and then turned it loose, and the horse furniture was offered for sale, it was held to be a larceny of the furniture and not of the horse. See also *Phillips's case*, 2 *Russ. C. & M.* 97. 2 *East's P. C.* 662. *Rosc. on Cr. Ev.* 472.

[10] See *Walker's case*, *Mood. R.* 155. *Vyse's case*, *Id.* 218. *Clarke's case*, *R. & R.* 181. *U. S. v. Moulton*, 5 *Mason Rep.* 557. *Westbur's case*, 1 *Leach*, *C. C.* 12. *U. S. v. Davis*, 5 *Mason's R.* 356. *Bingley's case*, 5 *Car. & Pay.* 603.

[9] *Of the thing taken.*—It is enough to make the crime larceny that the thing stolen is of any pecuniary value, or valuable to the owner or person having a general or special property or interest in it, or right of possession of it, though it be not of any value to sell. *Rosc. on C. Evid.* 512; *Phippoe's case*, 2 *Leach*, *C. C.* 673; *Bryant's case*, 2 *S. C. Law. Repos.* 269; *The People v. Holbrook*, 13 *Johne. R.* 90; 2 *Russ. on Crim.* 62; *Payne v. The People*, 6 *Johne. R.* 103.

At common law a *chese in action* is not the subject of larceny. *Culp. v. The State*, 1 *Port*, *R.* 33.

But *semble* that bank-notes were not chattels within the meaning of *Stats.* 3 *Will. & M. c.* 9, and 5 *Anne, c.* 31. *Rex v. Morris*, 1 *Leach*, *C. C.* 468; 2 *East*, *P. C.* 748; see *post* in this note.

Money was not within the meaning of the words "goods and chattels," in the

2. Neither can larceny be committed of things, that adhere to the freehold, as trees, grass, bushes, hedges, stones or lead of a house, or the like.(o)

(o) But now by 4 Geo. II. cap. 32. it is felony to steal, rip, cut, or break with intent to steal any lead, iron bar, iron gate, iron rail or palisado, fixed to any house, or out-house, or fences thereunto belonging, and every person, who shall be aiding or abetting, or shall buy or receive any such lead, &c. knowing the same to be stolen, is subject to the same punishment.

Statutes 3 Will. & M. c. 9, and 5 Anne, c. 31. Rex v. Guy, 1 Leach, C. C. 241; 2 East, P. C. 748; Rex v. Davidson, 1 Leach, C. C. 242.

But re-issuable notes, if they cannot properly be called valuable securities whilst in the hands of the maker, may be called (in an indictment) "goods and chattels." *U. S. v. Moulton, 5 Mason R. 537; Rex v. Vyse, Ry. & M. C. C. 218, cited infra.*

A check on a banker's, written on unstamped paper, payable to D. F. J., and not made payable to bearer, is not a valuable security within 7 & 8 Geo. 4. c. 29. s. 5. *Rex v. Yeates, Car. C. L. 273, 333, R. & M. C. C. R. 170. Held, not to be a felony within 2 Geo. 2 c. 25, to steal bankers' notes completely executed, but which have never been put into circulation, on the ground that no money was due upon them. Anon. 2 Russ. C. & M. 147; 2 Leach, C. C. 1061 n.*

It has been held in this country, that bank bills complete in form, but not issued, are the property of the bank; and may be so treated in criminal proceedings for receiving them, with knowledge of their having been stolen. *The People v. Wiley, 3 Hill's N. Y. Rep. 194.*

Stealing re-issuable notes after they have been paid, and before they have been re-issued, did not subject the party to an indictment on the 2 Geo. 2. c. 25, for stealing notes, but he may be indicted for stealing paper with valuable stamps upon it. *Rex v. Clark, R. & R. C. C. 181, 2 Leach, C. C. 1036.*

Country bankers' notes which have been paid by the bankers in London, at whose house they were made payable, and by them sent down to country bankers to be re-issued, on the way they were stolen, and the prisoner was indicted for receiving them. The indictment, in some counts, charged the notes to be valuable securities, (see *Wilson v. The State, 1 Porter, R. 118,*) and in others as pieces of paper of the goods and chattels of the country bankers. The prisoner was convicted, and the conviction held right. Some of the judges doubted whether these notes were to be considered as valuable securities, but if not they all thought they were goods and chattels. *Rex v. Vyse, R. & M. C. C. 218.*

Exchequer bills, although signed by a person not authorized to do so, are securities and effects within the Statute 15 Geo. 2 c. 13. s. 12. *Rex v. Aslett, 1 N. R. 1; 2 Leach, C. C. 958; R. & R. C. C. 67.*

The halves of country bank-notes, sent in a letter, are goods and chattels, and a person who steals them is indictable for larceny. *Rex v. Mead, 4 Car. & P. 535.*

Dollars or Portugal money, not current by proclamation, are not goods within the meaning of the 24 Geo. 2. c. 45. *Rex v. Leigh, 1 Leach, C. C. 52; S. P. Rex v. Grimes, 2 East, P. C. 646.*

A larceny may be committed of window-sashes, which are neither hung nor beaded into the frames, but merely fastened by lathes nailed across the frames to prevent their shaking out; as they are not fixed to the freehold. *Rex v. Hedges, 1 Leach, C. C. 201; 2 East, P. C. 590 n.*

Piratically stealing a ship's anchor and cable is a capital offence by the marine laws, and triable under the 28 Hen. 8. c. 15; 39 Geo. 3. c. 37, not extending to this case. *Rex v. Curling, R. & R. C. C. 123.*

And the stealing is equally an offence, although the master of the vessel concur in it, and although the object is to defraud the underwriters for the benefit of the owners. *Ib.*

The Ownership.—Property cannot be laid in a person who has never had either real or constructive possession. *Rex v. Adams, R. & R. C. C. 225. 2 Russ. C. & M. 113.*

In an indictment for larceny the property stolen may be described as the real owner's

But if they are severed from the freehold, as wood cut, grass in cocks, stones digged out of a quarry, then felony may be committed by stealing of them, for they are personal goods. 18 H. 8. 2. b. 12. 8 E. 3. Coron. 119.

although it was never actually in his possession, but in the possession of his agent only. *Rex v. Remnant*, R. & R. C. C. 136. 2 Russ. C. & M. 168.

The wife of A. was employed by her father to sell sheep and receive the amount at K. She did so; but before she left K. a £5 note which she received in payment for the sheep was stolen from her:—*Held*, that in an indictment for a larceny the note was properly described as the property of the husband. *Rex v. Roberts*, 7 Car. & P. 485.

In an indictment for larceny of goods, the property of a peer who is a baron, the goods may be laid as the goods and chattels of "G. T. R. Lord D." without styling him Baron D. although the more proper way to describe the peer is by his christian name and his degree in the peerage as duke, earl, baron, or the like. *Reg. v. Pitts*, 8 Car. & P. 771. S. P. Reg. v. Caley, 5 Jur. 709.

If goods seized under a writ of *fi. fa.* are stolen, they may be described as the goods of the party against whom the writ issued; for though they are in *custodiâ legis*, the original owner continues to have a property in them till they are sold. *Rex v. Endstall*, 2 Russ. C. & M. 158. 197. An indictment for stealing the wearing apparel of a son who is an apprentice to his father, and furnished with his clothes in pursuance of his indenture must lay them to be the property of the son and not of the father. *Rex v. Forsgate*, 1 Leach, C. C. 463.

In an indictment for stealing property which had belonged to a deceased person who appointed executors who would not prove the will, it was held the property must be laid in the ordinary, and not in a person who after the commission of the offence, but before the indictment, had taken out letters of administration with the will annexed, because the rights of an administrator only commence from the date of the letters as distinguished from those of an executor, which commence not from the granting of the probate, but from the death of the testator. *Rex v. Smith*, 7 Car. & P. 147.

Where two had jointly stock upon a farm, and one died leaving several children:—*Held*, that the property in sheep stolen was properly alleged to be in the survivor and the children, the former swearing that he considered himself to hold one moiety for the benefit of the latter. *Rex v. Scott*, 2 East, P. C. 655. R. & R. C. C. 13.

Semble, that the property might have been laid in the survivor alone as he was in possession of the children's moiety as their agent. *Ib.*

D. and C. were partners, C. died intestate, leaving a widow and children; from the time of his death the widow acted as partner with D. and attended the business of the shop. Three weeks after C.'s death part of the goods were stolen; they were described in the indictment as the goods of D. and the widow:—*Held*, that the description was right. *Rex v. Galy*, R. & R. C. C. 178. 2 Russ. C. & M. 161.

The goods in a dissenting chapel vested in trustees, cannot be described in an indictment as the goods of a servant who has merely the custody of the chapel, and things in it to clean and keep in order, although he has the key of the chapel, and no other person but the minister has another key. *Rex v. Hutchinson*, R. & R. C. C. 412. 2 Russ. C. & M. 158.

A bible had been given to a society of Wesleyans; and it had been bound at the expense of the society. B. stated that he was one of the trustees of the chapel, and also a member of the society. No trust-deed was produced:—*Held*, that in an indictment for stealing the bible the property was rightly laid in B. and others. *Rex v. Boulton*, 5 Car. & P. 537.

An unqualified person may have a sufficient legal possession of game to support an indictment for stealing it from him. *Anon.* 2 Russ. C. & M. 152.

A box belonging to a benefit society was stolen from a room in a public house. Two of the stewards had keys of this box; and by the rules of the society the landlord ought to have had a key, but in fact he had not. *Held*, that the prisoner might be convicted on a count laying the property in the landlord alone. *Rex v. Wymer*, 4 Car. & P. 391.

An indictment for stealing goods may under the 55 Geo. III. c. 137, state them to be the goods of the overseers of the poor for the time being of the parish of A.; for this will

But if a man come to steal trees, or the lead of a church or house, and sever it, and after about an hour's time, or so, come and fetch it away, this hath been held felony, because the act is not continued but interpolated, and in that interval the property lodgeth in the right

import that they belonged at the time of the theft to the persons who were the then overseers. *Rex v. Went*, R. & R. C. C. 359. 2 Russ. C. & M. 167.

In stealing from the Invalid-office at Chelsea, the property must be laid in the house of the king. *Rex v. Peyton*, 1 Leach, C. C. 324. 2 East, P. C. 501.

Goods belonging to a guest stolen at an inn may be laid to be the property either of the innkeeper or guest. *Rex v. Todd*, 1 Leach, C. C. 557. n.

So goods stolen from a washerwoman, may be laid to be her property. *Rex v. Parker*, 1 Leach, C. C. 357, n.

So in the case of an agister who takes in sheep to agist for another, they may be laid to be his property. *Rex v. Woodward*, 1 Leach, C. C. 357 n.; 2 East, P. C. 653.

The coach-glass of a gentleman's coach standing in a coachmaster's yard, may be laid to be the property of the coachmaster. *Rex v. Taylor*, 1 Leach, C. C. 356; 2 East, P. C. 653.

The property in goods stolen, held to be properly alleged to be in the driver of a coach from the boot of which they were taken. *Rex v. Deakin*, 2 East, P. C. 653; 2 Leach, C. C. 862.

In larceny, the goods of a furnished lodgings must be described as the lodger's goods, not as the goods of the original owner. *Rex v. Belstead*, R. & R. C. C. 411; 2 Russ. C. & M. 154; *Rex v. Brunswick*, 1 R. & M. C. C. R. 26; 2 Russ. 154.

If a corn factor purchases a ship laden with corn, and send his lighter to fetch it from the ship to his wharf, a delivery of the corn on board the lighter puts it into the possession of the corn factor, although the lighter-man never delivers it at the factor's wharf. *Rex v. Spears*, 2 Leach, C. C. 825; 2 East, P. C. 568.

If a corn factor purchase the cargo of a vessel laden with corn, and send his servant with a lighter to fetch it from the ship, in loose bulk, and the servant contrive to have a certain portion of it put into sacks by the meters on board the ship, and take the corn so sacked feloniously away in the lighter immediately from the ship, he may be indicted for stealing the property of the corn factor, although it was never put into his lighter, or otherwise reduced into the corn factor's possession. *Rex v. Abrahdt*, 2 Leach, C. C. 824; 2 East, P. C. 569.

An indictment for larceny, laying the goods stolen to be the property of *Victory Baroness Turkheim*, is good, although her name is *Selinda Victoire*. *Rex v. Sulls*, 2 Leach, C. C. 861.

An indictment for the larceny of property belonging to trustees who are not incorporated, must lay the property to be in them as individuals, subjoining a description of the character in which they are authorized to act. *Rex v. Shenington*, 1 Leach, C. C. 513.

Indictment.—Though to make the thing the subject of an indictment for a larceny, it must be of some value, and stated to be so in the indictment, yet it need not be of the value of some coin known to the law, that is to say a farthing at the least. *Reg. v. Morris*, 9 Car. & P. 349; see *ante* the commencement of this note.

An indictment for stealing a bank note did not conclude, *contra formam statuti*—Held, by the fifteen judges, that it was bad. *Rex v. Pearson*, 5 Car. & P. 121; *S. P. Ratcliffe's case*, 1 M. C. C. R. 313; 2 Lewin, C. C. 57.

In order to warrant a sentence of transportation for life on an indictment for a larceny, after a previous conviction for felony, the indictment need not conclude, *contra formam statuti*. *Reg. v. Blea*, 8 Car. & P. 735.

Where, on the trial of a man and woman for larceny, it appears by the evidence that they addressed each other as husband and wife, and passed and appeared as such, and were so spoken of by the witnesses for the prosecution, it will be for the jury to say whether they are satisfied that they are in fact husband and wife, even though the woman pleaded to the indictment which described her as "a single woman." *Reg. v. Woodward*, 8 Car. & P. 561.

In such a case, a female prisoner ought not to be indicted as a single woman. *Ib.*

In an indictment against a servant of the "West India Dock Company" for stealing a quantity of canvass and hessen belonging to the company from their warehouses, it

owner as a chattel, and so it was agreed by the court of king's bench 9 Car. 1. upon an indictment for stealing the lead of *Westminster-Abbey*. *Dalt. cap.* 103. p. 166.(p)

(p) *New Edit. cap.* 156. p. 501.

was held sufficient to state the property to be "the goods and chattels of the West India Company," and not necessary, notwithstanding the words of the 1 & 2 Will. 4 c. 11. s. 133, to allege in addition that it was feloniously taken from the said company. *Reg. v. Stokes*, 8 Car. & P. 151.

An indictment on 2 Geo. 2. c. 25. alleged the stealing of a bill of exchange in *L.* whereon the names of *A.* and *B.* were endorsed, which was the case when the bill was stolen at *M.*, and it appeared that the bill had an additional name as an indorsee when negotiated at *L.*: *Held*, no variance. *Rex v. Austin*, 2 East, P. C. 602.

An indictment for larceny of a promissory note, may describe it generally, as "one promissory note for the payment of one guinea," without setting the note forth. *Rex v. Milnes*, 2 East, P. C. 602.

In an indictment for larceny, if the thing stolen be described as a bank post-bill, be not set out, the court cannot take judicial notice that it is a promissory note, or that it is such an instrument as under stat. 2 Geo. II. c. 25, may be the subject of larceny, although it be described as made for the payment of money. *Rex v. Chard, R. & R. C. C.* 488.

Where an indictment described a bank note as signed by *A. H.* for the Governor and Company of the Bank of England, and a prisoner was convicted: such conviction was *held bad*, there being no evidence of *A. H.*'s signature. *Rex v. Craven, R. & R. C. C.* 14. 2 East, P. C. 601.

Describing a bank note "as a certain note, commonly called a bank note," was not such a description as will warrant a conviction on 2 Geo. II. c. 25. for stealing it. *Id.* See as to stealing bank notes, *Spangler v. Com.* cited *infra*. *Com. v. Messenger*, 1 Binn. R. 273. *Com. v. McDowell*, 1 Browne's, R. 360. *Stewart v. The Com.* 4 S. & R. 194. 2 Russ. on C. 1. *Note to American Ed.* 1845.

An indictment for stealing £10, in monies numbered, is not sufficient, some of the pieces of which that money consisted, should be specified. *Rex v. Fry, R. & R. C. C.* 482. 2 Russ. C. & M. 169.

In an indictment on stat. 2 Geo. II. c. 25. it was improper to lay bank notes as chattels, but that word might have been rejected as surplusage, if the indictment be in other respects sufficient. *Rex v. Sadi*, 2 East, P. C. 601.

A set of new handkerchiefs in a piece, may be described as so many handkerchiefs, though they are not separated one from another, if the pattern designates each, and they are described in the trade as so many handkerchiefs. *Rex v. Niles*, 1 R. & M. C. C. R. 25. 2 Russ. C. & M. 169.

Where an indictment for stealing in a dwelling-house, alleged it to be the dwelling-house of *Sarah Lunns*, and it appeared in evidence that her name was *Sarah London*: *Held*, that the variance was fatal to the capital part of the indictment. *Rex v. Woodward*, 1 Leach, C. C. 253. n. See *The State v. France*, 1 Overton, (Tenn.) Rep. 434.

In cases of larceny of animals, *feræ naturæ*, the indictment must show that they were either dead, tame, or confined, otherwise they must be presumed to be in their original state. *Rex v. Rough*, 2 East, P. C. 607. And see *Rex v. Hudson*, 2 East, P. C. 611. And it was not sufficient to add "of the goods and chattels," of such a one. *Rex v. Rough*, 2 East, P. C. 607. And see *Rex v. Hudson*, 2 East, P. C. 611.

An indictment for stealing a dead animal should state that it was dead; for upon a general statement that a party stole the animal, it is to be intended that he stole it alive. *Rex v. Edwards, R. & R. C. C.* 497. 2 Russ. C. & M. 171.

Upon an indictment for stealing a live animal, evidence cannot be given of stealing a dead one. *Id.* But in the case of *Rex v. Puckering*, 1 M. C. C. R. 242, *A.* was indicted for receiving a "lamb;" when he received the lamb it was dead, and it was *held* by the fifteen judges that the indictment was sufficient, it being immaterial as to the prisoner's offence, whether the lamb was alive or dead, his offence, and the punishment for it, being in both cases the same, this case appears to overrule the case of *Rex v. Edwards, supra*.

An indictment for stealing some live tame turkeys was laid in the county of *H.* it ap-

8. Neither of corn standing upon the ground, for tho it be a chattel personal, and goes to the executor, yet it savours of the realty, while it stands so. *Co. P. C. p. 109.*

4. Larceny cannot be committed of such things, whereof no man

peared that the prisoner stole them alive in the county of C. and killed them there, and brought them into the county of H. *Held*, that as the prisoner had not the turkeys in a live state, in the county of H. the charge as laid was not proved, and that the word "live" in the description, could not be rejected as surplusage, and therefore, that the indictment was bad. *Rex v. Holloway, 1 Car. & P. 128.*

If a parish be partly situate in the county of W. and partly in the county of S. it is not sufficient in an indictment for larceny, to state the offence to have been committed at the parish of H. in the county of W. *Rex v. Perkins, 4 Car. & P. 363.*

Evidence and Trial.—Where a person went into a shop for the purpose of purchasing a ruby pin, and after selecting one, which was put into a box, while the young man who was serving him was absent for about a minute, took it out of the box, and put it in his stock, and afterwards went into the shawl department of the shop to purchase other articles, saying that he would return and pay for both together, but was allowed to go away without inquiry being made as to whether he had paid in the shawl department, and a bill, including the price of the pin, was sent the next day to the house where he was residing: *Held*, on the trial of the prisoner for stealing the pin, that under these circumstances, it was for the jury to say whether there was any intention to steal the pin, and whether there was or was not credit given for it; and also, that the prosecutors ought to have called the person who served in the shawl department; and their not doing so was a circumstance which would justify the jury in looking with some suspicion at the case. *Reg. v. Box, 9 Car. & P. 126.*

A. went to the shop of B., and asked for shawls for Mrs. D. to look at; B. gave her five; she pawned two, and three were found at her lodgings; Mrs. D. was not called as a witness: *Held*, that A. on this evidence could not be convicted of a larceny in stealing the goods of B. *Rex v. Savage, 5 Car. & P. 143.*

A prisoner was indicted for stealing three articles. It appeared, that having taken the first article, he returned in about two minutes, and took the second, and then returned in half an hour and took the third: *Held*, that the last taking was a distinct felony, and could not be given in evidence with the other two; but that the interval of time between the first and second taking was so short that they must be considered as parts of the same transaction. *Rex v. Birdseye, 4 Car. & P. 386.*

If the only evidence against a prisoner indicted for larceny be, that the goods were found in his possession, sixteen months after they had been stolen, the judge will direct an acquittal without calling on him for his defence. *Rex v. ———, 2 Car. & P. 459.*

Where property, recently stolen, is found in possession of a party under circumstances which show it the more probable that he was made the instrument of others, for the purpose of disposing of it, than the party who actually took it, the presumption of guilt of larceny, arising from the recent possession, does not rise against him. *Reg. v. Collier, 4 Jur. 703.*

Stolen property usually passes through many hands. If, therefore, the interval of time of the loss and the finding be considerable, the presumption against the party having possession is much weakened. *Cockins's case, 2 Lewin, C. C. 235.*

The defence to a charge of stealing, that the prisoner pledged the property, intending to redeem and then restore it, is a defence not to be generally encouraged, though if clearly made out in proof, it may be allowed to prevail. The rule for the jury's guidance in such a case seems to be, that if it clearly appear that the prisoner only intended to raise money upon the property for a temporary purpose, and at the time of pledging the article had a reasonable and fair expectation of being enabled shortly, by the receipt of money, to take it out and restore it, he might be acquitted; but otherwise not. *Reg. v. Phetheon, 9 Car. & P. 553.*

A prisoner was indicted for stealing carpenter's tools, and the only evidence against him was, that the stolen property was in his possession three months after it was lost: *Held*, that this was not such a recent possession as to put the prisoner upon

hath any determinate property, tho the things themselves are capable of property, as of *treasure trove*, or wreck till seized, tho he, that hath them in point of franchise, may have a special action against him, that takes them.

5. Larciny cannot be committed of things, that are *feræ naturæ*, unreclaimed, and *nullius in bonis*, as of deer or conies, tho [511] in a park or warren, fish in a river or pond, wild-fowl, wild swans, pheasants.

But if any of these are kild, larciny may be committed of their flesh or skins, because now they are under propriety.

Of domestic cattle, as sheep, oxen, horses, &c. or of domestic fowls, as hens, ducks, geese, &c. and of their eggs, larciny may be committed, for they are under propriety, and serve for food.

Of those beasts or birds, that are *feræ naturæ*, but reclaimed and made tame or domestic, and serve for food, larciny may be committed, as deer, conies, pheasants, partridges, but then it must be, when he, that steals them, knows them to be tame, and so of reclaimed hawks, and likewise of the young of such larciny may be committed, but of the young of those beasts or birds, that are *feræ naturæ*, tho in a park, and tho the owner hath a kind of property *ratione loci, privilegii & impotentia*, yet larciny cannot be committed of them, as of young fawns in a park, young conies in a warren, of young pigeons in a dove-coat, fish in a trunk or net, larciny may be committed. [11]

stating how he came by it, and an acquittal was directed. *Rex v. Adams*, 3 Car. & P. 600.

Non-delivery upon request is evidence of a tortious conversion. *Rex v. Semple*, 1 Leach, C. C. 424, 2 East, P. C. 691.

On an indictment for larceny the wife of a receiver who is not indicted, cannot be compelled to give her evidence against the prisoner. *Rex v. Ast*, Car. C. L. 66.

If it is probable that all the goods stolen were not stolen at one time, but it is still possible that they might have been so, the judge will not put the prosecutor to elect to go upon the stealing of some particular article or articles. *Rex v. Dunn*, Car. C. L. 82.

Larceny must be tried in the county where committed, but the offence is considered as committed in every county into which the thief carries the goods. *Rex v. Thompson*, 2 Russ. C. & M. 174.

Therefore if a man steal goods in the county of A. and carry them into the county of B. he may be indicted for the larceny in the latter county. *Ib.*

But if a compound larceny be committed in one county, and the offender carry the property in another, although he may be convicted in the latter county of the simple larceny, he cannot be there convicted of the compound larceny. *Ib.*

Where four stole goods in the county of G. and divided them in that county, and then carried their shares into the county of W. in their separate bags: *Held*, that it was not a joint larceny in W. but separate larcenies in that county, and the subject of different prosecutions. *Rex v. Barnett*, 2 Russ. C. & M. 175. And see *Rex v. County*, 2 Russ. C. & M. 127-175.

On an indictment for the larceny of a bill of exchange, obtained from the prosecutor under a pretence of discounting it, parol evidence of the bill may be given after proof of a *subpœna duces tecum*, given to the person in whose possession it was shown to be, shortly previous to the trial, but who did not attend. *Rex v. Aickles*, 1 Leach, C. C. 294. 2 East, P. C. 675.

[11] If pigeons are so far tame that they come home every night to roost in wooden boxes, hung on the outside of the house of their owner, and a party come in the night and steal them out of these boxes, this is a larceny. *Rex v. Brooks*, 4 Car. & P. 131.

Of young hawks in the nest larciny may be committed, but not of hawks eggs, but the takers are punishable by fine and imprisonment upon the statute of 11 *H. 7. cap. 17.* and 31 *H. 8. cap. 12.*(*r*)

Of wild swans, nor of their young, larciny cannot be committed, but if they be made tame and domestic, or if they be marked and pinioned, it is felony to take them or their young.

But it seems, that if they be marked, and yet flying swans, that range abroad out of the precincts or royalty of the owner, it is not felony to kill and take them, because they cannot be known to belong to any: these several instances and differences may be collected from *Co. P. C. p. 109, 110. Dalt. cap. 103.*(*s*) and 7 *Co. Rep. 15. b. Case de Swans & libros ibi.*

6. Larciny cannot be committed in some things, whereof the owner may have a lawful property, and such whereupon [512] he may maintain an action of trespass, in respect of the baseness of their nature; as mastiffs, spaniels, gray-hounds, blood-hounds, or of some things wild by nature, yet reclaimed by art or industry, as bears, foxes, ferrets, &c. or their whelps, or calves, because, tho reclaimed, they serve not for food but pleasure, and so differ from pheasants, swans, &c. made tame, which, tho wild by nature, serve for food.

Only of the reclaimed hawk, in respect of the nobleness of its nature and use for princes and great men, larciny may be committed, if the party know it be reclaimed.

V. What shall be said the personal goods of any person, or of another person.[12]

Every indictment of larciny ought to suppose the goods stolen to be the goods of somebody.

An indictment of larciny of the goods *cujusdam ignoti* is good, for it is at the king's suit, and tho the owner be not known, the felony must be punished. 21 *H. 6. Enditement 12.*

And yet 10 *H. 6. Enditement 9.* an indictment *quod A. verberavit B. and 20 jacks pretii 20s. felonice cepit*, held good without showing whose they were.

But an indictment of *A.* that he is *communis latro* without showing in particular what he stole, is not good. 22 *Assiz. 73.*

An indictment, that *bona domus & ecclesie tempore vacationis*,

(*r*) By this statute it is made felony to take hawks eggs out of any nests within the king's lands, but this is repealed by the general words of 1 *Mar. cap. 1.*

(*s*) *New Edit. cap. 156. p. 499.*

Ferrets, though tame and saleable, cannot be the subject of larceny. *Rez v. Searing, R. & R. C. C. 351. 2 Russ. C. & M. 153*, and note 20, *post. p. 516.* See *Findlay v. Bear, 8 S. & R. 571. Norton v. Ladd, 5 N. H. Rep. 203. Com. v. Chase, 9 Pick, R. 15. Wallis v. Meate, 3 Binn. R. 546. Tibbs v. Smith, T. Raym. 33. Brock's case 4 Car. & Pay. 131. Ward v. The People, 3 Hill, 395.*

[12] See 2 *East's P. C. 587. 2 Russ. on Crimes, 136. 7th ed. 3 Bac. Ab. Felony. 4 Bl. Com. 232. Hodges Cases, & East's P. C. 590. n. 1 Leach, 201. Lee v. Ridson, 7 Taunt. R. 191.*

or *bona capellæ in custodia J. S. felonice cepit*, is good, 7 E. 4. 14. b. Co. P. C. p. 110. Stamf. P. C. p. 25. b. & 95. b.

If a man steal bells, or other goods belonging to a church, he may be indicted, *quod felonice, &c. cepit bona parochianorum de B. M.* 31 & 32 Eliz. B. R. *Hadman and Green versus Ringwood*, (t) and yet an action of trespass lies for the churchwardens in such case, *quare bona & catalla parochianorum in custodia sua; or in custodia A. B. prædecessorum suorum gardianorum ecclesiæ cepit & asportavit ad damnum parochianorum.* T. 36 Eliz. B. R. *Method and Barfoot.* Dyer 99.

If *A.* have a special property in goods, as by pledge, or a lease for years, and the goods be stolen, they must be supposed in the indictment the goods of *A.*

If *A.* bail goods to *B.* to keep for him, or to carry for him, [513] and *B.* be robbed of them, the felon may be indicted for larceny of the goods of *A.* or *B.* and it is good either way, for the property is still in *A.* yet *B.* hath the possession, and is chargeable to *A.* if the goods be stolen, and hath the property against all the world but *A.*

A. is indicted, that he stole the goods of *B.* and it appears in the indictment, that *B.* was a *feme covert* at the time, the indictment is naught, for they are the goods of her husband, and so if *A.* be indicted for stealing the goods of *B.* and upon the evidence it appears, that *B.* had neither interest nor possession in the goods, or was a *feme covert*, the party ought to be acquitted, but then he may be presently indicted *de novo* for stealing the goods of the husband or true proprietor; and so it once happened before me at *Aylesbury* 1667. in the case of *Emes*, who was convicted and executed upon a second indictment.

Regularly a man cannot commit felony of the goods, wherein he hath a property. [13]

If *A.* and *B.* be joint-tenants or tenants in common of an horse,

(t) Cro. Eliz. 145, 179.

[13] To whatever extent, and for whatever purpose, any one has a property in or right to a thing stolen, to such extent, and in respect to such purpose, it is stolen from him, and a theft is from all the proprietors except in the case of theft by one of the owners, in which case it can be a theft only from the others. *Cowing v. Snow*, 11 Mass. R. 415. Where an owner, whether his property be absolute or modified, partial or of the entire thing, fraudulently for his own benefit takes it from another in whose hands it is, with intent to subject him to the loss, and despoil him of the value of the thing, the act is, in its essential character, a theft; and so it has been held in direct cases at the common law; and it is now established beyond question, that an absolute owner may steal from another what belongs to himself. See *ante*, page 504; note 2, and authorities there cited. *Report of the Penal Code of Mass.* p. 11. *Palmer v. The People*, 10 Wend. R. 165. By the Stat. 7 & 8 Geo. IV. *Peel's Act*, c. 29, s. 45, the stealing of a chattel or a fixture by the lessee is made larceny: The tenant in this case has the exclusive right of actual possession under his contract; that is, one who is possessory owner may commit larceny of the thing of which he is such owner in respect to the proprietary owner. The indictment is as in any other case of simple larceny. 1 Archb. *Peel's Acts*, 406; *The People v. Wiley*, 3 Hill's N. Y. R. 199.

and *A.* takes the horse, possibly *animo furandi*, yet this is not felony, because one tenant in common taking the whole doth but what by law he may do. [14]

Yet if *A.* take away the trees of *B.* and cut them into boards, *B.* may take them away, and it cannot be felony; so if *A.* take the cloth of *B.* and make it into a doublet, *B.* may take it, and it cannot be felony. *M. 2 Eliz. More n. 67. p. 19.*

If *A.* take the hay or corn of *B.* and mingles it with his own heap or cock, or if *A.* take the cloth of *B.* and embroider it with silk or gold, *B.* may retake the whole heap of corn, or cock of hay, or garment and embroidery also, and it is no felony, nor so much as a trespass. *H. 36 Eliz. B. R. Popham n. 2 p. 38.*

Yet if *A.* bail goods to *B.* and afterwards *animo furandi* steals the goods from *B.* with design probably to charge him for them in an action of detinue, this is felony; *quod vide 7 H. 6. 43. a. Co. P. C. p. 110. Stamf. P. C. p. 26. a.*

The wife cannot commit felony of the goods of her husband, for they are one person in law, 21 *H. 6. Corone* 455. *Co. P. C. p. 110.* and therefore, if she take or steal the goods of her [514] husband, and deliver them to *B.* who knowing it, carries them away, this seems no felony in *B.* for it is taken, *quasi* by the consent of her husband, (u) yet trespass lies against *B.* for such taking, for it is a trespass, but *in favorum vitæ* it shall not be adjudged a felony, and so I take the law to be, notwithstanding the various opinions. *Dalt. cap. 104. p. 268, 269. ex lectura Cooke. (x)*

But if the husband deliver goods to *B.* and the wife had taken them feloniously from *B.* this had been felony in the wife, *Dalt. cap. 104. p. 268.* for if the husband himself had taken them feloniously from *B.* it had been felony, as hath been said; but then it must in both cases be a taking *animo furandi*.

But if a man take away another man's wife against her will *cum bonis viri*, that is felony by the statute of *Westm. 2. cap. 34.* which saith, *Habeat rex sectam de bonis sic asportatis*, (y) 13 *Assiz. 6.* But if it be by the consent of the wife, tho' against the consent of the husband, it seems to be no felony, but a trespass, for it cannot be a felony in the man, unless it be a felony in the woman, who consented to it, 13 *Assiz. 6.* but *Dalton* thinks it felony, *ubi supra.*

Yet in some cases the principal agent may be excused from felony, and yet he, that is principal in the second degree, may be guilty, as if a man put a child of seven years to take goods, and bring them to him, and he carry them away, the child is not guilty by reason of his infaney, yet it is felony in the other.

(u) But in case *B.* were her adulterer, Mr. *Dalton* thinks it would be felony, for in such a case no consent of the husband can be presumed. *Dalton ubi infra.*

(x) *New Edit. cap. 157. p. 504.*

(y) 2 *Co. Instit. 434.*

[14] See 2 *East's, P. C. 557; Rosc. on Crim. Ed. 514; Bramley's case, Russ. & Ry. 478; The People v. Gay, 1 Hill's R. 364.*

If *A.* die intestate, and the goods of the deceased are stolen before administration committed, it is felony,[15] and the goods shall be supposed to be *bona episcopi de D.* ordinary of the diocese, and if he made *B.* his executor, the goods shall be supposed *bona B.* tho he hath not proved the will, and they need not shew specially their title as ordinary or executor, because it is of their own possession, in which case a general indictment as well as a general action of trespass lies without naming themselves executor or ordinary, and so for an administrator.

But if servants in the house imbezzle their master's goods after his decease, this seems not to be felony at common law, but only trespass, because the goods were *quodammodo* in their custody; and therefore remedy is provided by the statute of 33 *H. 6. cap. 1.*[16]

[15] See *Davis's case*, 2 *S. C. Law Rep.* 291; *Smith's case*, 7 *Carr & Pay*, 147; *Scott's case*, *Russ. & Ry.* 13; *Gaby's case*, *Id.* 178; *Wolson v. Sayward*, 13 *Pick. R.* 402.

[16] The statute of 33 *Hen. VI. c. 1.* provides against larceny by household servants of the goods of their master after the decease of the master. The *Stat. 21 Hen. VIII. c. 7.* provides that it shall be felony in a servant "to whom any caskets, jewels, money, goods or chattels shall be delivered to keep, to withdraw himself and go away with said caskets, &c., with intent to steal the same and defraud his master thereof, contrary to the trust so put in him;" and also makes it felony in a servant who, "being in the service of his master without the assent of his master, embezzles the said caskets, &c., and converts the same to his own use with purpose to steal it;" reciting at the same time that it was doubtful whether this was felony at the common law. *Mr. Russell, vol. 2. p. 1217. Am. Ed. 1824*, remarks that, "this statute is little resorted to at the present day. The clear maxim of the common law is, that where a party has only the bare custody of the goods of another, the legal possession remains in the owner, and the party may be guilty of trespass and larceny in fraudulently converting the same to his own use. So that it has been thought to be more reasonable and consistent to consider this statute as in the nature of a declaratory act." See *Paradise's case*, 2 *East, P. C.* 565. of a servant's taking bills of exchange; *Robinson's case*, 2 *East, P. C.* 565. of a carter's taking a package of goods which his master in whose general employment he was, entrusted to him to carry; *Spear's case*, 2 *Leach*, 825; 2 *East, P. C.* 568. of a lighterman who sold part of a lighter-load of oats, which he was sent to fetch from on board of the ship; *Lavender's case*, 2 *Russ.* 1221. *Am. Ed. 1824.* of money given to a servant to leave with another; *Chipchase's case*, 2 *Leach*, 699. *S. C.* 2 *East, P. C.* 567. of a clerk's stealing a bill of exchange from the desk of which he had charge. See also *Smith's case*, 2 *Russ.* 208; *R. & R.* 267. *Wilkinson's case*, 2 *Russ.* 201. *Wait's case*, 2 *Russ.* 204; *S. C.* 2 *East, P. C.* 570; *S. C.* 1 *Leach*, 33; *Bazely's case*, 2 *East, P. C.* 571; *S. C.* 2 *Leach*, 835; *Hammon's case*, 2 *Russ.* 202; *S. C.* 2 *Leach*, 1083; *Murray's case*, 2 *East, P. C.* 683; *Jenson's case*, *Moody*, 434; *Clew's case*, 4 *Wash. C. C. R.* 700; *Metcalf's case*, *Moody*, 433; *Bull's case*, 2 *East, P. C.* 572; *S. C.* 2 *Leach*, 841; *Boss's case*, 1 *Leach*, 251; *Carr's case*, 2 *Russ.* 208; *R. & R.* 98; *Leach's case*, 3 *Stark, N. P. C.* 70; 2 *Deac. Abr.* 780; *Hartley's case*, 2 *Russ.* 209; *R. & R.* 139; *Thorne's case*, 2 *East, P. C.* 622; *Squire's case*, 2 *Stark, N. P.* 349; *Hutchinson's case*, *R. & R.* 412; *Eastall's case*, 2 *Russ.* 197; *Commonwealth v. Morse*, 14 *Mass. R.* 217; *People v. Norton*, 8 *Cowen*, 137; *Dillenback v. Jerome*, 7 *Cowen*, 294; *Hassell's case*, 1 *Leach*, 3; *Baker's case*, 1 *Dow. & Ry. N. P. C.* 19; 1 *Deac. Abr.* 778; *Robinson's case*, 2 *Russ.* 198; 2 *East, P. C.* 565; *Harding's case*, *R. & R.* 125; *White's case*, 2 *Tyler*, 352; *McNamie's case*, *Rosc. Ev.* 481; *Moody*, 368; *Hughe's case*, *Moody*, 370; 2 *Deac. Abr.* 1667; *Abraham's case*, 2 *East, P. C.* 569; *S. C.* 2 *Leach*, 968; *State v. Self*, 1 *Bay.* 242; *Atkinson's case*, 2 *Russ.* 201; *S. C.* 1 *Leach*, 302; *n. (a.) Harris's case*, 2 *Russ. C. & M.* 209; *Spenser's case*, *Russ. & Ry.* 299; *Williams's case*, 7 *C. & P.* 338; *Clay's case*, 2 *East, P. C.* 580; *Beachy's case*, *Russ. & Ry.* 319; *S. C.* 2 *Russ. C. & M.* 110; *Williams's case*, 6 *Car. & Pay.* 626; *Biscall's case*, 1 *Id.* 454; *Wittingham's case*, 2 *Leach*, 912; *Headge's case*, *Id.* 1033; *Freeman's case*, 5 *Carr. & P.* 534; *Hayden's case*, 7 *Id.* 445; *Howell's case*, *Id.* 325; *Prince's case*, *Mood. & Mal.*

that if they appear not upon proclamation, they shall be attaind of felony, but if they appear, they shall answer for it as a trespass.

But an indictment, *quod invenit hominem mortuum, & felonice furatus fuit duas tunicas* without saying *de bonis & catallis* of the executor or ordinary, is not good, and therefore the party was discharged. 11. R. 2. *Endilement*, 27.

A. digged up a dead body out of the grave, and stole his shroud, and buried him again, this is reported by Mr. *Dalton*, cap. 103. p. 266. to be no felony, but a misdemeanor, for which the party was whipt. And accordingly I have seen it reported to be held 16 *Jac.* in *Nottingham's* case, (z) *quia nullius in bonis*, but see *Co. P. C.* p. 110. in *Haine's* case (a) ruled by the advice of all the judges to be felony, and in the indictment the goods shall be supposed the goods of the executor, administrator, or ordinary.

But it is held, that if *A.* put a winding-sheet upon the dead body of *B.* and after his burial a thief digs up the carcase and steals the sheet, he may be indicted for felony *de bonis & catallis A.* because it transferd no property to a dead man. [17] 12 *Co. Rep.* 112.

VI. I come to the sixth consideration, who may be said a person committing larciny, but of this I have at large treated before cap. 3, &c. and therefore shall say but little here.

An infant under the age of discretion regularly cannot be guilty of larciny, viz. under fourteen years, unless it appears by circumstances, that he hath a discretion more than the law presumes.

A madman, *non compos*, or lunatic in the times of his lunacy cannot commit larciny, but ought to be found not [516] guilty upon due evidence thereof.

A *feme covert* alone may be guilty of larciny, if done without coercion of her husband. 27 *Assiz.* 40. [18]

But it hath generally now obtaind, that she cannot be guilty of larciny jointly with her husband, because presumed to be done by coercion of her husband. *Vide Dalt. cap. 104. (b) Stamf. P. C. fol. 26. a. & librus ibi.*

(z) This case is mentioned by *Dalton* in the place cited by our author, which in *New Edit.* is cap. 156. p. 502.

(a) 12 *Co.* 112.

(b) *New Edit. cap. 157. p. 503.*

21; *Mellish's* case, *Russ. & Ry.* 80; *Thornley's* case, *Mood.* 343; *Hawton's* case, 7 *Car. & Pay.* 281; *Snowley's* case, 4 *C. & P.* 390; *Sullen's* case, *Mood.* 129; *Walsh's* case, *Russ. & Ry.* 215; *S. G.* 4 *Taunt.* 258. 284; *Hoggen's* case, *Id.* 145; *Nettleton's* case, *Mood.* 259; *Hobson's* case, *Russ. & Ry.* 56; *Taylor's* case, *Id.* 63; *Hall's* case, *Id.* 463; *Jones's* case, 7 *Car. & Pay.* 834; *Rep. of the Penal. Code. Mass.* 22.

[17] As to stealing a human body, see 1 *Crim. Law Com. Rep.* 20. 2 *East's P. C.* 632. 2 *Russ. on Crimes.* 163. *Rosc. on Crim. Ev.* 517.

As to property in grave clothes, see 3 *Inst.* 110. *Haynes's* case, 12 *Rep.* 113.

Blackstone remarks (vol. 4. p. 235.) that by the law of the *Franks* a person who dug a corpse up in order to strip it, was to be banished from society, and no one suffered to relieve his wants till the relatives of the deceased consented to his re-admission: and he cites *Montesquieu*, *Sp. L.* b. 30. c. 19.

[18] See ante, p. 44, notes; and see further *Wilford's* case, *Russ. & Ry.* 517. *French's* case, *Id.* 491. *Clarke's* case, *Mood. R.* 376, note. *Willis's* case, *id.* 375. *Solfries's* case, *id.* 243. *Harrison's* case, 2 *East's P. C.* 559. *Turner's* case, 1 *Leach, C. C.* 536. *The People v. Schuyler*, 6 *Cowen, R.* 572.

But this I take to be only a presumption till the contrary appear, for I have always thought, that if upon the evidence it can clearly appear, that the wife was not drawn to it by her husband, but that she was the principal actor and inciter of it, she is guilty as well as the husband, but *stabilur præsumptio, donec probetur in contrarium*, neither is the book of 2 E. 3. Corone 160. to the contrary, but in the book of 27 Assiz. 40. where she was indicted alone, inquiry was made, whether it were by coercion of the husband.

And therefore, if A. and B. his wife be indicted by these names of larciny, the indictment is not void, for the husband may be convicted, tho the wife be acquitted upon the presumption of her husband's coercion.

Again, the husband may be acquitted, and the wife found to have done the felony alone, for every indictment is several in law; or again, tho *primâ facie* the wife cannot be guilty of larciny, no nor of burglary, where the husband is party in the fact, (tho she may be guilty of murder or manslaughter jointly with her husband) and therefore *primâ facie* the wife in such case must be acquitted, yet for my part I think the circumstances may be such, that the wife may be as well guilty in larciny or burglary, as her husband.

If a servant commit felony by the coercion of his master, yet it doth not excuse the servant, tho it excuse the wife, as is before said, for the wife is inseperably *sub potestate viri*, but it is not so with a servant, for as he is not bound to obey his master's unlawful commands, so he may recover damages for any wrong done him by his master. *Dalt. cap. 104, p. 269.(c)[19]*

See Black. Com. Lib. iv. cap. 17, p. 229 to 244. and Foster 73, 123, 124, 366. and 1 Hawk. P. C. Index tit. Larciny.

(c) *New Edit. p. 504.*

[19] Simple larceny must be in the first place an *unlawful taking*, which implies that the goods must pass from the possession of the right owner, and without his consent, and therefore where there is no change of possession, or a change of it by consent, or a change from the possession of a person without title to that of the right owner,* there can in any of these cases be no larceny. And as the taking must be without consent of the owner, so in general no delivery of goods from the owner to the offender upon trust can ground a larceny. As if A. lends B. a horse, and he rides away with him. Yet if the delivery be obtained from the owner by a person having *animus furandi* at the time, and who afterwards unlawfully appropriates the goods in pursuance of that intent, it is larceny; as if in the case above supposed, B. solicited the loan of the horse with intent to steal him. (*Major Semple's case, 2 Leach, 469, 470.*) But in such cases, bare non-delivery shall not of course be intended to arise from a felonious design; since that may happen from a variety of other accidents. So a person who has received goods by delivery from the owner, will nevertheless be found guilty of larceny by appropriating them, if they were delivered under such circumstances as not to divest the owner of the legal possession; as when a servant embezzles his master's plate, (*Christian's Blackstone, vol. iv. page 230, note;*) or the guest at an inn or tavern makes away with the articles of which he has temporary use. *Hawk. P. C. b. 1. c. 33. s. 6; 4 Bl. Com. 331.*

Again, there must not only be a taking, but a *carrying away*; *cepit et asportavit* was the old law Latin. A bare removal from the place in which he found the goods, though the thief does not quite make off with them, is a sufficient asportation, or carrying away.

* But if a person has temporary title against the permanent owner, the latter may be guilty of larceny in taking them. *R. v. Wilkinson, R. & R. C. C. 470; 4 Bl. Com. 231.*

As if a man be leading another's horse out of a close and be apprehended in the fact, or if a guest stealing goods out of an inn, has removed them from his chamber down stairs, these have been adjudged sufficient carryings away to constitute a larceny. (3 *Inst.* 108, 109;) or if a thief intending to steal plate, takes it out of a chest in which it was, and lays it down upon the floor, but is surprised before he can make his escape with it, this is larceny.

Farther, this taking and carrying away must be of *personal goods*. Lands, tenements, hereditaments, either corporeal or incorporeal, either freehold or less than freehold, cannot in their nature be taken and carried away. And of things likewise that adhere to the freehold, as corn, grass, trees, and the like, or lead upon a house, no larceny could be committed by the rules of the common law; but the severance of them was merely a trespass, which depended on a subtilty in the legal notions of our ancestors. These things were parcel of the real estate, and therefore, while they continued so, could not by any possibility be the subject of theft, being absolutely fixed and immovable; and if they were severed by violence, so as to be changed into movables, and at the same time by one and the same continued act, carried off by the person who severed them, they could never be said to be taken from the *proprietor* in this their newly-acquired state of mobility, which is essential to the nature of larceny, being never as such in the actual or constructive possession of any one but him who committed the trespass. He could not in strictness be said to have taken what at that time were the personal goods of another, since the very act of taking was what turned them into personal goods. But if the thief severs them at one time, whereby the trespass is completed, and they are converted into personal chattels in the constructive possession of him on whose soil they are left or laid, and comes again at another time when they are so turned into personalty, and takes them away, it is larceny at the common law; and so it is if the owner or any one else has severed them. So, upon nearly the same principle, the stealing of writings relating to real estate is, at common law, no felony, but a trespass, (*Rex v. Westbeer, Stra.* 1137,) because they concern the land, or according to our technical language, *savour of the realty*, and are considered as part of it by the law; so that they descend to the heir together with the land which they concern. Bonds, bills, and notes which concern mere *choses in action*, were also at the common law, held not to be such goods whereof larceny might be committed, being of no intrinsic value, (8 *Rep.* 33. b.) and not importing any property in possession of the person from whom they were taken. By the common law, also, larceny could not be committed of treasure trove, or wreck, till seized by the king, or him who hath the franchise, for till such seizure, no one has a determinate property therein; nor could it be committed, at the common law, of such animals in which there is no property, either absolute or qualified, as of beasts that are *feræ naturæ*, and unreclaimed, such as deer. *Hawk. P. C. b. 1. c. 33. s. 25; ante, p. 11.*

It is also said (*Dalt. Just. c. 156,*) that if swans be lawfully marked, it is felony at common law to steal them, though at large in a public river; and that it is likewise felony to steal them, though unmarked, if in any private river or pond; otherwise it is only a trespass. But of all valuable domesticated animals, as horses and other beasts of draught, and of all animals, *domitæ naturæ*, which serve for food, as neat or other cattle, swine, poultry, and the like, and of their fruit or produce taken from them while living, as milk or wool, (*Dalt.* 21; *Crompt.* 36; *Hawk. P. C. b. 1. c. 33. s. 28. The King v. Martin*, by all the judges, *P. 17. Geo. III.*) larceny may be committed at common law, and also of the flesh of such as are either *domitæ* or *feræ naturæ*, when killed; (*ante p. 511.*) while on the other hand, as to those animals which do not serve for food, and which, therefore, the law holds to have no intrinsic value, as dogs of all sorts, and other creatures kept for whim and pleasure, though a man may have a bare property therein, and maintain a civil action for the loss of them, (*ante p. 512.*) yet they are not of such estimation as that the crime of stealing them amounts to larceny.

Lastly, the taking and carrying away, must be *with intent to deprive the right owner*, or as it is frequently expressed, *animo furandi*. (The civil law expresses this by the words "*lucri causa*." 4 *Inst.* 1. 1.) This requisite, besides excusing those who labor under incapacities of mind or will, indemnifies also mere trespassers, and other petty offenders. As if a servant takes his master's horse without his knowledge, and brings him home again—if a neighbor takes another's plow that is left in the field, and uses it upon his own land, and then returns it—if under colour of owner of rent where none is due, I distrain another's cattle or seize them—all these are trespasses, but no felonies, (*ante, p. 509.*) The ordinary discovery of a felonious intent is where the party doth it clandestinely, or being charged with the fact, denies it. But this is by no means the only criterion of criminality, for in cases that may amount to larceny, the variety of circum-

stances is so great, and the complication thereof so mingled, that it is impossible to recount all these which may evidence a felonious intent or *animus furandi*; wherefore they must be left to the due and attentive consideration of the court and jury.

Having thus considered the general nature of simple larceny, at common law, we now arrive at its punishment. Theft, by the *Jewish law*, was only punished with a pecuniary fine and satisfaction to the party injured, (*Exod. xxii.*) And in the civil law till some very late constitutions, we never find the punishment capital. The laws of *Draco*, at *Athens*, punished it with death; but his laws were said to be written in blood; and *Solon* afterwards changed the penalty to a pecuniary mulct. And so the *Attic laws*, in general, continued, (*Petit. L. L. Attic. l. 7. tit. 5.*) except that once, in a time of dearth, it was made capital to break into a garden and steal figs; but this law, and the informers grew so odious, that from them all malicious informers were styled *sycophants*, a name which we have much perverted from its original meaning. In *England*, the ancient *Saxon laws* nominally punished theft with death, if above the value of twelve pence; but the criminal was permitted to redeem his life by a pecuniary ransom, as amongst their ancestors the *Germans*, by a stated number of cattle. *Tac. de Mor. Germ. c. 12.* But in the ninth year of *Henry I.* this power of redemption was taken away, and all persons guilty of larceny, above the value of twelve pence,* were directed to be hung. So that stealing to above this value (which was called *grand larceny*;) became a felony absolutely capital, and so continued to our own time,† while *petit larceny*, that is theft to inferior amount, (though also described as felony,) was punished with imprisonment or whipping only.‡ However, by the law relating to *benefit of clergy*, (see c. 44. p. 517, as latterly modified;) persons who committed simple larceny only, though to the amount of more than twelve pence, or indeed to any amount whatever, were, in fact, excused the pains of death, provided it were the first offence, and provided the benefit of clergy had not been taken away from the particular species of theft, by some express statute as was very frequently the case, (4 *Black. Com.* 237.) and when the capital punishment was thus taken away, were formerly liable to be burnt in the hand, or whipped, or in more modern times, to be whipped, or transported for seven years, which latter punishment might also, latterly, be inflicted in lieu of the common law penalties, on persons convicted of petit larceny, (4 *Geo. I. c. 11.* 19 *Geo. III. c. 74.* 4 *Black. Com.* 237.) And such was the state of the law on this subject, as late as the year 1827, when by statute 7 & 8 *Geo. IV. c. 29. ss. 3, 4.* it was provided that every person convicted of simple larceny, of any amount, (all distinctions between grand and petit larceny, being by the same statute abolished,) shall be liable to be transported for seven years, or imprisoned for not more than two years: such imprisonment to be with hard labor and solitary confinement, and (if the offender be a male) to be accompanied with whipping at the discretion of the court. See *chap. 44. note, p. 517.* In certain cases, however, where the larceny relates to a subject for which the policy of the law provides with more anxiety, the punishment is more severe. For by 7 & 8 *Geo. IV. c. 29. s. 16.* (amended as to punishment by 7 *Will. IV. & 1 Vict. c. 90.*) if any person shall steal to the value of ten shillings, any goods or articles of silk; woollen, linen, or cotton, or of any one or more of these materials, mixed with each other, or mixed with any other material, whilst placed, laid or exposed during any stage, process, or progress of manufacture, in any building, field, or other place, he shall be transported for a term not exceeding fifteen years, or less than ten years, or imprisoned for a term not exceeding three years, with hard labor and solitary confinement, if the court think fit, during

* This sum, (says *Blackstone*, vol. iv. p. 237.) was the standard in the time of king *Athelstan*, and he observes that afterwards, in the reign of king *Henry I.* one shilling was the stated value at the Exchequer, of a pasture-fed ox, (*Dial. de Scacc. I. I. s. 7.*) and that if we should suppose this shilling to mean that *solidus legalis* mentioned by *Lyndwode*, (*Prov. 1. 3. c. 13.*) or the 72d part of a pound of gold, it would be equal to 13s. 14d. of the present standard.

† The progressive reduction in the value of money, while death continued to be the sentence for theft, to the same amount as before, justified the complaint of Sir *H. Spelman*, (*Gloss. 350.*) that while every thing else living became dearer, the life of man had continually grown cheaper.

‡ 3 *Inst.* 218. *Hawk. b. I. c. 33. s. 36.* 4 *Black. Com.* 237. These denominations of grand and petit larceny, are now at an end, by 7 & 8 *Geo. IV. c. 29. s. 2.* which gives to thefts to the amount of twelve pence, and under, the same effect as to thefts of greater amount. See a passage from *Knight's Hist. of England*, B. I. c. 7. in a note at the end of this volume.

such imprisonment.* And by sect. 25, (amended as to punishment, by 7 Will. IV. & 1 Vict. c. 90.) if any person shall steal any horse, mare, gelding, colt, or filly; or any bull, cow, ox, heifer, or calf; or any ram, ewe, sheep, or lamb; or shall wilfully kill any of such cattle, with intent to steal the carcase or skin, or any part of the, cattle so killed, he shall be guilty of felony, and be liable to the same punishments as last above particularized.†

The additional severity, in these instances, is owing to the difficulty there would otherwise be in preserving goods so easily carried off. Upon which principle the Roman law punished more severely than other thieves, the *abigsi* or stealers of cattle, (*Ff.* 47. t. 14.) and the *balnearii* or such as stole the clothes, of persons who were washing in the public baths, (*Ib.* t. 17.) both which constitutions seem to be borrowed from the laws of Athens, (*Pott. Antiq.* b. 1. c. 26.) And so, too, the ancient Goths punished with unrelenting severity thefts of cattle, or corn that was reaped and left on the field. Such kind of property which no human industry can sufficiently guard, being esteemed under the peculiar custody of heaven. (*Stiern. de Jure Goth.* l. 3. c. 5.)

The offence which we have been hitherto considering, is simple larceny as it existed at common law; but in connexion with this offence, and proper for consideration under the same head, is the crime of *simple stealing*, (or *theft*) of things not the subject of larceny at common law. For in progress of time it was found necessary to extend the protection of the penal laws to many of these subjects of which the ancient law of larceny took no account; and acts of parliament were accordingly passed from time to time by which punishments were imposed for thefts committed in respect of various kinds of property so circumstanced, and though these statutes have been since repealed, the same general object has been pursued in the 7 & 8 Geo. IV. c. 29; passed "For consolidating and amending the laws in England relative to larceny, and other offences connected therewith." By this act provisions are made against stealing "valuable securities," such as bonds, bills, and the like, (7 & 8 Geo. IV. c. 29. s. 5,) and many other subjects of property, of which the enumeration will be found in a note below,‡ so that it may be laid down in general terms, that stealing has now become an offence liable to punishment or penalty in regard to all movables whatever. We may also remark with respect to the kinds of stealing thus created by statute in supplement to the ancient law of larceny, that all the common law doctrines relative to larceny which we have already had occasion to notice, are in general applicable to thefts of this description also, (*Rex v. St. John*, 7 C. & P. 324.) though they are not technically denominated larcenies, (see *Rex v. Gooch*, 8 C. & P. 293;) and that their punishment is in many cases identical. In many instances, however, they do not amount like larceny at common law to a felony, but to a misdemeanor only, and are visited with some lighter degree of punishment, and there are several kinds of them not assignable to the class either of felony or misdemeanor, but restrained by fixed pecuniary penalties only, recoverable in a summary way by information before a justice of the peace.

We have seen that larceny may not only be simple, but combined with circumstances of aggravation, which is described in our books as mixed, compound or complicated larceny, (4 Bla. Com. 239; Hawk. P. C. B. 1. c. c. 33, 34;) and this is not only like simple larceny felonious, but is felony of a more penal character. We will therefore now consider,

Larceny from a dwelling-house, shop, warehouse, or counting-house.—Larceny from the

* As to the former state of the law, with respect to stealing woollen cloth, linens, fustians, calicoes, or cotton goods from the place of manufacture, see 22 Car. 2. c. 5. 15 Geo. II. c. 27. 18 Geo. II. c. 27–51. Geo. III. c. 41. 4 Geo. IV. c. 53.

† The punishment of horse and cattle stealing by 7 & 8 Geo. IV. c. 29. s. 25. was death, as it had previously been, (without benefit of clergy,) by the statutes (now repealed by 7 & 8 Geo. IV. c. 27.) of 1 Edw. VI. c. 12. 2 & 3 Edw. VI. c. 33. 31 Elizabeth, c. 12. 14 Geo. II. c. 6. 15 Geo. II. c. 84. Afterwards it was reduced by 2 & 3 Will. IV. c. 62. to transportation for life, to which, by 3 & 4 Will. IV. c. 44. previous imprisonment with or without hard labour, might be superadded.

‡ See 7 & 8 Geo. IV. c. 29. s. 21. as to stealing records and judicial documents; s. 22. stealing or destroying wills; s. 23. stealing documents of titles; s. 26. deer; s. 30. hares or conies; s. 31. beasts or birds; s. 33. pigeons; s. 34. fish; s. 36. oysters; s. 37. ores in mines, &c.; s.s. 38, 39. trees or shrubs, &c.; s. 40. fences, stiles, gates, &c.; s. 42. plants, fruits, &c.; s. 44. fixtures in houses, squares, or street fences; 7 Will. IV. & 1 Vict. c. 87. s. 8. as to plundering wrecks; 8 & 9 Vict. c. 47. as to stealing dogs. A variety of antecedent statutes that had been passed with the same object of supplying the defects of the ancient law in this particular, and that are noticed by Blackstone, vol. iv. p. 233, &c. are now repealed by 7 & 8 Geo. IV. c. 27.

house, though it seems to have a higher degree of guilt than simple larceny, yet was not at all distinguished from the other at common law, (*Hawk. P. C. B. l. c. 36.*) unless where it were accompanied with the circumstances of breaking the house by night, and then it fell under another description, viz. that of burglary. But afterwards, by several acts of parliament, the history of which is ingeniously deduced by a learned modern writer, (*Barr. on Statutes, 375, &c.*) who has shown them to have gradually arisen from our improvements in trade and opulence, the benefit of clergy was taken from larcenies committed in a house in almost every instance, as also from those committed in shops, warehouses, coach-houses or stables, so that the capital sentence to which they were subject as larcenies took effect. These acts, however, are all now repealed, and the present law on the subject is governed by 7 & 8 Geo. IV. c. 29. and 7 Will. IV. & 1 Vict. c. 86. By the first of these acts amended as to punishment by 7 Will. IV. & 1 Vict. c. 90.* if any person shall break and enter any dwelling-house and steal therein any chattel, money, or valuable security to any value whatsoever, or shall break and enter any building and steal therein any chattel, money or valuable security, such building being within the curtilage of a dwelling-house and occupied therewith, but not being part thereof according to the provisions of the first-mentioned act, (7 & 8 Geo. IV. c. 29. s. 13.) or shall break or enter any shop,† warehouse or counting-house, and steal therein any chattel, money, or valuable security, the offender in any of such cases shall be transported for a term not exceeding fifteen years nor less than ten, or be imprisoned for a term not exceeding three years, to which imprisonment, hard labour, and solitary confinement may be superadded if the court think fit. And it is further enacted by 7 & 8 Geo. IV. c. 29. s. 12. (amended as to punishment by 7 Will. IV. & 1 Vict. c. 90.) and 7 Will. IV. & 1 Vict. c. 86. s. 5. that whoever shall steal in any dwelling-house any chattel, money or valuable security, to the value in the whole of five pounds or more, or shall steal any property in any dwelling-house, and shall by any menace or threat put any one being therein in bodily fear, shall be guilty of felony, and liable to the same punishments as last above particularized.†

Larceny from a church, or, (as it is sometimes called) *sacrilege*. By stat. 23. Hen. VIII. c. 1. and 1 Edw. VI. c. 12. it was felony without benefit of clergy to commit larceny above the value of twelvecence in a church or chapel. (*post, p. 518.*) But these statutes are now repealed; and by 7 & 8 Geo. IV. c. 29. s. 10. (amended as to punishment by 5 & 6 Will. IV. c. 81. and 6 & 7 Will. IV. c. 4.) if any person shall break and enter any church or chapel,§ and shall steal therein any chattel, or having stolen any chattel in any church or chapel, shall break out of the same, he shall be transported for life, or not less than seven years, or imprisoned for not more than three years, with hard labour and solitary confinement at the discretion of the court or judge during the period of imprisonment.

Larceny from the person, which is either by *privately stealing*, or by open and violent assault, usually called *robbery*. The offence of *privately stealing* from a man's person, as by picking his pocket, or the like, privily, without his knowledge, was debarred of the benefit of the clergy so early as by the statute 8 Eliz. c. 4.‖ a severity which seems to be owing to the ease with which offences are committed, the difficulty of guarding against them, and the boldness with which they were practised (even in the queen's court and presence) at the time when this statute was made, besides that this was an infringe-

* It had been previously amended as to punishment by 2 & 3 Will. IV. c. 62. and 3 & 4 Will. IV. c. 44.

† To fall under this description the place must be a shop for the sale of goods, and not a mere workshop. *Reg. v. Saunders, 9 C. & P. 79.*

‡ The former state of the law as to larceny from a house, shop, &c. was very complicated. It depended on statutes 5 & 6 Edw. VI. c. 9. 39 Eliz. c. 15. 3 & 4 W. & M. c. 9. 10 & 11 Will. III. c. 23; all which are now repealed by 7 & 8 Geo. IV. c. 27. By these statutes the amount of the property stolen as being above twelve pence, or of the value of five shillings or forty shillings constituted in the several cases respectively a material ingredient in the offence.

§ As to what buildings come under this provision, vide *Rex v. Wheeler, 3 Car. & P. 585.* *Rex v. Richardson, 6 Car. & P. 335.* *Rex v. Nixon, 7 Car. & P. 442.* *Reg. v. Evans, 1 Car. & M. 298.*

‖ This, it will be observed, applies only to the case where the thing stolen was of the value of more than twelve pence; for if it was below that value, so as to reduce the offence to petit larceny, there was no need of the benefit of clergy, the sentence not being capital. *Hawk. P. C. b. 1. c. 35. s. 4.*

ment of property in the manual occupation or corporal possession of the owner, which was an offence even in a state of nature: and therefore the *saccularii*, or cut-purses, were more severely punished than common thieves by the *Roman* and *Athenian* laws. (*Ff.* 47. 11. 7. *Pott. Antiq.* 1. 1. c. 26.) But this statute is now repealed by 7 & 8 *Geo.* IV. c. 27. and new provisions, of which we shall presently have occasion to speak more at large, are made by 7 *Will.* IV. & 1 *Vict.* c. 87.

Open and violent larceny from the person or robbery, the *rapine* of the civilians, is the unlawful and forcible taking from the person of another of goods or money to any value by violence or putting him in fear. *Hawk. P. C.* b. 1. c. 34, s. 2. 1. There must be an unlawful taking, otherwise it is no robbery.* On the other hand, if the thief having once taken a purse returns it, still it is a robbery. *Rex v. Reat*, 1 *Leach*, C. C. 228. 2. It is immaterial of what value the thing taken is, a penny as well as a pound, thus forcibly extorted makes a robbery. *Hawk. P. C.* b. 1. c. 34, s. 16. 3. Lastly, the taking must be by force or a previous putting in fear, which makes the violation of the person more atrocious than privately stealing. For according to the maxim of the civil law, (*Ff.* 47. 2-4, xxii.) *qui vi rapuit fur improbius esse videtur*. This previous violence, or putting in fear, is the criterion that distinguishes robbery from other larcenies. For if one privately steals a chattel from the person of another, and afterwards keeps it by putting him in fear, this is no robbery, for the fear is subsequent: (*post p.* 534.) Not that it is indeed necessary, though usual to lay in the indictment that the robbery was committed by putting into fear; it is sufficient if laid to be done by violence. (*Trin. Term*, 3 *Anne*, by all the judges.) And when it is laid to be done by putting into fear, this does not imply any great degree of terror or affright in the party robbed; it is enough that so much force or threatening by word or gesture be used as might create an apprehension of danger, or induce a man to part with his property without or against his consent. (*Fest.* 128.) Thus if a man be knocked down without previous warning, and stripped of his property while senseless, though strictly he cannot be said to be put into fear, yet this is undoubtedly a robbery. Or if a person with a sword drawn begs an alms, and I give it to him through mistrust and apprehension of violence, this also falls within the definition of the same crime. *Hawk. P. C.* b. 1. c. 34, s. 8.) So if under a pretence of sale a man forcibly extorts money from another, neither shall this subterfuge avail him. But it is doubtful whether the forcing a higgler or other chapman to sell his wares, and giving him the full value of them, amounts to so heinous a crime as robbery. (*Ibid.* s. 14.) This species of larceny was debarred of the benefit of clergy by statute 23 *Hen.* VIII. c. 1, and other subsequent statutes, not indeed in general, but only when committed in a dwelling-house or in or near the king's highway. A robbery, therefore, in a distant field was not punished with death, (*post p.* 535,) but was open to the benefit of clergy till the statute 3 & 4 *W. & M.* c. 9, which took away clergy from both principals and accessories before the fact in robbery wheresoever committed. But all these statutes, as well as the 8 *Elix.* c. 4, with respect to privately stealing from the persons, are now repealed by 7 & 8 *Geo.* IV. c. 27. And by 7 *Will.* IV. & 1 *Vict.* c. 87, provisions are now made against both species of offences, with distinctions as regards robbery, suitable to the aggravations with which that crime may have been committed: This statute enacts that whoever shall rob any person, and at the time or immediately before or immediately after such robbery, shall stab, cut, or wound any person, shall suffer death, and that whoever being armed with any offensive weapon or instrument shall rob or assault with intent to rob any person, or shall together with one or more person or persons rob or assault with intent to rob any person, or shall rob any person, and at the time of or immediately before or immediately after such robbery shall beat, strike, or use any other personal violence to any person, shall be guilty of felony and be transported for life, or not less than fifteen years, or imprisoned† for not more than three years; that whoever shall accuse or threaten of such abominable crime as in the act specified, or of any attempt or solicitation thereto, and extort property by such intimidation, shall incur the like penalty; that whoever shall rob any person, or steal any property from the person of another,

* A mere attempt to rob was held to be a felony so late as *Henry IV.*'s time: *post p.* 532; but afterwards it was taken to be only a misdemeanor until 7 *Geo.* II. c. 21, which made it transportable felony. This statute was repealed by 4 *Geo.* IV. c. 34, which is itself repealed by 7 & 8 *Geo.* IV. c. 27. And as to the present law, *vide* 7 *Will.* IV. & 1 *Vict.* c. 87.

† In any case in which imprisonment may be awarded under this statute, hard labour and solitary confinement may be added. 7 *Will.* IV. & 1 *Vict.* c. 87, s. 10.

shall be transported for a term not exceeding fifteen years nor less than ten, or be imprisoned for not more than three: that whoever shall *assault any person with intent to rob,** shall be guilty of felony, and be imprisoned for not more than three years; and that whoever with *menaces or force shall demand any property* of any person with intent to *steal the same*, shall incur the like penalty. In connexion also with the offence comprised in this statute of extorting money by threat of accusation, we may notice the provision of the prior act of 7. & 8 Geo. IV. c. 29, s. 8,† by which it is enacted, that if any person shall knowingly send or deliver any letter or writing, demanding of any person with menaces, and without reasonable or probable cause any chattel, money, or valuable security,‡ or shall accuse or threaten to accuse, or shall knowingly send or deliver any letter or writing accusing or threatening to accuse any person of a crime punishable by law with death, transportation, or pillory, or of any assault with intent to commit rape, or of attempt to commit rape, or of any such infamous crime as in the act mentioned with intent to extort any chattel, money, or valuable security, such offender shall be guilty of felony, and be transported for life or not less than seven years, or imprisoned (with or without hard labour and solitary confinement) for not more than four years; and, if a male, be once, twice, or thrice whipped, if the court think fit, in addition to the imprisonment.

Larceny by clerks, servants, or agents.—Special provision against larcenies by servants was made by the statutes 33 Hen. VI. c. 1. and 21. Hen. VIII. c. 7. See *ante*, p. 513. note 16. both which are now repealed by 7 & 8 Geo. IV. c. 27. But by 7 & 8 Geo. IV. c. 29. s. 46, it is provided that if any clerk or servant§ shall steal any chattel, money, or valuable security, belonging to, or in the possession or power of his master, he shall be transported for a term not exceeding fourteen years, nor less than seven years, or imprisoned (with or without hard labour and solitary confinement) for a term not exceeding three years, and if a male, once, twice or thrice whipped; if the court think fit, in addition to the imprisonment. In addition to which there are separate provisions against *embezzlement*, a crime distinguished from larceny, properly so called, as being committed in respect of property which is not at the time in the actual or legal possession of the owner. As to this, it is enacted by the same statute, sect. 47, that if any clerk or servant, or any person employed for the purpose, or in the capacity of a clerk or servant, shall by virtue of such employment, receive or take into his possession any chattel, money, or valuable security for, or in the name, or on the account of his master,¶ and shall fraudulently embezzle the same, or any part thereof, every such offender shall be deemed to have feloniously stolen the same, and shall suffer the same punishment as last above particularized: and by sect. 49, that if any money or security for the payment of money, shall be intrusted to any banker, merchant, broker, attorney, or other agent, with any direction in writing, to apply such money, or any part thereof, or the proceeds, or any part of the proceeds of such security, for any purpose specified in such direction, and he shall, in violation of good faith, and contrary to the purpose so specified, in any wise convert to his own use or benefit such money, security or proceeds, or any part thereof,** every such offender shall be guilty of a misdemeanor, and be transported for a term not exceeding fourteen years, or less than seven years, or suffer such other punishment, by fine or imprisonment, or both; as the court shall award, and that if any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund of this country, or any foreign state, or in any fund of any body corporate, company or society shall be intrusted to any banker, merchant, broker, attorney, or other agent, for safe custody, or for any special purpose, without any authority to sell, negotiate, transfer or pledge; and he shall, in violation of good faith, and contrary to the object of the trust, sell, negotiate, transfer, pledge, or in any manner convert to his own use or benefit such chattel or security, or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund, to which such power of

* As to this provision, *vide Reg. v. Huxley*, 1 Car. & M. 596.

† *Et vide* as to letters threatening to kill, burn, &c. 4 Geo. IV. c. 54, s. 3.

‡ As to what is a threatening letter under this statute, *vide Rex v. Pickford*, 4 Car. & P. 227.

§ As to larceny by a clerk in a public office, *vide Rex v. Lovell*, 2 M. & Rob. 236.

|| As to who is a servant, within the meaning of this section, *vide Reg. v. Haydon*, 7 Car. & P. 445.

¶ Embezzlement of money by a servant not authorized to receive it, is not within this section. *Rex v. Thorley*, 1 M. C. C. R. 343.

** As to this provision, see *Rex v. White*, 4 Car. & Pay. 46.

attorney shall relate, or any part thereof, every such offender shall incur the same penalties as are imposed in the case last before mentioned.* It is provided, *sect. 50*, however, that this shall not affect any trustee, in or under any instrument whatever, or any mortgage of any property, real or personal, in respect of any act done by such trustee or mortgagee, in relation to the property comprised in, or affected by any such trust or mortgage, nor shall restrain any banker, merchant, broker, attorney, or other agent, from receiving any money which shall be or become actually due and payable upon any valuable security, according to the effect and tenor thereof, in such manner as he might otherwise have done, nor from selling, transferring, or otherwise disposing of any securities or effects in his possession, upon which he shall have any lien, claim, or demand, entitling him by law so to do, unless such sale, transfer, or other disposal shall extend to a greater number or part of such securities or effects than shall be requisite for satisfying such lien, claim or demand. By the same statute, *sect. 51*, it is enacted, that if any factor or agent, intrusted for the purpose of sale, with any goods or merchandize, or intrusted with any bill of lading, warehouse keeper's or wharfinger's certificate, or warrant or order, for delivery of goods or merchandize, or any of the said documents as a security for any money or any negotiable instrument, borrowed or received by such factor or agent at, or before the time of making such deposit or pledge, or intended to be thereafter borrowed or received, he shall incur the same penalties as in the two former cases, but that no such factor or agent shall be liable to prosecution for depositing or pledging any such goods or merchandize, or any of the aforesaid documents, in case the same shall not be made a security for, or subject to, the payment of any greater sum of money than the amount, which at the time of such deposit or pledge, was justly due and owing to such factor or agent, from his principal, together with the amount of any bill or bills of exchange, drawn by, or on account of, such principal and acceptor, by such factor or agent.

Larcenies in relation to the post-office.—By 7 Will. IV. & 1 Vict. c. 36, s. 25, every person employed under the post-office who shall, contrary to his duty, open or procure or suffer to be opened, or wilfully detain or delay, or procure or suffer to be detained or delayed a post letter shall be guilty of a misdemeanor, and punished by fine or imprisonment, or both, as to the court shall seem meet. By *sect. 26*, every person so employed who shall steal, or for any purpose embezzle, secrete, or destroy a post letter, shall be guilty of felony, punishable with transportation for seven years or imprisonment not exceeding three years; and if any letter contain any chattel, money, or valuable security, then with transportation for life.† By *sect. 32*, every person so employed who shall steal, or for any purpose embezzle, secrete, or destroy, or wilfully detain or delay in the course of conveyance or delivery by post any printed votes or proceedings in parliament, or any printed newspaper, or other printed paper sent by post without covers, or in covers open at the sides, shall be guilty of a misdemeanor, punishable by fine or imprisonment, or both, as to the court shall seem meet. These provisions relate only to offences by persons employed in the department of the post-office; but by *sects. 27 and 28*, every person who shall steal out of a post letter-bag or a post letter from a post letter-bag, or from a post-office, or officer of the post, or a mail, or shall stop a mail with intent to rob or search the same, shall be guilty of felony, and be transported for life.‡ By *sect. 29*, every person who shall steal or unlawfully take away a post letter-bag, sent by a post-office packet, or a letter out of any such bag, or shall unlawfully open any such bag, shall be guilty of felony, and transported for a term not exceeding fourteen years. By *sect. 30*, every receiver of a post letter, post letter-bag, chattel, money, or valuable security feloniously stolen under the post-office acts, knowing the same to have been so stolen, shall be guilty of felony, and transported for life. By *sect. 31*, every person who shall fraudulently retain, or wilfully secrete, or keep or detain, or being required by an officer of the post-office, neglect or refuse to deliver up a post letter which ought to have been delivered to any other person, or a post letter-bag, or post letter which shall have been sent and lost, shall be guilty of a misdemeanor, punishable with fine and imprisonment. And by *sects. 41 & 42*, it is provided generally, that every person convicted of an offence for which transportation for life is awarded by that act, shall be liable to be transported either for life or any time not less than seven years, or imprisoned for any time not exceeding four years; and that every person convicted of any offence punishable according to the post-office acts by transportation for any time not exceeding fourteen years, shall be liable to

* As to this section, *vide Rex v. Nettleton, R. & M. 259.*

† As to this section, *vide Reg. v. Rathbone, 1 Car. & M. 220; Reg. v. Menze, Ib. 284.*

‡ As to these provisions, *vide Reg. v. Hatley, 1 Car. & Kir. 89.*

be transported for any time not exceeding fourteen years, or less than seven years—or imprisoned for any time not exceeding three years; and that in all cases of imprisonment, the court may superadd hard labour and solitary imprisonment.*

Offences against the post-office in the *United States* consist

First. Of robbing of the mail; and *Second.* Of larceny or embezzlement from the mail.

The act of *March 3d*, 1825, provides that if any person shall rob any carrier of the mail of the *United States*, or other person entrusted therewith, of such mail, or of part thereof, such offender or offenders shall, on conviction, be imprisoned not less than five years, nor exceeding ten years; and if convicted a second time of a like offence, he or they shall suffer death; or if, in effecting such robbery of the mail the first time, the offender shall wound the person having custody thereof, or put his life in jeopardy, by the use of dangerous weapons, such offender or offenders shall suffer death. And if any person shall attempt to rob the mail of the *United States*, by assaulting the person having custody thereof, shooting at him, or his horse or mule, or threatening him with dangerous weapons, and the robbery is not effected, every such offender, on conviction thereof, shall be punished by imprisonment, not less than two, nor exceeding ten years. . . And if any person shall steal the mail, or shall steal, or take from, or out of, any mail, or from or out of, any post-office, any letter or packet; or if any person shall take the mail, or any letter or packet therefrom, or from any post-office, whether with or without the consent of the person having custody thereof, and shall open, embezzle, or destroy any such mail letter, or packet, the same containing any article of value or evidence of any debts due, demand, right or claim, or any release, receipt, acquittance, or discharge, or any other article, paper, or thing mentioned, as described in the twenty-first section of this act: or if any person shall, by fraud or deception, obtain from any person having custody thereof, any mail, letter, or packet, containing any article of value, or evidence thereof, or either of the writings referred to, or next above mentioned, such offender or offenders, on conviction thereof, shall be imprisoned, not less than two, nor exceeding ten years.

And if any person shall take any letter, or packet, not containing any article of value or evidence thereof, out of a post office, or shall open any letter or packet which shall have been in a post office, or in custody of a mail carrier, before it shall have been delivered to the person to whom it is directed, with design to obstruct the correspondence, to pry into another's business or secrets, or shall secrete, embezzle, or destroy, any such mail, letter, or packet, such offender upon conviction, shall pay for every such offence, a sum not exceeding five hundred dollars and be imprisoned not exceeding twelve months. (*Act of 3d March*, 1825, *sect.* 22.) *Peters's Statutes at Large*, Vol. IV. p. 107–108.

If any person shall rip, cut, tear, burn, or otherwise injure, any valise, portmanteau, or other bag, used, or designed to be used, by any person acting under the authority of the postmaster general, or any person in whom his powers are vested, in a conveyance of any mail, letter, packet, or newspaper, or pamphlet, or shall draw, or break any staple, or loosen any part, lock, chain or strap, attached to, or belonging to any such valise, portmanteau, or bag with intent to rob, or steal any mail, letter, or packet, newspaper or pamphlet, or to render either of the same insecure, every such offender, upon conviction, shall for every such offence, pay a sum not less than one hundred dollars, nor exceeding five hundred dollars, or be imprisoned not less than one year, nor exceeding three years, at the discretion of the court, before whom such conviction is had. Every person who, from and after the passage of this act, shall procure, and advise, or assist, in the doing or perpetration of any of the acts or crimes by this act forbidden, shall be subject to the same penalties and punishments as the persons are subject to who shall actually do or perpetrate any of the said acts or crimes according to the provisions of this act. *Ibid.* *sect.* 23.

If any person employed in any of the departments of the post office establishment, shall unlawfully detain, delay or open, any letter, packet, bag, or mail of letters, with which he shall be entrusted, or which shall have come to his possession and which are intended to be conveyed by post; or if any person shall secrete, embezzle or destroy, any letter or packet entrusted to such persons as aforesaid, and which shall not contain any security for, or assurance relating to money as hereinafter described, every such offender being thereof duly convicted shall for every such offence be fined, not exceeding three hundred dollars, or imprisoned not exceeding six months, or both, according to the circumstances

* Stealing letters sent by the post was felony without benefit of clergy, by 7 *Geo.* III. c. 50. repealed by 7 *Will.* IV. & 1 *Vict.* c. 32.

and aggravations of the offence. And if any person, employed as aforesaid, shall secrete, embezzle, or destroy, any letter packet, bag, or mail of letters with which he or they shall be entrusted or which shall have come to his or her possession, and are intended to be conveyed by post, containing any bank note, or bank post-bill, bill of exchange, warrant of treasury of the *United States*, note of assignment of stock in the funds, letters of attorney for receiving annuities or dividends, or for selling stock in the funds, or for receiving the interest thereof, or any letter of credit, or note for, or relating to, payments of moneys, or any bond, or warrant, draft, bill, or promissory note, covenant, contract, or agreement whatsoever, for, or relating to the payment of money, or the delivery of any article of value, or the performance of any act, matter or thing, or any release, acquittance, or discharge of or from any debt, covenant or demand, or any part thereof; or any copy of any record of any judgment, or decree, in any court of law, or chancery, or any execution which may have issued thereon, or any copy of any other record, or any other writing of value, or any writing representing the same; or if any such person employed as aforesaid, shall steal, or take, any of the same out of any letter, packet, or bag, or mail of letters that shall come to his or her possession, such person, shall on conviction for any such offence be imprisoned, not less than ten years, nor exceeding twenty one years. And if any person who shall have taken charge of the mails of the *United States*, shall quit or desert the same before such person delivers it into the post-office kept at the termination of the rout, or some known mail carrier, or agent of the general post-office, authorized to receive the same, every such person so offending shall forfeit, and pay a sum not exceeding five hundred dollars for every such offence. And if any person concerned in carrying the mail of the *United States*, shall collect, receive or carry any letter, packet, or shall cause or procure the same to be done contrary to this act, every such offender shall forfeit and pay for every such offence, a sum not exceeding fifty dollars. Act 3d March, 1825., sect. 21.

If any person shall buy, receive, or conceal, or aid in buying, receiving, or concealing any article mentioned in the twenty-first section of this act, knowing the same to have been stolen or embezzled from the mail of the *United States*, or out of any post-office, or from any person having the custody of the said mail, or the letters sent, or to be sent therein; or if any person shall be accessory after the fact, to any robbery of the carrier of the mail of the *United States*, or other person entrusted therewith, of such mail, or of part thereof, every person so offending shall, on conviction thereof, pay a fine not exceeding two thousand dollars, and be imprisoned and confined to hard labour for any time not exceeding ten years. And such person or persons so offending may be tried and convicted without the principal offender being first tried, provided such principal offender has fled from justice, or cannot be found to be put upon his trial. Sect. 45. *Peters' U. S. Statutes at Large*, vol. iv. p. 107-8.

As to what constitutes a robbery of the mail and putting the life of the carrier or person entrusted therewith in jeopardy, see *U. S. v. Hare*, *U. S. C. C. Balt. May*, 1818. 2 *Wheeler's Cr. Cases*, 12. *U. S. v. Wood*, *Philadelphia*, June, 1818. *U. S. v. Barnard*, *Trenton*, 1819. *U. S. v. Amehiser*, *Balt.* 1823, cited in *Wharton's Am. Crim. Law*, 574, note.

As to an indictment under the 23 section for advising to rob the mail, see *U. S. v. Mills* 7 *Peters' S. C. Rep.* 18.

As to what constitutes a dangerous weapon under the 22d section of the act, see *U. S. v. Wood*, 3 *Wash. Rep.* 440.

All persons present at the commission of the robbery consenting thereto, aiding, assisting, or abetting therein, or in doing any act which is the constituent of the offence, are principals. The word 'rob' in the 22d section is used in its common law sense. The word 'jeopardy' means a well grounded apprehension of danger to life in case of refusal to yield to threats or resistance. *U. S. v. Wilson*, 1 *Baldw. R.* 102.

It is unnecessary to give a particular description of a letter charged to have been secreted and embezzled by a postmaster under the 21st section of the act of March 3d, 1825, nor to describe the bank notes particularly enclosed in the letters, *U. S. v. Lancaster*, 2 *McLean*, R. 431. It is enough to state the letter came to the hands of the postmaster in the words of the statute without showing where it was mailed, or on what route it was conveyed. *Id.* To convict a person of stealing a letter, &c. who is employed in the department, such employment must be distinctly alleged and proved. *U. S. v. Nott*, 1 *McLean Rep.* 499.

Offences under our post-office law are not felonies, but misdemeanors; and in such cases less nicety in the form is required than in indictments for felonies in *England*. *U. S. v. Lancaster*, cited *supra*. See also *U. S. v. Martin*, 2 *McLean's Rep.* 256.

Larcenies from ships or docks, wharfs or quays.—By 7 & 8 Geo. IV. c. 29. s. 17, (amended as to punishment, by 7 Will. IV. & 1 Vict. c. 90.) any person stealing any goods or merchandize in any vessel, barge, or boat, in any port of entry, or discharge, or upon any navigable river or canal,* or in any creek belonging to, or communicating with, any such port, river, or canal, or stealing any goods or merchandize from any deck, wharf, or quay, adjacent to any such port, river, canal, or creek, shall be transported for not more than fifteen years, or less than two years, or imprisoned for not more than three years, with hard labour, (if the court thinks fit,) and solitary confinement.†

Having now considered the several kinds of larcenies, whether simple or with aggravation, we must refer, under the same head, to that offence so closely connected with larceny itself, of *receiving stolen property, knowing the same to have been stolen*. This offence was, at common law, a misdemeanor only, but was afterwards made felony by several statutes, now repealed, (by 7 & 8 Geo. IV. c. 27.) and by 7 & 8 Geo. IV. c. 29. s. 54, it is provided, that if any person shall knowingly receive any chattel, money, or valuable security, or other property whatever, the stealing or taking whereof shall amount to felony, either by common law or by virtue of that act, every such receiver shall be guilty of felony,‡ and may be indicted either as an accessory after the fact, or for a substantive felony, and however convicted, shall be liable, at the discretion of the court, to be transported for a term not exceeding fourteen years, nor less than seven years, or imprisoned (with or without hard labour, and solitary confinement) for a term not exceeding three years, and if a male, to be once, twice or thrice whipped, if the court think fit, in addition to the imprisonment. By sect. 55, if any person shall knowingly receive any chattel, money, or valuable security, or other property whatever, the stealing, taking, obtaining, or converting whereof, is made an indictable misdemeanor, by the act, every such receiver shall be guilty of a misdemeanor, and transported for seven years, or imprisoned, (with or without hard labour, and solitary confinement,) for not more than two years, and if a male, once, twice, or thrice whipped, if the court think fit, in addition to the imprisonment. And by sect. 60, where the stealing of any property whatever is punishable by that act, on summary conviction, either for every offence, or for the first and second offences only, or for the first offence only, the guilty receiver shall be liable for every first, second, or subsequent offence of receiving, to the forfeiture and punishment, to which a person guilty of a first, second, or subsequent offence of stealing or taking such property is, by the said act, made liable. 4 Steph. Comm. B. VI. c. 5.

If any person, within any of the places under the sole and exclusive jurisdiction of the *United States*, or upon the high seas, shall take and carry away with an intent to steal or purloin the personal goods of another, such person so offending, his counsellors, aiders, and abettors, (knowing of any privy to the offences aforesaid,) shall, on conviction, be fined not exceeding the fourfold value of the property so sold, embezzled, or purloined; the one moiety to be paid to the owner of the goods, and the other moiety to the informer and prosecutor, and be publicly whipped, not exceeding thirty-nine stripes. Act 30th April, 1790, sect. 16. 1 Peters's St. at. Large; 114.

By act 23d August, 1842, the punishment for the offences mentioned in the preceding article, upon conviction thereof, shall be by fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, or by both according to the nature and aggravation of the offence.

By the act of 28th February, 1839, the punishment of whipping and the pillory was abolished. The offence of larceny is not punishable under this act, unless committed in a place under the sole and exclusive jurisdiction of the *United States*; and, to bring the case within the statute, there must be an averment of such sole and exclusive jurisdiction in the indictment. *U. S. v. Davis*, 5 Mason's C. C. R. 356.

Where a larceny is committed in a place not under the sole and exclusive jurisdiction of the *United States*, it may yet be punishable under the third section of the act of 1825, ch. 276. *Ibid.*

Offences are punishable under that section according to the State laws where they are committed, under circumstances or in places in which, before that act, no court of the *United States* had authority to punish them. *Ibid.*

* The luggage of passengers, by steamboat, comes under the description of "goods," within this provision. *Reg. v. Wright*, 7 Car. & P. 159.

† Theft, on navigable rivers, to the value of 40s. was felony, without benefit of clergy, by 24 Geo. II. c. 45. now repealed, by 7 & 8 Geo. IV. c. 27.

‡ It is immaterial that the intention with which he receives them is for the purpose of concealment, and not for profit. *R. v. Richardson*, 6 Car. & P. 335. *Rex v. Davis*, *Id.* 177.

Larceny committed on board of an American ship in an enclosed dock in a foreign port, is not punishable under the statute of 30th April, 1790, ch. 9, sect. 16. *U. S. v. Hamilton*, 1 *Mason's C. C. Rep.* 152.

The feloniously stealing goods which had been cast away from a vessel wrecked at *Rockaway Beach*, the goods when so taken having been above high-water mark in the county of *Queen's*, in the state of *New York*, was an offence under the 9th section of the act entitled, "An act more effectually to provide for the punishment of certain crimes against the *United States*," passed 3d March, 1825. *U. S. v. Coombs*, 12 *Peters's R.* 72.

Money, and bank-notes, and coin, are personal goods within the meaning of this section respecting stealing and purloining on the high seas. *U. S. v. Moutan*, 5 *Mason's Rep.* 537; see *U. S. v. Davis*, 5 *Mason's R.* 356.

The taking, by the defendant, of an article delivered to him as a servant to remove from one room to another, and converting the same to his own use, is larceny, and not embezzlement. *U. S. v. Clew*, 4 *Wash. C. C. R.* 700. *Lewer v. Com.* 15 *S. & R.* 93.

If the finder of bank-notes convert them to his own use, with the full knowledge of the owner, it is not larceny, but a civil injury. *Porter v. Tennessee, Mart. & Yerg.* 226.

A *bona fide* finder of an article lost, as a trunk containing goods lost from a stage-coach, and found on the highway, is not guilty of larceny by any subsequent act in secreting or appropriating to his own use the article found. *People v. Anderson*, 14 *Johns.* 294. *Com. v. Snelling*, 4 *Binn. R.* 379.

The finder of lost goods, is bound by the laws of *Vermont* to advertise them. If he conceal or convert them, he is chargeable with larceny. *State v. Jenkins*, 2 *Tyler*, 379.

Larceny cannot be committed of goods and chattels found in the highway where there are no marks by which the owner can be ascertained. *Tyler v. People, Breese*, 227.

One taking staves, though under a contract with the owner to have half for making them, may be guilty of larceny. *State v. Jones*, 2 *Dev. & Bat.* 544.

If a person finds personal property on the highway, knowing, or having the means of knowing the owner, and does not restore it, but converts it to his own use, such conversion will constitute larceny. *State v. Wetson*, 9 *Conn. Rep.* 527.

Obtaining goods by a fraudulent purpose, the vender delivering them with an intention to part with the property in the goods, in no case constitutes a larceny. *Mowrey v. Walsh*, 8 *Cow.* 238.

False pretences and artifices in obtaining another's property by one entertaining a felonious design, will constitute larceny, provided it does not appear that a temporary trust or possession was extended to the party. *Wilson v. State*, 1 *Port.* 118.

A larceny may be committed of goods obtained from the owner by delivery if obtained, *animo furandi*. *State v. Gorman*, 2 *N. & M.* 90.

It is constructive larceny in *Pennsylvania* to induce one by fraudulent means to part with the property in goods; this description is confined to the possession of goods. *Lewer v. Commonwealth*, 15 *S. & R.* 93.

Under an indictment for stealing a horse, the jury were charged that the question was, the intention to steal at the time of the taking: an indictment as for obtaining goods, &c., under false pretences would not lie, it seems, unless there were a consent of the owner to the taking. *State v. Smith*, 2 *Tyler*, 272. *Id.* 352.

Larceny may be committed on one's own property, where the intent is to charge another with the value of it. *Palmer v. People*, 10 *Wend.* 165. *The People v. Wiley*, 3 *Hill, R.* 194.

Upon an indictment in *Virginia* for stealing a free mulatto boy, knowing at the time that he was free, it was held, that the offence was complete under the statute, by kidnapping without the actual sale: Held also, that the stealing a free negro with felonious intent to appropriate him, was criminal, whether the person so stealing him knew him to be free or not, and that an averment of knowledge in the indictment need not be proved, but might be regarded as *surplusage*: Held also, that the consent of the boy, if given, he being only of eight years of age, would not excuse the offence. *Davenport's case*, 1 *Leigh*, 558.

A servant employed to drive the wagon of a common carrier cannot claim the exemption of his master in case of a fraudulent abstraction of goods entrusted to his care, which would not amount to technical larceny in the master. *Commonwealth v. Brown*, 4 *Mass.* 580.

If a hostler in charge of a horse takes him away, *animo furandi*, it is a felony; if he takes him only to use him, and then returns him again, it is a breach of trust. *State v. Self*, 1 *Bay*, 242.

The act of *South Carolina* of March 5th, 1737, makes it larceny to steal a bank-note, if it be proved to be a genuine bank-note. *State v. Tillery*, 1 *N. & M.* 9; *State v. Casadot*, *ib.* 91.

The statute of *Alabama*, making "promissory notes" the subject of larceny, does not include "bank-notes." An indictment, alleging the larceny of "bills of credit," is bad, the State having no authority to issue such bills. *Culp v. State*, 1 *Porter*, R. 33.

An indictment will not lie for larceny of "bills of credit" on the *United States' Bank* of amount less than such bank is authorized by its charter to issue. *Ib.* 33.

Invalid bonds, notes, &c. are not the subject of larceny. *Wilson v. State*, *Ib.* 118.

Money and bank-notes and coin are personal goods within the meaning of the 16th section of the *Crimes Act* of 1790, c. 9, respecting stealing and purloining on the high seas. 1 *Peters's U. S. Stat. at Large*, 114. *U. States v. Moulton*, 5 *Mason*, 537.

"Personal goods," under the act of *Congress* of 1790, c. 9, do not include *choses in action*, the latter not being the subject of larceny at common law. *U. States v. Davis*, 5 *Mason*, 356.

At common law a *chose in action* is not the subject of larceny. *Culp v. State*, 1 *Port.* 33.

Doves, being animals *feræ naturæ*, cannot be subjects of larceny, unless when in the custody of the owner, as in a dove-house. *Commonwealth v. Chace*, 9 *Pick.* 15. So of bees. *Wallis v. Mease*, 3 *Binn.* R. 546.

A martin in a trap in the woods cannot be a subject of larceny while it remains in the trap. *Norton v. Ladd*, 5 *N. Hamp.* R. 203.

A mere letter is not a subject of larceny, and taking it away is not a criminal offence. *Payne v. People*, 6 *Johns.* 103.

An indictment lies for taking skins from an Indian camp in the absence of the Indians. *Pennsylvania v. Becomb*, *Addis.* 386.

Under the act of *South Carolina* of 1826, corn growing in a field is a subject of larceny although not previously severed from the soil. *State v. Stephenson*, 2 *Bailey*, 334.

MASSACHUSETTS.—For the statutes, see *Mass. Rev. Stat. ch.* 126. §§ 11. 12. 13. 14. 15. 16. 17. 18. 19. *Ed.* 1836. *Supp. to Rev. Stat. c.* 31. p. 112. *ed.* 1839. Where several packages of goods were delivered to a common carrier, to be transported in a body, an abstraction of one entire package, constitutes a taking in the sense of larceny. *Com. v. Brown*, 4 *Mass. R.* 580. *Dame v. Baldwin*, 8 *Id.* 518. So where a miller having received barilla to grind, fraudulently retained part of it, returning a mixture of barilla and plaster of Paris, it was held to be larceny. *Com. v. James*, 1 *Pick. R.* 375. So articles of clothing on a dead body, cast ashore from a wrecked vessel, are the subjects of larceny. *Morison v. Sayward*, 13 *Id.* 402.

A person stealing goods in one State and bringing them into another, may be indicted in the latter for the larceny. *Com. v. Culling*, 1 *Mass. R.* 116. *Com. v. Andrews*, 2 *Id.* 14. So also in *N. Y.* see *post.* So also in *Connecticut*, *Rex v. Peat*, *Root's R.* 69. *The State v. Ellis*, 3 *Conn. R.* 185. So in *Vermont*, *The State v. Bartlett*, 11 *Verm. R.* 650. So in *Ohio*, *The State v. Hamilton*, 11 *Ohio R.* 351. *Vide U. S. v. Davis*, 5 *Mason*, 256. *Sed aliter* in *N. C.* *The State v. Brown*, 1 *Hayes*, 160. See also *Simmons v. Com.* 5 *Binn. R.* 617, where the subject is much discussed. *The State v. Knight*, 1 *Tayl. R.* 65. *The People v. Gardner*, 2 *Johns. R.* 477. *The People v. Schenk*, *Id.* 479. This question is still open to much difficulty. In some States it has been settled by legislation. See *post.* p. 516^o.

So also, may the receiver of such stolen goods, be indicted in the latter State for receiving them. And one aiding and abetting in a larceny in one county, and afterwards concerned in the possession and disposal of the stolen property, in another county, though the goods were removed to the latter county, without his agency or consent, may be convicted of larceny in this latter county. *Com. v. Dewitt*, 10 *Mass. R.* 154.

The offence of breaking and entering "a house not occupied as a dwelling house," in the night time, and stealing therein property of less value than \$100, is only a simple larceny, and therefore to be punished with a maximum of one year's imprisonment in the State prison. *Wilde v. The Com.* 2 *Metc.* 408. So of stealing in a dwelling house, shop, &c. in the night time: though by the *Rev. Stat.* the same offence, if committed in the day time, is made an aggravated larceny. *Com. v. Tuck*, 20 *Pick. R.* 356. *Hopkins v. Com.* 3 *Metc.* 460. *Devoe v. Com. Id.* 316. *Evans v. Com.* 3 *Id.* 453. An indictment for stealing in a dwelling house, shop, &c. in the day time, property of less value than \$100, must contain the averment of *day time*, or it will only be good as an indictment for a simple larceny. *Haggett v. Com.* 3 *Metc.* 357. *Hopkins v. Com. Id.* 460.*

* It has been held in some cases, that when the thing stolen is not there in the usual course, and is not such as is ordinarily kept there, stealing it, is not larceny, "in a dwelling

In an indictment for larceny, the articles alleged to be stolen, must be averred to be "of the goods and chattels," of the right owner, if known; or of the goods and chattels of some person unknown. *Com. v. Morse*, 14 *Mass. R.* 217, 218. *Com. v. Manley*, 12 *Pick. R.* 173.

On an indictment for larceny, if value is alleged of part of the articles stolen, and none of the remainder, though charged to consist of coin, judgment will be arrested as to that part to which no value is ascribed. *Com. v. Smith*, 1 *Mass. R.* 245.

A count in an indictment, charging that the defendant broke and entered a shop, with intent to commit a larceny, and did then and there commit a larceny, is not bad for duplicity. *Com. v. Tuck*, 20 *Pick. R.* 356.

The same, of a charge of breaking and entering a dwelling-house, and committing a larceny. *Com. v. Hope*, 22 *Pick. R.* 1.

An indictment for larceny, charging the goods stolen to be the property of A. is not supported by evidence that they were the property of A. & B. who were partners. *Com. v. Trimmer*, 1 *Mass. R.* 476.

On a charge of shop breaking and larceny, possession of part of the stolen goods is *prima facie* evidence, both of the larceny of the whole property stolen, and of the breaking and entering. *Com. v. Millard*, 1 *Mass. R.* 6.

The word "*barilla*" is good in an indictment, as a denomination of a subject of larceny. *Com. v. Jones*, 1 *Pick. R.* 375.

Under the *stat.* of 1784, c. 66. § 1. providing against the stealing of "any note or certificate of any bank, or any public office, securing the payment of money to any person, or certifying that the same is due," an indictment was held sufficient which charged the defendant with stealing a "bank note" of a certain value, without a more particular description of the note. *Com. v. Richards*, 1 *Mass. R.* 337.

An indictment under the same *stat.* c. 66. § 8. for breaking a "store" is not sufficient, although the words of the *stat.* are, "warehouse, shop, or other building whatsoever," unless it aver that the store is a building. *Com. v. M'Monagle*, 1 *Mass. R.* 517. *Sed aliter*, under *stat.* 1804. c. 143. § 6. which contains the word *store*. *Com. v. Lindsey*, 10 *Mass. R.* 153.

In an indictment for breaking and entering an office in the night time, under the last mentioned *stat.* c. 143. § 4, it is not necessary to aver that the office is "not adjoining to, or occupied with a dwelling-house." *Devoe v. Com.* 3 *Metc. R.* 316. *Evans v. Com.* *Id.* 453. *Phillips v. Com.* *Id.* 588. *Sed vide* also *Com. v. Tuck*, 20 *Pick. R.* 356.

Stealing in the night time, in any dwelling-house, &c., was not provided for in the *Rev. Statutes*. (See *Com. v. Tuck*, *cit. sup.* and *Hopkins v. Com.* 3 *Metc. R.* 460.) but this omission was supplied by the act of Feb. 18, 1843. See *Tully v. Com.* 4 *Metc. R.* 357.

NEW YORK.—The statutes of *New York* will be found in 2 *Rev. Stat.* 679. §§ 63, 64, 65. 2 *Id.* 690, §§ 1, 66, 67, 68, 69, 70.

When the personal property of one is through inadvertence left in the possession of another, and the latter *animo furandi* conceals it, he is guilty of larceny; knowing it to be the property of another, his possession will not protect him from the charge of felony. *The People v. McGarren*, 17 *Wend. R.* 460. *The People v. Cogdell*, 1 *Hill R.* 94.

To constitute larceny the possession of the property must be acquired *animo furandi*. *The People v. Anderson*, 14 *Johns. R.* 294.

A mere intention existing afterward to convert the property, will not constitute the offence of larceny. *Id.*

One who obtains the bailment of goods fraudulently, intending to deprive the owner of his property, may be convicted of larceny under an indictment alleging that he felon-

house," &c., as linen left in a shop to be sent to a seamstress; *Anony.* 8 *Mod.* 165; or to a laundress. 2 *East's P. C.* 642; or a watch left at a watchmaker's shop to be repaired; *Stone's case*, 1 *Leach, C. C.* 334; 2 *East's P. C.* 643. *S. C.*; or a coachman's coat hung up in a stable, that not being the usual place of keeping it; *Sea's case*, 1 *Leach, C. C.* 304; 2 *East, P. C.* 643. *S. C.*; or uncurrent money on board of a ship in port; *Grimes's case*, 2 *East's P. C.* 647; *Foster*, 78, 79; but such a construction seems to be inconsistent with the plain meaning of the law, and the reason of the exception is not very apparent. Where the thing stolen was left in a house by mistake, and was such as might in the ordinary course, be in the house, the stealing of it from the house was held to be larceny in a dwelling house, within the construction of the statute against such larceny. *Carroll's case*, *Mood. Cav.* 89; *Mass. Com. Rep.* 25.(n)

niously stole, took, and carried away the property, &c. *Cary v. Hesterling*, 1 Hill's R. 311.

In the prosecution of an indictment for a larceny, if the crime be established in respect to a single article, though the indictment describe several, the defendant may be convicted. 3 Hill's R. 194.

A trial and acquittal for robbery is a bar to an indictment for larceny where the property alleged to have been taken is the same. *The People v. McGowan*, 17 Wend. R. 386.

The rule in such case is, that if the former indictment might have been sustained by proof which would be sufficient to sustain the second indictment, a *prima facie* case is made out for the prisoner by the production of the record of acquittal, and without further proof on the part of the prosecution, he is entitled to be discharged. *Id.*

On the trial of an indictment for stealing foreign bank bills, it is incumbent on the prosecutor to produce at least *prima facie* evidence of the existence of such banks and of the genuineness of the bills. *The People v. Cary*, 12 Wend. R. 547.

As to the bills themselves, it is not necessary to prove by positive testimony that the names subscribed to them are in the handwriting of the officers of such banks; but it should at least be proved by a witness familiar with the bills, that he believed them to be genuine. *Id.*

By the *Rev. Stat. 2 Rev. St.* 698, § 4, it is enacted that every person who shall feloniously steal the property of another in any other state or county, and shall bring the same into this state, may be convicted and punished in the same manner as if such larceny had been committed in this State; and in every such case such larceny may be charged to have been committed in any town or city into or through which such stolen property shall have been brought. See *The People v. Burke*, 11 Wend. R. 129. *The People v. Gardner*, 2 Johns. R. 477, and the remarks of the Ch. Just. on this latter case in *The People v. Burke*.

The principle established by the *N. Y. Stat.* was applied without the intervention of a statute in *Com. v. Culling*, 1 Mass. R. 116, and *Com. v. Andrews*, 2 Id. 14. See this note, p. 516°.

The true construction of the *Stat. Sess. 42. ch. 246*, § 4. providing that every person who shall be a second time convicted of petit larceny shall be adjudged to imprisonment in the State prison, is that the second offence must be committed after a conviction for the first, in order to warrant an enhanced penalty. It is not enough that there be two successive petit larcenies by the same person which are severally and successively prosecuted to conviction; though the second indictment charge the first conviction as a part of the crime. *The People v. Butler*, 3 Cow. R. 347.

An indictment for petit larceny, charging it as a second offence, is good, though in respect to the first offence, it merely alleges that the defendant was convicted, &c. without averring in terms a judgment or sentence, and though it does not specify the property to which the first offence is related, or the person from whom it was stolen: *aliter*, if the indictment omits to aver that the defendant had been pardoned, or otherwise discharged from the first conviction, before the commission of the second offence. *Stevens v. The People*, 1 Hill's R. 261.

NEW JERSEY.—For the statute, see *Elm. Dig.* 107, 108.

If one takes the goods of another out of the place where they were put, though he is detected before they are actually carried away, the larceny is complete. *The State v. Wilson*, Coxe R. 439.

A prisoner cannot be tried by two justices of the peace on a charge for larceny, "without an accusation in writing." See *Blm. Dig.* 107, § 32. See *Statutes of the State of N. J.* revised in 1847, tit. VIII. Crimes and Punishments, p. 256.

PENNSYLVANIA.—The Statutes of *Pennsylvania* will be found in the Act of April 5, 1790, sect. 3. 2 *Smith's L.* 531. *Stroud's Purdon*, 956. 6th ed. *Id.* 1051. 7th ed. sects. 4, 5. 9. Act of 21 March, 1806. 4 *Smith's L.* 334. *Stroud's Purd.* 958, sects. 1, 2. Act of 30 January, 1810. 5 *Smith's L.* 81. *Stroud's Purd.* 958. 6th ed. 1054. 7th ed. as to bank notes amended by Act of 10 March, 1817, sect. 1. 6 *Smith's L.* 412. *Stroud's Purd.* 959, 6th ed. 1055, 7th ed. The Act of 29 April, 1844, sect. 2. *Pamph. L.* 513, enacts that in all cases where taxes are assessed and paid on dogs in *Philadelphia* and *Allegheny* counties, the said dogs shall be considered as personal property.

If the owner of goods part with the possession, for a particular purpose, and the person who receives the possession avowedly for that purpose, has a fraudulent intention to

make use of the possession, as the means of converting the goods to his own use, and does so convert them, it is *larceny*. But if the owner intends to part with the *property*, and delivers possession absolutely, and the purchaser receives the goods for the purpose of doing with them what he please, it is not larceny, although fraudulent means may have been used to induce him to part with them. *Lewer v. Com.* 15 S. & R. 93. 97.

Taking is a material part of larceny, but it may be presumed from the possession of the property. *Penn v. Myers*, Add. R. 320. *Id. v. Becomb*, id. 386.

At common law, larceny cannot be committed of a dog. Nor does the 4th sect. of the act of April, 1790, extend the crime beyond its ancient limits. *Findley v. Bean*, 8 S. & R. 571. But see the local act of April 29, 1844, § 2, *sup*.

Under the act of April 5th, 1790, an indictment for stealing bank notes must lay them as promissory notes for the payment of money, and therefore an indictment for stealing a "ten dollar note of the President, Directors and Company of the Bank of the United States," is bad. *Com. v. Boyer*, 1 Binn. R. 201.

Under the Act of 1810, an indictment for stealing bank notes must aver in general that they were issued by a bank incorporated by law, or name the bank, and aver that it was incorporated; or show in some sufficient manner, that the notes were lawful, and therefore an indictment charging the defendant with stealing bank notes generally, describing them as "promissory notes for the payment of money," is bad. *Spangler v. Com.* 3 Binn. R. 533.

Under the act of Assembly of 1817, however, it is not necessary to state that the bank was duly incorporated. *McLaughlin v. Com.* 4 Raw. R. 464.

An indictment for stealing three promissory notes for the payment of money, commonly called bank-notes, "on the Bank of the United States," was held to be good. *Id.* 464.

An indictment for stealing "a bank-note of the Bank of Baltimore," without describing it as a promissory note for the payment of money, was held bad under the act of 1790. *Com. v. McDowell*, 1 Browne, R. 360.

County orders are not bills of exchange, and are not enumerated in the act of 5th April, 1790. When a statute creates a felony, to authorize a judgment on conviction, the indictment must conclude *contra formam statuti*. *Warner v. Com.* 1 Barr. R. 154.

VIRGINIA.—For the statutes see *Rev. Code*, c. 171, § 6; *Supp. to R. C.* 295. 308; *Rev. Code*, ch. 152, § 1; *Rev. Code*, ch. 154, § 8; *Rev. Code*, ch. 160, § 7.

A prosecution may be maintained under the Virginia act of 1806 for stealing a bank-note of any other State. *Cummings v. Commonwealth*, 2 Virg. Cas. 128.

The Virginia act of 1806, which made it felony to steal any "bank-note," embraced any available *choses in action* bearing that name; nor is the meaning of the term restricted by the 8th section of the act of 1819. *Pomeroy v. Commonwealth*, *Id.* 342.

In the construction of this act of 1806 it has been held, that a general description of a bank-note, as one for a specified sum and current within the United States, without mentioning the name of the bank by which it was issued, is sufficient in an indictment for the larceny thereof. *Id.* 128.

On a prosecution for larceny of bank-notes it is not indispensably necessary to produce them on the trial. *Moore v. The Com.* 2 Leigh, R. 701.

No other possession of bank-notes, &c., mentioned in this act; is necessary to render them the subject of larceny than is required in the case of goods: and if the expression, "from the possession" means an actual possession, it can only apply to taking by robbery. *Angel v. The Com.* 2 Virg. Cases, 228.

CHAPTER XLIV.

CONCERNING THE DIVERSITIES OF GRAND LARCINIES AMONG THEMSELVES IN RELATION TO CLERGY.[1]

ALTHO the punishment of all grand larciny by the law is death, (α) yet in relation to clergy, which is a kind of relaxation of the severity of the judgment of the law, there is difference made by acts of parliament between some larcinies and others.

By the antient privilege of the clergy, and by the confirmation and

(α) In antient times it was in some cases punished with the loss of a thumb; in others with pillory, and the loss of an ear. *Corone* 434. *Britt.* 24. b.

[1] This has now become a title of curiosity only, the *Stat. 7 & 8 Geo. IV. c. 28*, having enacted by *Sect. 6*, that benefit of clergy with respect to persons convicted of felony shall be abolished: and by *Sect. 7*, that no person convicted of felony shall suffer death, unless for some felony which was excluded from the benefit of clergy before or on the first day of the then session of Parliament, (*Feb. 8, 1827*), or which should be made punishable with death by some statute passed after that day.

This benefit of clergy constituted in former times so remarkable a feature in criminal law, and a general acquaintance with its nature is still so important for the illustration of the books, that it may be desirable to subjoin farther notice on the subject. It originally consisted in the privilege allowed to a clerk in orders, when prosecuted in the temporal court, of being discharged from thence and handed over to the court Christian, in order to make canonical purgation, that is, to clear himself on his own oath, and that of other persons as his compurgators, (*vide Reeves's Hist. Eng. L. vol. 2, pp. 14, 134; 25 Edw. III. st. 3, 4*), a privilege founded, as it is said, upon the text of Scripture, "Touch not mine anointed, and do my prophets no harm." In England this was extended by degrees to all who could read, and so were capable of becoming clerks. (*Reeves ubi supra et vol. 4, p. 156*.) But by *4 Hen. VII. c. 13*, it was provided, that laymen allowed their clergy should be burned in the hand, and should claim it only once; and as to the clergy, it became the practice in cases of heinous and notorious guilt, to hand them over to the ordinary, *absque purgatione facienda*, the effect of which was, that they were imprisoned for life. *4 Bl. Com. 369*. Afterwards, by *18 Eliz. c. 7*, the delivering over to the ordinary was abolished altogether, but imprisonment was authorized in addition to burning in the hand. By *5 Ann. c. 6*, the benefit of clergy was allowed to those entitled to ask it, without reference to their ability to read. By *4 Geo. I. c. 11; 6 Geo. I. c. 23*, and *19 Geo. III. c. 74*, the punishment of transportation was authorized in certain cases, in lieu of burning in the hand; and by the act last mentioned the court might impose, instead of burning in the hand, a pecuniary fine, or (except in manslaughter) order the offender to be whipped. As to the nature of the offences to which the benefit of clergy applied, it had no application except in capital felonies, and from the more atrocious of these it had been taken away by various statutes prior to its late abolition by *7 & 8 Geo. IV. c. 28, s. 6*. As the law stood at the time of that abolition, clerks in order were, by force of the benefit of clergy, discharged in clergyable felonies without any corporal punishment whatever, and as often as they offended, and the only penalty being a forfeiture of their goods; and the case was the same with peers and peeresses, (as to whom see *4 & 5 Vict. c. 22*), but they could claim it only for the first offence. As to commoners also, they could have benefit of clergy only for the first offence, and they were discharged by it from the capital punishment only, being subject on the other hand, not only to forfeiture of goods, but to burning in the hand, whipping, fine, imprisonment, or in certain cases transportation in lieu of the capital sentence. *4 Bl. Com. p. 371; 4 Steph. Com. 436*.

special concession of the statute of 25 *E. 3. cap. 4.* the benefit of clergy was to be allowed in all treasons and felonies touching other persons than the king himself and his royal majesty.

Therefore as well in grand larciny, as in other felonies, clergy is to be allowd, where it is not taken away by some subsequent act of parliament.

And in all those cases, wherein it is so taken away, the indictment of such larciny or other felony must bring the case within the particular provision of those statutes, which in such cases takes away clergy, otherwise it is to be allowd, tho upon the evidence it may fall out, that the truth of the fact appears to be such, as is within the special provision of those statutes, that so take away clergy.

The statutes therefore, that take away clergy in some particular larcinies, are these that follow:

I. By the statute of 23 *H. 8. cap. 1.* "All persons found guilty of robbing any church or chapel, or other holy places, or of robbing any person in his dwelling-house, the owner or dweller of the same house, his wife, children or servants then being within, and put in fear and dread by the same, or for robbing any person in or near the highway, and those, that are found guilty of [518] abetting, procuring, helping, or counselling thereof, are exempt from the benefit of clergy, except such as are in the order of sub-deacon."

But upon this statute, tho there must be a stealing of goods, there need not be an actual breaking,^(b) for the stealing in the house, and putting the dweller, his wife or servants in fear, is robbery.

This statute extended only to a conviction by verdict or confession, but the statute of 25 *H. 8. cap. 3.* extended it to a standing mute, or challenging of above the number of twenty, or not directly answering, and also in case of an arraignment of a prisoner for a felony by bringing the goods he stole into one county, where he had first stolen the goods in a foreign county, in one of those manners mentiond in the statute of 23 *H. 8.* it gave power to the justices, upon examination of the fact, to put the prisoner from his clergy, but herein these things are observable: 1. It did not give power of examination, where the prisoner confessed the felony, but where he put himself upon his trial. 2. These examinations need not be recorded. 3. It did not extend only to those cases, where the prisoner was to be ousted of his clergy by force of the statute of 23 *H. 8.* and not to other cases, where he was to be ousted of his clergy by any subsequent statute, and therefore upon a robbery in a dwelling-house, where the owner, his wife or servants were within, and not put in fear, he could not be ousted of his clergy by

(b). In the case of robbing a church there must be an actual breaking to bring it within this statute; but by 1 *E. 6. cap. 12.* it is not necessary, for by that statute all felonious taking of goods out of church or chapel is ousted of clergy in all cases, except that of challenging above twenty, which defect is supplied by 3 & 4 *W. & M. cap. 9.*

examination in a foreign county upon the statute of 25 *H. 8. Anders. Rep. n. 158. p. 114. Co. P. C. cap. 52. p. 115.*

And therefore it was ruled in one *Cole's* case, a woman broke a dwelling-house in *Kent* in the day-time, none being there, and took away goods above the value of five shillings, and under the value of ten shillings, and carried the goods into *Sussex*, where [519.] she was indicted of larciny, and upon examination it appeared she had broke the house, and took the goods *ut supra*, being above five shillings and under ten shillings, and the jury found accordingly, and she was burnt in the hand, and discharged, for a man in such a case should have had his clergy in the county of *Sussex*, because tho the statute of 39 *Eliz. cap. 15.* take away clergy in the proper county, yet the statute of 25 *H. 8.* as to examination and taking away clergy in a foreign county extends only to felonies put out of clergy by 23 *H. 8.* or 5 & 6 *E. 6. cap. 10. coram domino* Bridgman in *Sussex ex libro suo.*

Again, the statutes of 23 *H. 8.* and 25 *H. 8.* did put accessaries *before* in such cases from the benefit of their clergy, as well as the principals, but as to *that* they are repealed by 1 *E. 6. cap. 12.*

But by the statute of 1 *E. 6. cap. 12.* tho the statute of 23 *H. 8.* be re-enacted as to the principals in the cases before mentioned, and also in cases of breaking houses to the intent to steal, (any person being therein, and put in fear) if convict by verdict or confession, or standing mute, and not directly answering, yet it hath this general clause, *and in all other cases offenders shall have benefit of their clergy*, and therefore by this act these changes were wrought.

1. In the cases, where clergy was excluded by this act, there is no saving for persons in holy orders.

2. It repealed the statute of 25 *H. 8. cap. 3.* as to examination in a foreign county, and for that reason the statute of 5 & 6 *E. 6. cap. 10.* was made, whereby that statute was revived, and stands now in force in every article thereof.

3. It restored clergy to accessaries *before* in all those cases, wherein they were ousted of clergy by 23 & 25 *H. 8.* and therefore the statute of 4 & 5 *Ph. & M. cap. 4.* was made, whereby accessaries *before* in murder, or robbery in any dwelling-house, or in or near the highways, are ousted of clergy upon conviction, outlawry, standing mute, or challenging above twenty, or not directly answering.

So that the statutes of 23 and 25 *H. 8.* stand at this day in force with this addition, that persons in holy orders stand equally [520] exempt from the benefit of clergy with others by the statute of 1 *E. 6.* as to cases within that statute.

But if only a stranger were in the house, and neither the owner, his wife, children or servants, this gives no discharge of clergy by the statute of 23 *H. 8.* and therefore there was provision in that case by the ensuing statute.

II. But the statute of 1 *E. 6. cap. 12.* breaking of any house by night or by day, any person being in the house or put in fear, if it

were with an intent to steal, tho nothing be stolen, a principal was excluded from clergy in all cases, except outlawry and challenging above twenty.

And also in a foreign county, yet if upon examination it be so found, he is ousted of clergy by the statute of 5 & 6 E. 6. cap. 10. but the accessory *before* or *after* is not ousted of clergy by this statute.

III. By the statute of 5 & 6 E. 6. cap. 9. "If any person be found guilty according to the laws of the land for robbing any person or persons in his or their dwelling houses, or dwelling-places, the owner or dweller, his wife, children or servants being within the same house or place, or in any place within the precincts thereof, such offender shall not be admitted to clergy, whether the owner or dweller, his wife or children, then or there being, shall be waking or sleeping.

"And also he, that robs any person in any booth or tent, in any fair or market, his wife, children, or servant then being within the booth or tent, shall be excluded from clergy.

This statute is of force, and of great and daily use, and therefore it will be convenient to make some observations upon it.

Upon this statute these things are observable:

1. That it extends not to oust clergy in any case but upon conviction of the offender, either by verdict or confession, for a man that confesseth is found guilty by his confession, but it extends not to standing mute, challenging above twenty, or not directly answering. (c)

And therefore it is considerable, whether, if a man be attaint by outlawry, he may not be admitted to his clergy. [521] as a clerk attaint, which, tho it avoids not the attainder, yet it may take off the execution, for clergy is allowable to a person attaint, if the case be within clergy, *Crompt. Jurisdic. of Courts*, 126. b. (d) *Dy.* 205. a. b. and it is held, outlawry upon this statute excludes not clergy. 11 *Co. Rep.* 29. b. *Poultter's case*.

2. That yet by the statute of 4 & 5 P. & M. cap. 4. clergy is taken away in this case from the accessory *before*, as well as in case of standing mute and challenging above twenty, or not directly answering, for the statute of 4 & 5 P. & M. extends to accessaries *before* in all cases of robbing in dwelling-houses, as well those within this statute, as those upon the statute of 23 H. 8.

3. It hath been held by good opinion, that this statute extends only to him that actually enters the house and steals there, and that therefore if A. B. and C. come to a house in the day-time with an intent to enter, and steal goods, and that A. only breaks and enters the house, and takes the goods, that A. only shall be excluded of his clergy, and B. and C. that were aiding and assisting should have

(c) But by 3 & 4 W. & M. cap. 9. it extends to all these cases, as also to the case of an outlawry.

(d) *Crompt. Justice* 119. b.

their clergy: this was the opinion of divers judges at a meeting in *Serjeants-Inn* 30 *Novemb.* 1664. who grounded themselves principally upon *Audley's* case,^(e) upon the statute of 39 *Eliz.* hereafter cited, but I think they are all to be excluded of their clergy upon this statute of 5 & 6 *E. 6.* and there cannot be a stronger authority in it, than the judgment of parliament in the statute of 4 & 5 *P. & M.* cap. 4. whereby it is enacted, "That if any person shall maliciously command, hire, or counsel any person to commit any robbery in any dwelling-house, he shall be excluded of clergy."

And certainly he, that is present, aiding, and abetting, is more than an accessory *before*, but then perchance the indictment must not run generally, *was present, aiding, and abetting*, but that *B. and C. did maliciously command, hire, or counsel A. to commit the fact,*

Dy. 183. b. 11 Co. Rep. 37. a Poulter's case; tho, in my own [522] opinion, the words *maliciously present, aiding, and abetting*, do countervail the former, and much more, and it cannot be intended, that the statute meant to take away clergy from those that maliciously counsel or command, which at most makes but an accessory, and yet that he that is present and abetting, shall have his clergy.

But, in my opinion, all may be indicted, *quod fregerunt & intraverunt*, &c. as in case of burglary or robbery, and it differs from the statute of 39 *Eliz.* and the rather, because the statute of 4 & 5 *P. & M.* extends not to offenses made after by 39 *Eliz.*

4. This statute extends not to breaking of the house with an intent to rob it, but there must be an actual robbing, or taking away goods.

5. The robbing by day or night is within this statute.

6. The dweller, his wife, children or servants must be within the precinct of the house sleeping or waking, but it is not necessary they should be put in fear, neither is it necessary they should be in the same room where the robbery is done.

7. But it is not enough, that a stranger be in the house, unless the owner, his wife, children, servants or some of them be in the house at the time also, tho it be enough upon the statute of 1 *E. 6. cap. 12.*

8. There must be not only an actual stealing of some goods in the house, but an actual breaking of the house, for the statute speaks of robbing, which imports more than a bare taking of goods.

Aug. 14 Car. 1. Thomas Williams, Thomas Bates, and Richard Harper having broken the lodgings of Sir *H. Hungate* at *Whitehall*, and taken thence several goods of Sir *H. Hungate, Croke* and *Crowley* were advised with, to pen the indictment, who agreed these points; 1. It must be laid for breaking the king's mansion-house called *Whitehall*,^(f) and stealing the goods of Sir *H. Hungate*, for all the lodgings in *Whitehall* were part of the king's house, and

differ'd from an inn of court, where each chamber is a several [523] mansion-house, because every one hath a several interest in his chamber. 2. That upon the statute of 5 & 6 *E. 6.*

the indictment need only be, that he broke the king's house called

(e) *Cro. Car. 473.* by the name of *Evans.*

(f) See *Kel. 27.*

Whitehall, and stole the goods of Sir *H. Hungate*, divers of the king's servants then being in the house, without saying, that any body was put in fear (which was necessary by the statute of 23 *H. 8.*) but merely upon the statute of 5 & 6 *E. 6.* and accordingly the indictment was drawn. 3. That upon an indictment upon 23 *H. 8.* or upon 5 *E. 6.* there must be an actual breaking of the house, and also a robbery or stealing of some thing.

4. That if a thief come into the house, the doors being open, and then breaks open a chamber-door, and steals goods from thence, this is a breaking of the house within those statutes, and accordingly at the gaol-delivery at the *Old Bailey*, 29 *Aug.* 14 *Car.* 1. those two justices being present, they were indicted, and *Harper* being fled, the other two were found guilty; *Williams* was reprieved before judgment, but *Bates* was executed, *ex libro Twisden*.

Upon this latter resolution it seems, that *Bayne's* case in *Popham's Rep.* 36 & 37 *Eliz.* n. 10 was somewhat too severe(g), where one came into a tavern to drink, and stole a cup that was brought them to drink in, the owner and his servants being in the house, and upon this he was ousted of his clergy upon the statute of 5 & 6 *E. 6.* which case was doubted by the justices upon a meeting among them *Novemb.* 1664. but it was then agreed, if two come into a tavern to drink, the door being open, and divers of the family being in the house, and one goes up stairs and breaks a chamber-door, and steals goods, and both depart before the felony be discovered; resolved by us all, that clergy is taken away from him that breaks open the door, if he be indicted upon the statute of 5 *E. 6.* but not from the other, for the breaking of the door was an act of violence, and so the breaking of a counter or chest;(h) for a chest *vide postea*.

But tho the breaking of the door, or perchance of a counter, may be such an act, as may make it a robbery within the statute of 5 *E. 6.* yea, and altho in that case before-mentioned, and in a case upon a special verdict out of *Cambridgeshire* before-men- [524] tioned, it was held the breaking of a chest was all one as to this purpose with the breaking of a door, tho the chest were not fixed to the freehold, *quod vide ante cap.* 43. yet I must needs say, that the course at *Newgate* hath been always since my time, that the breaking open of a chamber-door, and of a counter or cupboard fixed to the freehold, hath brought it within the statute of 5 *E. 6.* to oust of clergy; yet when a party enters the doors open, and breaks up only a chest or trunk, and steals thence goods, that is not such a robbery, as is within the statute of 5 *E. 6.* to oust of clergy, and so was the difference agreed at *Newgate* 1671. upon the robbery of the cook of *Serjeants-inn* in *Fleet-street*, by certain persons that came in to eat, and slipt up stairs, and picked open a chamber-door, and broke open a chest, and stole plate of good value: it was agreed, that the picking open the lock of the chamber-door brought it within the statute to oust clergy, but the breaking open of a chest or trunk only

(g) This case denied to be law, *Kel.* 68.

● (h) See *Kel.* 69.

would not oust clergy upon the statute of 5 *E. 6.* or 39 *Eliz.* and so by *Lee* secondary was the constant course at *Newgate* in his time.

As to robbery in booths or tents in fairs and markets, within the 5 *E. 6. cap. 12. H. 41 Eliz. B. R.* the robbing of a shop in *Westminster-hall* was ruled not to be within this statute to be ousted of clergy.

If a servant opens a chamber-door in his master's house, and steals goods, Sir *N. Hyde*, who was severe enough in cases criminal, doubted whether this were within this statute to oust him of his clergy: *vide infra*.

IV. The next statute relating to this matter of robbing in houses is 39 *Eliz. cap. 15.* which recites, that the penalty of robbing of houses in the day-time, no persons being in the house at the time of the robbery committed, is not so penal as robbery in any house, any person being therein at the time of the robbery committed, which hath emboldened persons to commit heinous robberies in breaking and entering persons houses, none being in the same, and enacts,

“That if any person shall be found guilty by verdict, confession, or otherwise for the felonious taking away in the day-time of money, goods, or chattels to the value of five shillings or upwards, in any dwelling-house, or any part thereof, or any out-house or out-houses belonging and used with the said dwelling-house or houses, altho no person shall be in the said house or houses at the time of the felony committed, every such person shall be excluded from the benefit of clergy.

Upon this statute these things are observable:

1. That the indictment, whereupon such person is to be excluded of the benefit of his clergy, ought precisely to follow the statute, *viz.* it must be in the day-time, and no person being in the house, and must appear to be so upon evidence.

2. And therefore, if either the indictment pursue not the statute, or the evidence make not good the indictment, he is to have his clergy, and therefore upon such an indictment he may be acquitted of stealing against the form of the statute, and found guilty of simple felony at common law, tho the indictment conclude *contra formam statuti*; and the same law it is, if an indictment be formed upon the statute of 23 *H. 8.* or 5 & 6 *E. 6.* for tho the indictments in those cases be special, and conclude sometimes *contra formam statuti*, yet they include felony at common law, and tho the indictment concluding *contra formam statuti* be good, it is not necessary; so as the circumstances required by the statute be pursued, for the statutes in these cases make not the felony, but only exclude clergy, when the felony is so circumstantiated, as the statute mentions, and is so expressed in the indictment.

3. If the indictment be formed upon this statute, as that he broke and entred the house in the day-time, and stole, no person being in the house, if it appear upon the evidence, that the felony was committed without these circumstances, as if it were committed in the

night, or not in the day, so that it is burglary, or if committed when some of the family were in the house, in which case he had been ousted of his clergy by the statute of 5 & 6 *E. 6.* if the indictment had been formed upon that statute, yet in such case the offender being specially indicted upon the statute of 39 *Eliz.* shall be found guilty of simple felony at common law, and shall not [526] be ousted of his clergy by the statute of 23 *H. 8.* 1 *E. 6.* 5 & 6 *E. 6.* or 18 *Eliz. cap. 7.* because the indictment is not formed upon those statutes, but only upon 39 *Eliz.* and if the circumstances of the statute of 39 *Eliz.* upon which the indictment is formed, be not pursued in the evidence, he must have his clergy, and so is the constant practice.

4. Altho this statute of 39 *Eliz.* in the body of the act speaks only of stealing, yet in as much as the preamble speaks of robbery, it hath been always taken, that upon this statute, as well as upon the statute of 5 *E. 6.* there must be these three things concur to oust clergy: 1. There must be *an actual stealing* or taking away of goods of some value upon the statute of 5 & 6 *E. 6.* and of goods to the value of five shillings upon this statute, but it is not necessary, that the goods be carried out of the house, for if he take them out of a trunk or cupboard, and lay them in the room, and be apprehended before he carry them away, it is a stealing within the statutes, and at common law also, as was resolved by all the judges, *uno dissentiente*, in a case out of *Cambridgeshire* upon a special verdict there found upon an indictment upon the statute of 5 & 6 *E. 6. anno 1664.* (i) 2. It must be a stealing of goods *in the house*, and therefore he that steals, or is party to the stealing them, being out of the house, is not by this statute to be ousted of his clergy. 3. Upon this statute, as well as upon the statute of 5 & 6 *E. 6.* there must be some act of force or *breaking.* (k)

Now what shall be said such a force, as must bring the party within this statute, hath been touched before, to which I add, 1. That whatsoever breaking will make a burglary, if it were in the night, will make such a force or breaking, as is within this statute and that of 5 *E. 6.* to oust the thief of his clergy, as if he [527] break open the outward or inward door of the house, pick the lock of such door, draw the latch, break open the window, &c. 2. Some breaking or force will oust clergy upon the statutes of 5 & 6 *E. 6.* and 39 *Eliz.* which will not make a burglary, if it were in the night, as where he enters by the doors open, and breaks open a

(i) This was *Simpson's* case mentioned below, and is reported *Kel. 31.*

(k) But now by 10 & 11 *W. 3. cap. 23.* "Whoever by night or day shall in any shop, ware-house, coach-house, or stable, privately and feloniously steal to the value of 5s. or more, tho such shop be not broke open, nor any person therein, or shall assist, hire or command any person to commit such offense, shall be excluded from the benefit of clergy." Now repealed and supplied.

And by 12 *Ann. cap. 7.* "Whoever shall feloniously steal to the value of 40s. in any dwelling-house or out-house thereto belonging, altho it be not broken, nor any person therein, their aiders or assistants are excluded from clergy." Repealed and supplied.

counter or cupboard fixed to the freehold, as was agreed in the *Cambridgeshire* case before-mentioned.

T. 16 Car. 2. Simson's case, where the case was thus: a man came into a dwelling-house, none being within, and the doors being open, and broke up a chest, and took out goods to the value of five shillings, laid them on the floor, and before he could carry them out of the chamber, he was apprehended, and upon this matter specially found he was ousted of his clergy upon the statute of 39 *Eliz.* for the taking them out of the chest was felony by the common law, and the statute of 39 *Eliz.* did not alter the felony, but only excluded clergy; *per omnes justiciarios Angliæ. Ex libro Bridgman.*

But whereas in that case the breaking open of the chest was held such a force or breaking, as excludes clergy upon that statute, I have observed, that the constant practice at *Newgate* hath not allowed that construction, unless it was a counter or cupboard fixed; yet *note*, this resolution of 16 *Car.* was by all the judges of *England* then present, and tho one dissented, he after came about to the opinion of the rest. *Ideo quære.*

T. 13 Car. 1 R. R. Evans and Finch(l) were arraigned at *Newgate* upon an indictment, that they at twelve of the clock in the day, *domum mansionalem Hugonis Audely de interiori templo, nullâ personâ in eadem domo existente, fregerunt, & 40l.* from thence did steal, a special verdict was found, that *Evans* by a ladder climbed up to the upper window of the chamber of *H. Audely*, and took out of the same forty pounds, and *Finch* stood upon the ladder in view of *Evans*, and saw *Evans* in the chamber, and was assisting to the robbery, and took part of the money, and that at the time of the robbery divers persons were in the *Inner Temple-hall*, and in [528] divers other parts of the house; ruled, 1. That a chamber in an inn of court is *domus mansionalis* within the statute of 39 *Eliz.* of him who was the owner of the chamber. 2. That altho this chamber was parcel of the *Inner Temple*, and other persons were in the hall and other parts of the *Inner Temple*, yet no person being in the chamber, this offence was within the statute of 39 *Eliz.* and so it differs from the case of *Whitehall* before-mentioned, where the indictment was upon the statute of 5 & 6 *E. 6.* 3. That in as much as *Evans* was only in the chamber, and *Finch* entered not the chamber, *Evans* had judgment of death, and *Finch* had his clergy.

And the like law had been upon the statute of 5 & 6 *E. 6.* as is before declared, for these statutes only exclude the parties, that actually take out of the dwelling-house, not those that are present and assenters, (m) as hath been also before declared (n) upon the statute of 1 *Jac.* of stabbing.

(l) *Cro. Car.* 473.

(m) But by 3 & 4 *W. & M. cap. 9.* clergy is taken away from all, who comfort, aid, abet, assist, counsel, hire, or command any person feloniously to break any dwelling-house; shop, or ware-house thereto belonging, and feloniously to take away any money, goods, &c., to the value of 5s. or upwards, altho no person be within the same.

(n) *Vide antea*, p. 468.

And herein it differs from burglary and robbery, for therein all persons, that are present, aiding, and assisting, are equally burglars or robbers with him, that enters or actually takes; but of this hereafter.

But this statute of 39 *Eliz.* takes not away the benefit of clergy, where the offender stands mute, but only in the case of conviction by verdict, confession, or otherwise according to the laws of the realm; *quare* of outlawry, for there the party is attaint indeed, but not found guilty, for if he reverse the outlawry, he shall plead to the felony. (o)

And thus far for those larcinies, that relate to the dwelling-house of any wherein clergy is excluded.

V. The next statute, that excludes from clergy, is the statute of 1 *E. 6. cap. 12.* and 2 & 3 *E. 6. cap. 33.* which exclude clergy from any person convict by verdict or confession of stealing any horse, mare, or gelding, or wilfully standing mute.

But it takes not away clergy from accessaries *before* or [529] *after.*

VI. The statute of 8 *Eliz. cap. 4.* by which he that takes money or goods feloniously from the person of any other, privily, without his knowledge, is ousted of his clergy, if convict by verdict or confession, or if he challenge above twenty peremptorily, or stands mute, or will not directly answer, or be outlawed.

Upon this statute these things are observable: 1. It doth not alter the nature of the felony, and therefore, if what he take away so be not above the value of twelve-pence, it is only petit larciny, as it was before, and so differs from the case of robbery, *Co. P. C. cap. 16. p. 68. Crompt. de Pace, fol. 33. b.* 2. The indictment must be pursuant to the statute, *viz. quod felonice &c. clam & secretè a personâ, &c. cepit*, otherwise the offender hath his clergy. 3. It doth not oust accessaries of their clergy, nor it seems doth it oust any of his clergy but him, that actually picks the pocket, and not those that are present, aiding and assisting, upon the reason of *Evan's* case before, for it shall be taken literally.

By an act of this parliament, *viz. * * * (p)*

See table of the principal matters in Foster, Tit. Clergy.

CHAPTER XLV.

[530]

CONCERNING PETIT LARCINY.

PETIT larciny is the felonious stealing of money or goods not above the value of twelve-pence without robbery, for altho that by some opinions the value of twelve-pence make grand larciny, 22 *Assiz. 39.*

(o) But now by 3 & 4 *W. & M. cap. 9.* clergy is expressly taken away in case of outlawry, or of standing mute, &c.

(p) This was left unfinished by our author, but I suppose the statute here meant is 22 *Car. 2. cap. 5.* which "All who shall feloniously steal woollen manufactures from the tenters, or shall embezzle the king's naval stores, are excluded from clergy.

As to subsequent statutes, which take away clergy from larciny in dwelling-houses, *vide postea sub fine cap. 48.*

per Thorp, yet the law is settled, that it must exceed twelve-pence to make grand larciny. *West 1. cap. 15.(a) 8 E. 2. Coron. 404.[1]*

The judgment in case of petit larciny is not loss of life, but only to be whipt, or some such corporal punishment less than death, and yet it is felony, and upon conviction thereof the offender loseth his goods, for the indictment runs *felonice*. *27 H. 8. 22.*

A party indicted of petit larciny and acquitted, yet if it be found he fled for it, forfeits his goods, as in case of grand larciny. *8 E. 2. Coron. 406. Stamf. P. C. p. 184. a.*

But in case of petit larciny there can be no accessaries neither before nor after. *P. 9. Jac. 12 Co. Rep. 81.*

If two or more be indicted of stealing goods above the value of twelve-pence, tho in law the felonies are several, yet it is grand larciny in both. *8 E. 2. Coron. 404.*

But if upon the evidence it appears, that *A.* stole twelve-pence at one time, and *B.* twelve-pence at another time, so that the acts themselves were several at several times, tho they were the goods of the same person, this is petit larciny in each, and not grand larciny in either.

If *A.* be indicted of larciny of goods to the value of five shillings, yet the petit jury may upon the trial find it to be but of the value of twelve-pence, or under, and so petit larciny. *41 E. 3. Coron. 451. 18 Assiz. 14. Stamf. P. C. p. 24. b.*

If *A.* steal goods of *B.* to the value of six-pence, and at [531] another time to the value of eight-pence, so that all put together exceed the value of twelve-pence, tho none apart amount to twelve-pence, yet this is held grand larciny, if he be indicted of them altogether, [2] *Stamf. P. C. p. 24:* collected from the book of *8 E. 2. Coron. 415. Dalt. cap. 101. p. 259.(b)*

But if the goods be stolen at several times from several persons, and each a-part under value, as from *A.* four-pence, from *B.* six-pence, from *C.* ten-pence, these are several petit larcinies, and tho contained in the same indictment make not grand larciny.

But it seems to me, that if at the same time he steals goods of *A.* of the value of six-pence, goods of *B.* of the value of six-pence, and goods of *C.* to the value of six-pence, being perchance in one bundle, or upon a table, or in one shop, this is grand larciny, because it was one entire felony done at the same time, tho the persons had several properties, and therefore, if in one indictment, they make grand larciny. [3]

(a) 2 Co. Instit. 190.

(b) New Edit. cap. 154. p. 494.

[1] This distinction between *grand* and *petit* larceny is now abolished by 7 & 8 Geo. IV. c. 29, s. 2. See *Ryland's note* to 4 Bl. Com. 229. 19th Lond. Ed. 1836.

[2] *Birdseye's case*, 4 Carr. & Pay. 386. *Jones's case*, *Id.* 217. 2 East's P. C. 740.

[3] It is manifest that the defendant might have three different defences as to the taking of the property of three owners. Would not a single count, which compelled a defendant to make three *distinct* defences, as to three *distinct* pieces of property of three *different* owners, be bad for duplicity. See *Com. v. Andrews*, 2 Mass. R. 409.

If *A.* steal *clam & secretè* out of the pocket of *B.* twelve-pence, tho the statute of 8 *Eliz.* take away clergy from a pick-pocket, yet it is but petit larciny; *quod vide supra p. 529.*

And so if a man could possibly steal a horse of the value of twelve-pence only, or under, or break a house in the day-time, and steal goods only of the value of twelve-pence, the owner, his wife or children being in the house, and not put in fear, this will be but petit larciny, notwithstanding the statute of 5 & 6 *E. 6.* take away clergy, for that statute altered not the nature of the offense, but takes away clergy, where clergy was before, namely where the offense was capital, as in case of grand larciny.

But if they were put in fear, then it would be robbery, how small soever the value were, and so could not sink into the nature of petit larciny; but of this in the next chapter.[4]

CHAPTER XLVI.

[532]

OF ROBBERY.

ROBBERY is the felonious and violent taking of any money or goods from the person of another, putting him in fear, be the value thereof above or under one shilling.

In this case it is to be considered, 1. What is a felonious taking

[4] In New York, under the statutes, petit larceny is not a felony. *Carpenter v. Nixon*, 5 *Hill's Rep.* 520. *Ward v. The People*, 3 *Hill's Rep.* 395. In it there are no accessories, but all concerned in the commission of the offence are principals. *Id.* 2 *N. Y. Rev. St.* 690.

To constitute petit larceny the sum stolen must be under \$25. *Id.*

IN PENNSYLVANIA, twenty shillings under the Act of April, 1790. *Stroud's Purd.* 956. 6th ed.; 1052. 7th ed.

IN NEW JERSEY, the same as in New York. *Rev. Stat. of 1847*, p. 266.

IN VIRGINIA, to constitute petit larceny, the sum must be under \$10. *Sup. Rev. Code*, 298. 308.

IN SOUTH CAROLINA, in the case of *The State v. Wood*, 1 *S. C. Rep.* 29. it was ruled that on an indictment for grand larceny the jury may find petit larceny. *Chase, J.* said "he had been informed by his brethren that the objection of the indictment being for grand larceny, the verdict for petit larceny was unauthorized, had been often overruled;" and cited 2 *East's P. C.* 778. where it is so laid down.

IN TENNESSEE, an indictment in the county court for petit larceny in stealing goods of greater value than twelve-pence should conclude against the form of the statute. The second section of the Act of 1807 has changed the nature of this offence in this as in some other States, viz. that petit larceny shall consist in stealing property under the value of \$10. At common law it consisted of stealing property under the value of twelve-pence, as stated in *Hale's text.* See *The State v. Humphries*, 1 *Overton's (Tenn.) R.* 107.

from the person.[1] 2. Who shall be said a felonious taker from the person of a man. 3. What violence or putting in fear is requisite to make up robbery. 4. In what cases such a robber is admissible to his clergy.

As to the first.

I. There must be in case of robbery (as also in all cases of larciny) something feloniously taken, for altho antiently an assault to the intent to rob, or an attempt to rob was reputed felony, *voluntas reputabatur pro facto*, 25 E. 3. 42. 13 H. 4. 7. per Gascoigne 27 Assiz. 38. yet the law is held otherwise at this day, (a) and for a long time since the time of Edward III. and therefore if A. lie in wait to rob B. and assault him to that purpose, and require him to deliver his purse, yet if *de facto* he hath taken nothing from him, this is not felony, but only a misdemeanor, for which he is punishable by fine and imprisonment. 9 E. 4. 26, b. *Stamf. P. C. p. 27. b. Co. P. C. p. 68.*

There is a double kind of taking, viz. a taking in law, and a taking in fact.

If thieves come to rob A. and finding little about him enforce him by menace of death to swear upon a book to fetch them a greater sum, which he doth accordingly, this is a taking by robbery, yet he was not in conscience bound by such compelled oath, for the fear continued, tho the oath bound him not, and in that case the in-

(a) *Plowd. Com. 259. b.*

[1] The taking must be from the person or in the presence of the prosecutor. *U. S. v. Jones*, 3 Wash. R. 209. *Com. v. Snelling*, 4 Binn. R. 379. *Rex v. Hamilton*, 8 Car. & P. 49.

Where it appeared that the prosecutor was with a third person, who had the prosecutor's bundle, and who, when the prosecutor was forcibly attacked by the defendant, dropped the bundle and ran to assist the prosecutor, when the prisoner took up the bundle and ran off, a learned judge is said to have doubted whether the offence was robbery. *Rex v. Fallows*, 5 Car. & P. 501.

It is essential that the property should be taken against the will of the party robbed. *Rex v. McDaniel*, *Foster Dis.* 121.

The goods must also appear to have been taken *animo furandi*, as in cases of larceny. *Archb. Cr. P.* 245.

There must also be an actual taking and carrying away. But it is immaterial whether the taking were by force or upon delivery; and if by delivery, it is also immaterial whether the robber compelled the prosecutor to it, by a direct demand in the ordinary way or upon any colourable pretence. A carrying away must also be proved; and where one meeting a man carrying a bed, told him to lay it down or he would shoot him, and the man accordingly laid down the bed, but the robber, before he could take it up so as to remove it from the place where it lay, was apprehended: the judges held that the robbery was not complete. *Rex v. Farrell*, 1 Leach, C. C. 362. *Rex v. Lapier*, *Id.* 320. *Fost. Dis.* 128. *Rex v. Mason*, R. & Ry. 419. *Rex v. Davies*, 2 East's P. C. 709. *Rex v. Hall*, 3 Car. & P. 409. *Rex v. Macauley*, 1 Leach, C. C. 287. *Rex v. Baker*, *Id.* 290. *Rex v. Stewart*, 2 East's P. C. 702. *Rex v. Homes*, *Id.* 703.* *Rex v. Gosnill*, 1 C. & P. 304.

* It was held in the case of *Com. v. Humphries*, 7 Mass. R. 242. that an indictment was good at common law which alleged the stealing, &c. by force and violence, but omitted the averment that the party robbed was put in fear.

dictment need not be special, for that evidence will maintain a general indictment of robbery, 44 *E. 3. 14. b. 4 H. 4. 2. a. Co. P. C. p. 68. Dalt. cap. 100. p. 257. (b)* who saith it was so adjudged also in *P. 36 Eliz.*

If *A.* assaults *B.* and bids him deliver his purse, and *B.* delivers it accordingly, this is a taking, and so it is if *B.* refuse, and then *A.* prays him to give or lend him money, which *B.* doth accordingly, this is robbery, for *B.* doth it under the same fear, *Dal. cap. 100. 44 Eliz. Cromp. 34. b.* so it is if *B.* throw his purse or cloak in a bush, and *A.* takes it up, and carries it away; so if *B.* flying from the thief lets fall his hat, and the thief take it and carry it away, for all is the effect of the same fear. *Dalt. ubi supra.*

So if *A.* without drawing his weapon requires *B.* to deliver his purse, who doth deliver it, and *A.* finding but two shillings in it gives it him again, this is a taking by robbery. 20 *Eliz. Crompt. 34. Dalt. ubi supra.*

If *A.* have his purse tied to his girdle, *B.* assaults him to rob him, and in struggling the girdle breaks, and the purse falls to the ground, this is no robbery, because no taking; but if *B.* take up the purse, or if *B.* had the purse in his hand, and then the girdle breaks, and striving lets the purse fall to the ground, and never takes it up again, this is a taking and robbery. *Co. P. C. p. 69. Dalt. cap. 100. Crompt. fol. 35.*

It is not always necessary, that in robbery there should be strictly a taking from the person, but it sufficeth if it be in his presence, as appears by some of the former instances, in case it be done with a putting in fear: as where a carrier drives his pack-horses, and the thief takes his horse, or cuts his pack, and takes away the goods: so if a thief comes into the presence of *A.* and with violence, and putting *A.* in fear, drives away his horse, cattle, or sheep. *Dalt. ubi supra. Stamf. P. C. p. 27. a. 2 East's P. C. 556.*

II. Who shall be said a person robbing or taking.

If several persons come to rob a man, and they are all present, and one only actually takes the money, this is robbery in all.

Pudsey and two others, viz. *A.* and *B.* assault *C.* to rob him in the highway, but *C.* escapes by flight, and as they [534] were assaulting him *A.* rides from *Pudsey* and *B.* and assaults *D.* out of the view of *Pudsey* and *B.* and takes from him a dagger by robbery, and came back to *Pudsey* and *B.* and for this *Pudsey* was indicted and convict of robbery, tho he assented not to the robbery of *D.* neither was it done in his view, because they were all three assembled to commit a robbery, and this taking of the dagger was in the mean time. 28 *Eliz. B. R. Crompt. 34.*

And so it is if *A. B.* and *C.* come to commit a robbery, and *A.* stands centinel at the hedge-corner to watch if any come, and *B.* and *C.* commit the robbery, tho *A.* was not actually present, nor within view, but at a distance from them; and the like in burglary. 11 *H. 4. 13. Co. P. C. p. 64.*

(b) *New Edit. cap. 153. p. 492.*

III. What shall be said a putting in fear, or violent taking.[2]

Without putting in fear or violence it is not robbery, but only larceny, and the indictment must run, *quod vi & armis apud B. in regia viâ ibidem, &c. 40s. in pecuniis numeratis felonice & violentè cepit*

[2] Any threat calculated to produce terror is sufficient to consummate the offence. Thus if a man takes another's child and threatens to destroy him unless the other give him money, this is robbery. *Rex v. Reeve, 2 East, P. C. 735. Rex v. Donally, Id. 718.*

So where the defendant, at the head of a mob, came to the prosecutor's house and demanded money, threatening to destroy the house unless the money were given; the prosecutor thereupon gave him 5s., but he insisted on more, and the prosecutor being terrified gave him 5s. more; the defendant and the mob took bread, cheese, and cider from the prosecutor's house without his permission and departed: this was holden to be a robbery. *Rex v. Demmons, 2 East, P. C. 731. Rex v. Brown, Id. 731. Rex v. Atley, Id. 712. Rex v. Winkworth, 4 Carr & P. 444.*

It makes no matter what pretences were employed to induce the owner to surrender possession, if he was put in bodily fear. *Merriman v. Chippenham, 2 East, P. C. 709. 4 Blac. Comm. 242. Rex v. Taplin, 2 East, P. C. 712.*

If a robber take a purse of money from a person, and restore it to him immediately, saying, "if you value your purse, take it back, and give me the contents," but is apprehended before the money is delivered to him, yet the crime is completed. *Rex v. Peat, 1 Leach, C. C. 228. 2 East, P. C. 557. Rex v. Thompson, R. & M. 78.*

Taking money from a woman at the time of an attempt to commit a rape, amounts to robbery, although there was no demand of money made by the prisoner, and it was clearly his original intent only to commit a rape. *Rex v. Blackham, 2 East, P. C. 711.*

So to take a man by the cravat and squeeze him against a wall, and in the mean time abstract his watch from his sob without his knowledge, is a robbery, though the plaintiff was not afraid, nor aware of the robber's intention. *Comp. v. Snelling, 4 Binn. R. 379.*

Where money was given to one of the mob during the riots in London in 1780, upon a knocking at the prosecutor's door in a menacing manner: held that it was robbery. *Rex v. Taplin, 2 East, P. C. 712.*

Where persons, under pretence of an auction, got a woman into a house and compelled her, by threats of carrying her before a magistrate and to prison for not paying for a lot pretended to have been bid for by her, to pay them one shilling through fear of prison, and for the purpose of obtaining her liberation, but without any fear of any other personal violence: Held, not robbery, but only duress. *Rex v. Wood, 2 East, P. C. 732.*

A woman went into a mock auction shop, and it was pretended that she had bid for certain articles, and the prisoner threatened to take her to Bow-street and have her sent to Newgate, unless she paid earnest for the articles, to avoid which, she paid one shilling: Held, that this was not sufficient restraint to make this a robbery. *Rex v. Newton, Car. C. L. 285.*

If the property be not taken by violence, nor parted with through fear, it is no robbery, though there were sufficient legal and reasonable ground for fear, as upon a threat to charge one with an unnatural crime. *Rex v. Reane, 2 East, P. C. 734. 2 Leach, C. C. 616.*

The crime of robbery may be committed by obtaining money from a man, by threatening to charge him with having been guilty of sodomitical practices. *Rex v. Jones, 1 Leach, C. C. 139.*

This has, in many cases, been holden to be robbery, see *Rex v. Hickman, post; Rex v. Egerton, post*, even where it appeared that the prosecutor parted with his money merely through fear of losing his character or employment by such imputation. Extorting money by this or like means has been made a felony in some States by statute. See *Mass. Rev. Stat. c. 125, sect. 17; N. Y. Rev. Stat. P. IV. c. 1, 3, 5, sect. 58.*

It is equally a robbery to extort money from a person by threatening to accuse him of an unnatural crime, whether the party so threatened has been guilty of such crime or not. *Rex v. Gardner, 1 Car. & P. 479.*

If a man obtain property from another by accusing him of having been guilty of an unnatural crime, it will amount to robbery, although the party was under no apprehension of personal danger, and felt no other fear than that of losing his character. *Rex v. Hickman; 1 Leach, C. C. 278; 2 East, P. C. 728.*

To constitute robbery, by taking money from another upon a threat of charging him

a personā; and therefore if the word *violenter* be omitted in the indictment, or not proved upon the evidence, tho it were *in altd vid regid & felonice cepit à personā*, it is but larciny, and the offender shall have his clergy. *Dy. 224. b. H. 17 Jac. in B. R.(c). Harman*

(c) 2 Rol. Rep. 154.

with an unnatural crime, the money must be taken immediately upon the threat made, and not after the parties have separated and there has been time for the prosecutor to deliberate and procure assistance, and especially after he had consulted a friend who was even present at the time when the money was paid, though the prosecutor parted with his money from fear of losing his character. *Rex v. Jackson, 1 East, P. C. Add. xxi; 1 Leach, C. C. 193 n.; 2 Leach, C. C. 618 n; and see Rex v. Cannon, R. & R. C. C. 146; 2 Russ. C. & M. 87.*

Parting with property upon charge of an unnatural crime, will not make the taking a robbery, if it is parted with not from the fear of loss of character, but for the purpose of prosecuting. *Rex v. Fuller, R. & R. C. C. 408; 2 Russ. C. & M. 88.*

Where money was obtained by calling a man a sodomite and threatening him, but the money was parted with by the prosecutor not so much from fear of losing his character, as from fear of losing his place: *Held*, by a majority of the judges, that it was sufficient to constitute a robbery. *Rex v. Elmstead, 2 Russ. C. & M. 86.*

The parting with money or goods through fear of loss of character and service, upon a charge of sodomitical practices, is sufficient to constitute robbery, although the party has no fear of being taken into custody, nor any dread of punishment. *Rex v. Egerton, R. & R. C. C. 375; 2 Russ. C. & M. 87.* See the cases cited and discussed in *2 Deac. C. L. 1136.*

Obtaining money from a woman by threatening to accuse her husband of an indecent assault, is not robbing. *Rex v. Edwards, 5 Car. & P. 518, S. C. nom. Rex v. Edward, 1 M. & Rob. 257.*

If a bailiff handcuff a prisoner, under pretence of carrying him to prison with greater safety, and by means of this violence extort money, he is guilty of robbery. *Rex v. Gascoigne, 1 Leach, C. C. 280; 2 East, P. C. 709.*

If a gang of poachers attack a gamekeeper and leave him senseless on the ground, and one of them return and steal his money, &c.:—*Held*, that one only can be convicted of the robbery, as it was not in pursuance of any common intent. *Rex v. Hawkins, 3 Car. & P. 392.*

Secd aliter, if a number had associated themselves together, for the purpose of committing a robbery, although one alone had perpetrated the act, as all would have been constructively present. *State v. Heyward, 2 N. & M. 312.*

A. had set wires in which game was caught: B. a gamekeeper found them, and took them, with the game caught in them, for the use of the lord of the manor. A. demanded them with menaces, and B. gave them up. The jury found that A. acted under a *bona fide* impression that the wires and game were his property:—*Held*, that it was no robbery. *Rex v. Hall, 3 Car. & P. 409.*

A. was attacked by robbers, who, after using very great violence towards him, took from him a piece of paper, on which was written a memorandum respecting some money that a person owed him:—*Held*, robbery. *Rex v. Bingly, 5 Car. & P. 602.*

Snatching an article from a man will constitute robbery, if it is so attached to his person or clothes as to afford resistance. *Rex v. Mason, R. & R. C. C. 419. 2 Russ. C. & M. 69.*

To snatch a diamond pin from the head-dress of a lady, with such force as to remove it with part of the hair, from the place in which it was fixed, is a sufficient violence to constitute robbery. *Rex v. Moore, 1 Leach, C. C. 335.*

To constitute the crime of highway robbery, the force used must be force with intent to overpower the party, and prevent his resistance; and if the force used is not with that intent, but only to get possession of the property of the party attacked, it is not highway robbery. *Rex v. Gnosil, 1 Car. & P. 504.*

Snatching property from the hand of another, is not sufficient force to constitute highway robbery. *Rex v. Baker, 1 Leach, C. C. 290. 2 East, P. C. 702.*

Indictment.—A servant was sent out by his master to receive money from his master's customers, and, having received the money, he was robbed of it on his way home. *Sem-*

was indicted of the robbery of *Halfpenny* in the highway; and upon the evidence it appeared, that *Harman* was upon his horse, and required *Halfpenny* to open a gap for him to go out, *Halfpenny* going up the bank to open the gap, *Harman* came by him, and slipt

ble, that an indictment for this robbery, in which the money was laid to be the property of his master, could not be supported, as the money had never been in the possession of the master. *Reg. v. Ruddick*, 8 Car. & P. 237.

And when in such a case, the objection was taken during the trial, the judge directed the jury to be discharged, and a new indictment to be sent to the grand jury, containing a count, laying the property in the servant. *Ib.*

A. and *B.* were indicted for the offence of robbery. The jury found that *A.* took the property of the prosecutor from him by violence, and that *B.* was present during part of the time, and that he was a party with *A.* to a design to bring the prosecutor to the place where he was robbed by *A.* and to obtain property from him on a false charge of an unnatural crime, but that he was not aiding or assisting in, or privy to, the taking of the property from the prosecutor, by violence: Held, by all the judges, that in order to convict *B.* the indictment should have been framed on the statute 7 Will. IV. & 1 Vict. c. 87. s. 4, and that he could not, since the passing of the statute, under the circumstances of this case, be convicted on an indictment charging the offence of robbery. *Reg. v. Tunn-ton*, 9 Car. & P. 309. 2 M. C. C. R. 118.

An indictment for robbery need not have the word "violently," but it must appear upon the whole statement that violence was used. *Rex v. Smith*, 2 East, P. C. 784.

If a prosecutor declare, on an indictment of robbery, that he parted with his property without any fear of violence to his person or injury to his character, the prisoner cannot be convicted. *Rex v. Reane*, 2 Leach, C. C. 616. 2 East, P. C. 734. *Sed vide*, *Com. v. Snelling*, 4 Binn. R. 379.

An indictment for a robbery, on an unmarried woman, in her maiden name, is good, although she marry before the indictment is found. *Rex v. Turner*, 1 Leach, C. C. 536.

An indictment for a highway robbery must state, that the assault was feloniously made with an offensive weapon. *Rex v. Palseyman*, 2 Leach, C. C. 563. 2 East, P. C. 783.

Evidence.—On an indictment for robbery, the declaration, in *articulo mortis*, of the party robbed, is not admissible in evidence. *Rex v. Lloyd*, 4 Car. & P. 233. 1 Greenl. on Ev. § 156.

A. and *B.* were riding in a gig together, were robbed at the same time, *A.* of his money, *B.* of his watch, and violence used towards both. There was an indictment for the robbing of *A.* and another indictment for the robbing of *B.* Held, that on the trial of the first indictment, evidence might be given of the fact, of the loss of the watch by *B.*, and that it was found on one of the prisoners, but that no evidence ought to be given of any violence offered to *B.* by the robbers. *Rex v. Roonty*, 7 Car. & P. 517.

MASSACHUSETTS—Robbery was always punished as a capital offence in this State, until the passing of the Statute of 1804, c. 143, by which the punishment was reduced to hard labour for life. This statute remained in force until the passing of Stat. 1818, c. 124, when robbery, if committed under certain circumstances of aggravation, was again punished with death.

The first case that occurred after the passing of the Statute of 1818, c. 124, was *The Commonwealth v. Michael Martin*, 17 Mass. Rep. 539, in which it was decided by the unanimous opinion of the whole court, that to make robbery a capital offence within the first section of the statute, it is sufficient if the party be armed with a dangerous weapon with intent to kill or maim the person assaulted, in case such killing or maiming be necessary to his purpose of robbing, and that he have the power of executing such intent. The prisoner was indicted upon the first clause of the first section of the statute for the robbery of *John Bray*. "being then and there at the time of committing the assault aforesaid, in manner and form aforesaid, armed with a certain dangerous weapon, called a pistol, with intent him the said *John Bray* then and there to kill and maim." The defence set up was, that to constitute the crime of robbery a capital offence within the statute, it must be proved that there was an absolute intent to kill or maim the party robbed; at all events whether the robbery could be accomplished without killing or maiming, or not; and that in the present case the fact of the prisoner's having left the party robbed, without killing or maiming him, or making an actual

his hand into his pocket, and took out his purse; *Halfpenny* not suspecting the taking of his purse, until turning his eye he saw it in *Harman's* hand, and then he demanded it, *Harman* answered him, *Villain if thou speakest of thy purse, I will pluck thy house over thine ears, and drive thee out of the country, as I did John Somers,* and then went away with his purse; and because he took it not with such violence, as put *Halfpenny* in fear, it was ruled to be but stealth, and not robbery, for the words of menace were used, after the taking of the purse, wherefore he was found guilty [535] only of larciny, and had his clergy.(d)

IV. As to the point of clergy in robbery.[3]

The statute of 23 *H. 8. cap. 1.(e)* and 5 & 6 *E. 6. cap. 9.* do not oust robbery of clergy in all cases, but only in two, viz. when the robbery is committed in a mansion-house, the owner, his wife, children or servants being in the house and put in fear,(f) or when committed in or near the highway.

(d) But it should seem, that this was a private stealing from the person of another, and therefore, if above the value of twelve-pence, would have been ousted of clergy by 8 *Eliz. cap. 4.* if the indictment had been laid pursuant to that statute.

(e) This statute, and that of 25 *H. 8. cap. 3.* ousts clergy only in cases of conviction, standing mute, not directly answering, or challenging peremptorily above the number of twenty, but does not extend to the case of an outlawry, but this seems to be included in the word *attainted* in 1 *E. 6. cap. 12.* however it is expressly provided for by 3 & 4 *W. & M. cap. 9.*

(f) Being put in fear is necessary by the 23 *H. cap. 1.* (and also by 1 *E. 6. cap. 12.* which perhaps is the statute intended by our author) but by 5 & 6 *E. 6. cap. 9.* all that is requisite is, that the owner, &c. be in the house, tho not put in fear, for the expression of that statute is, *the owner, &c. being in the house, whether sleeping or waking.*

attempt to do it, proved that there was no such intent, as by the statute constituted an essential ingredient in the capital offence. This construction of the statute was not adopted by the court; but they instructed the jury, that if they were satisfied from the evidence that the prisoner armed himself with a loaded pistol with intent to kill or maim the party whom he should rob, if such killing or maiming were necessary for his purpose of robbing; and that when he assaulted and robbed Major *Bray*, he had the power of executing such intent, and meant to do it, if he could not otherwise rob him, the offence was capital according to the statute; and they accordingly found the prisoner guilty. See the opinion of the court at large, delivered by *Parker, C. J.* in which the above construction of the statute is unanswerably maintained. The *Massachusetts Statutes* will be found in *Rev. St. ch. 125,* and *Supp. 127.*

IN PENNSYLVANIA.—To constitute robbery there must be a felonious taking of property from the person of another by force, either actual or constructive; but if force be used, it is not essential that the prosecutor should be either aware or afraid of the taking. So decided, upon special verdict, in the case of *The Commonwealth v. Snelling*, before cited, in which case it was observed, among other things, by *Tilghman, C. J.* "If a man is knocked down and rendered senseless, and in that situation his money is taken without his knowledge, it shall not avail the thief to say that it was not taken against the consent of the man whom he had rendered incapable of exercising the faculty of volition." "Fear is not an essential ingredient of robbery; force is sufficient." See *Commonwealth v. Humphries*, 7 *Mass. Rep. 242.*

To constitute the crime of robbery, it is not necessary that the taking should be from the person of the owner, it is sufficient if it be done in the presence of the owner, as if by intimidation he is compelled to open his desk or throw down his purse, and then the money is taken in his presence. *Wharton's Digest*, 151; *U. States v. Jones*, C. C. April, 1819, cited by *Wharton* from *MS. Report*, (3 *Wash. C. C. Rep. 209*, S. C.) For the *Penn. Stats.* see *Stroud's Purd. "Tit. Robbery and Larceny."*

[3] See note ante, ch. 44. p. 517.

And therefore *Trin. 38 H. 8. Moore, n. 16. p. 5.* A man indicted of robbery in *quādam viā regiā pedestri ducent' de London ad Islington*, and accordingly found guilty, had his clergy, for the words of the statute are *for robbery in or near the highway he shall be ousted of his clergy*, and therefore the indictment and conviction must be of a robbery *in vel propè allam viam regiam*, and it is not sufficient to say only *viā regiā* or *viā regiā pedestri*.

For where any person is to be ousted of his clergy by virtue of any act of parliament, two things are always requisite. 1. That the indictment bring the fact within the statute, but need not conclude, *contra formam statuti*.

2. That the evidence and finding of the jury likewise bring the case within the statute, otherwise the prisoner is to have his clergy.

But an indictment of a robbery *in vel propè allam viam regiam*, tho in the disjunctive is usual at *Newgate*, for if it be either in or near it, tho an indictment ought to be certain, yet this is not the substance of the indictment, nor that which makes the crime, but only to ascertain the court as to the point of clergy to serve the statute.

A robbery is committed upon the *Thames* in a ship there [536] lying at anchor below the bridge, on that side of the river which is in *Middlesex*; for this robbery *Hyde* and others were indicted as of a robbery done *in vel propè allam viam regiam*, and were ousted of their clergy, for the *Thames* is in truth *alla via regia* the king's high stream; and if it were not, yet it is not far off from it, and the statute says *near not next*.

By the statute of 25 *H. 8. cap. 3.(g)* clergy is ousted upon examination, if the original offense were committed in another county, and excluded from clergy by 23 *H. 8. cap. 1.* and that statute extends to robbery in a mansion-house, or in or near the highway.

A. robs *B.* on the highway in the county of *C.* of goods to the value only of twelve-pence, and carries them into the county of *D.* it is certain, that this is larciny in the county of *D.* as well as in the county of *C.* but it is only robbery in the county of *C.* where the first taking was, and for robbery he cannot be indicted or appealed in the county of *D.* but only in the county of *C.* but he may be indicted of larciny in the county of *D.* and it is certain, though the robbery were but of the value of one penny, yet if *A.* were indicted thereof in the county of *C.* he should have had judgment of death, and been excluded from clergy.

Yet if *A.* be indicted of larciny in the county of *D.* and the jury find the value to be only twelve-pence, he shall only have the judgment of petit larciny, and not suffer death, as he should have done, if he had been indicted of robbery in the county of *C.* altho it appear upon examination upon the trial in the county of *D.* that it was a robbery; the like law is, if it had been a robbery in a dwelling-house within the statute of 23 *H. 8.* because it can be no more than petit

(g) This statute was in effect repealed by 1 *E. 6. cap. 12.* but is revived by 5 & 6 *E. 6. cap. 10.*

larciny in the county of *D.* it being found but of the value of twelve-pence, and accordingly resolved by the opinion of all the justices, 31 *Eliz. Moore, n. 739. pag. 550.* for the statute of 25 *H. 8.* extended to oust them of clergy, where clergy is demandable; but the jury finding the value to be but twelve-pence, or under, no [537] clergy is demandable, because petit larciny, but the party is to be whipt only.

It hath been before observed *cap. 44.* that upon the statute of 29. *Eliz. cap. 15.* tho *A.* and *B.* be both present and consenting to the breaking and entering of a house to rob, and *A.* only enters into the house, and *B.* stands by, *A.* shall be ousted of his clergy, but *B.* shall have his clergy, (h) because *A.* only entered the house, and the words of the statute extend only to him that actually enters the house; yet if *A.* and *B.* be present, and consenting to a robbery in or near the highway, or to a burglary, tho *A.* only actually commits the robbery, or actually breaks and enters the house, and *B.* perchance be watching at another place near, or be about a robbery hard by, which he effects not, yet they are both robbers or burglars, and both shall be ousted of their clergy, as in *Pudsey's* case; and the reason of the difference is, because in this case both are robbers and burglars, but in the former case both steal not in the house, but only *A.* and that statute binds up the exclusion of the clergy to stealing in the house.

Anno. 1672. at *Newgate, Hyde* and *A. B. C.* and *D.* conclude to ride out to rob, and accordingly they rode out; but at *Hounslow D.* parted from the company, and rode away to *Colbrook; Hyde, A. B.* and *C.* rode towards *Egham*, and about three miles from *Hounslow, Hyde, A.* and *B.* assaulted a man; but before he was robbed *C.* seeing another man coming at a distance, before the assault, rode up to him about a bow-shot or more from the rest, intending either to rob him, or to prevent his coming to assist, and in his absence *Hyde, A.* and *B.* robbed the first man of divers silk stockings, and then rode back to *C.* and they all went to *London*, and there divided the spoil: it was ruled upon good advice, 1. That *D.* was not guilty of the robbery, tho he rode out with them upon the same design, because he left them at *Hounslow*, and fell not in with them, it may be he repented of the design, but at least he pursued it not. 2. That *C.* tho he was not actually present at the robbery, nor, as I remember, at the assault, but rode back to secure his company, was guilty as well as *Hyde, A.* and *B.* and thereupon *C.* as well as [538] *Hyde, A.* and *B.* had judgment of death, and was excluded of clergy, the indictment being for robbery on the highway; according to the resolution in *Pudsey's* case, for they were all robbers on the highway.

(h) But now by the statute of 3 & 4 *W. & M. cap. 9.* he would not have his clergy, for by that statute clergy is taken away from all aiders, abettors, or assisters.

CHAPTER XLVII.

CONCERNING RESTITUTION OF GOODS STOLEN, AND THE CONFISCATION OF GOODS OMITTED IN THE INDICTMENT OR APPEAL.

ALTHO this title may seem to come more properly to be examined, when we come to consider of the proceedings and judgment in criminal causes, yet in as much as it properly relates to larciny and robbery of goods, it will not be amiss to take it up here as an appendix to the four former chapters touching larciny and robbery.

There are three means of restitution of goods for the party, from whom they were stolen, viz. 1. By appeal of robbery or larciny.[1] 2. By the statute of 21 *H. 8. cap. 11.*[2] And 3. By course of common law.

I. Upon an appeal of robbery or larciny, if the party were convicted thereupon, restitution of the goods contained in the appeal was to be made to the appellant, for it is one of the ends of that suit.

And hence it is, that if in an appeal of felony or robbery the appellant omit any of the goods stolen from him, they are forfeit, and confiscate to the king. 45 *E. 3. Coron. 100.*

And so it is, if he brings an appeal of robbery or larciny, [539] and it appears upon the trial, that indeed the goods were the plaintiff's; but yet the appellee came to the goods not by felony, but by finding or bailment or the like without felony, the plaintiff forfeits these goods to the king for his false appeal. 3 *E. 3. Coron. 367.*

But if the defendant in the appeal be convicted, he shall not only have judgment of death, but the plaintiff shall have a restitution of his goods.

If *A.* steals the goods of *B. C.* and *D.* severally, and *B.* brings his appeal, and convicts the offender, yet before judgment *C.* and *D.* may pursue their appeals, and he shall be arraigned also upon their several appeals. 4 *E. 4. 11. a.*

So if judgment be given against *A.* upon the appeal of *B.* yet if the appeal of *C.* were begun before the attainder, *A.* shall be arraigned upon the appeal of *C.* because he is to have restitution of his goods thereby, yet by the book of 7 *H. 4. 31.* and 12 *E. 2. Coron. 379.* it seems, that the second trial at the suit of *C.* is but in nature of an inquest of office to entitle him to the restitution of his goods, because as to the judgment of life he is already in law a dead person, and the book of 4 *E. 4. 11.(a)* speaks not in case of a judgment, but only of a conviction or finding guilty; *quære, vide 44*

(a) That case was of a second appeal brought before the party had pleaded to the first.

[1] This no longer exists. See 59 *Geo. III. c. 46.*

[2] Now amended by 7 & 8 *Geo. IV. c. 29. § 58.*; and see 7 *Car. & P. 461. 640.*

E. 3. 44. yet *vide Stamf.* p. 66 and 107. it seems the attainder is no bar to *C.*

But certain it is, that if *A.* be attaint at the suit of *B.* and then and not before *C.* commences his appeal, *A.* shall not be arraigned thereupon; but if he be afterwards pardoned, then he shall be arraigned at the suit of *C.* commenced after the attainder, 6 *H.* 4. 6. b. 10 *H.* 4. *Coron.* 227. But if the attainder were at the king's suit for that very felony, for which *C.* brought his appeal after the attainder, then it seems he shall not be put to answer it. *Stamf.* *P. C.* p. 106.

Now touching restitutions upon appeals, *Stamf. Lib.* III. *cap.* 10. *fol.* 165. hath given us a full account, I shall follow his method partly and summarily. 1. Where the plaintiff shall have restitution. 2. When. 3. Of what things.

1. As to the *first*, where and in what cases the party appellant shall have restitution.

[540]

1. It must be upon fresh suit, and tho' antiently the law was strict herein as to the time and manner of the pursuit and apprehending of the felon, yet the law is now more liberal.

If the felon be taken by any others, as by the sheriff, yet if the party robbed come within a year after, and give notice of the felony, and enter his appeal, this is a fresh suit; if he used his diligence shortly after the felony to have taken him. 7 *H.* 4. 43. b.

2. The appellant must proceed with his appeal to convict the felon; but yet in cases of impossibility of such conviction it is sufficient that he used his endeavour; as if he takes the felon, and imprison him, and he dies within the year, and before the appeal commenced; so if the party abjure or break prison after he is taken, 12 *E.* 2. *Coron.* 380. so as the appeal be commenced within the year and day, and that he made fresh suit, 26 *Assiz.* 32. or if he challenge peremptorily above the number appointed by law, stands mute of malice, or hath his clergy, (b) 8 *H.* 4. 1. or be outlawed.

2. As to the *second*, when he shall have restitution.

He shall have restitution after judgment against the appellee, and before execution made or prayed. 21 *E.* 4. 73. b.

He shall have restitution after conviction of the principal, and before conviction of the accessory, and after conviction of one of the principals before conviction of the other, or tho' the other be acquitted upon his appeal. 21 *E.* 4. 16 a. 10 *H.* 4. *Coron.* 466.

But if *A.* steal severally the goods of *B.* and *C.* and he be convict upon the appeal of *B.* yet *C.* shall not have restitution till he be convict at his suit also, 4 *E.* 4. 11. *supra.* altho' the felon be convict at the suit of the appellant, yet he is not to have restitution till the fresh suit be inquired, which is to be done by the same jury that convicts the felon, if he plead to inquest, but if he confess the felony, or stand mute, it shall be in- [541]

quired by inquest taken *ex officio* by the judge. 1 H. 4. 5. a. 2. R. 3. 12. 3 H. 7. 12. b.

3. Of what things he is to have restitution.

If a felon waive the goods stolen without any pursuit after him, those goods are not in law *bona waiviata*, nor forfeit to the king or lord of a franchise; but if he waive them upon a pursuit of him, then they are *bona waiviata*, and forfeit to the king or lord of the liberty; *quod vide* 5 Co. Rep. 109. a. *Foxley's case*.

And this forfeiture is not like a stray, where tho the lord may seize, yet the party, who is the owner, may retake them within the year and day, but here the true owner cannot seize his own goods, tho upon fresh suit within the year and day. 8 E. 3. 11. a. *Avowry* 151. 3 E. 3. Cor. 162.

But yet this is not an absolute loss of the owner's goods, but rather an expedient settled by law to drive the owner to convict the felon by prosecuting his appeal, and therefore if he make fresh suit, and prosecute his appeal, and the felon be thereupon convict and attain, and the fresh suit be inquired and found by verdict or inquest of office, he shall have restitution of the goods so waived. 5 Co. Rep. 109. *Foxley's case*, 3 E. 3. Coron. 162.

But more of restitution under the next general, for it is regularly true, that of what things the owner shall have restitution upon the statute of 21 H. 8. he should have restitution upon a conviction in an appeal at common law, and *è converso*, so that what is said upon the statute, is applicable to restitution upon an appeal.

II. By the statute of 21 H. 8. cap. 11.[3] it is enacted, "That if any person do rob or take away the goods of any of the king's subjects within this realm, and be indicted, arraigned, and found guilty thereof, or otherwise attainted by reason of the evidence of the party so robbed, or owner of the said money, goods or chattels, or any other by their procurement, that then the party so robbed, or owner, shall be restored to his money, goods or chattels, and the justices, before whom such person shall be so attainted, or [542] found guilty by reason of the evidence of the party so robbed, or owner, or by any other by their procurement, have power to reward writs of restitution for the said money or goods, or chattels in like manner, as tho any such felon or felons were attainted at the suit of the party in an appeal.

This statute introduced a new law for restitution: for before this statute there was no restitution upon an indictment, but only upon an appeal. 22 E. 3. Coron. 460. *Samf. P. C. p. 167. a.*

Tho the statute speak of the king's subjects, it extends to aliens robbed; for tho they are not the king's natural-born subjects, they are the king's subjects, when in *England*, by local allegiance.

If the servant be robbed of the master's money, and the master, or his servant by his procurement give evidence and convict

[3] See *ante*, note (2). p. 538.

the felon, the master shall have a writ of restitution, if it appear upon the indictment and evidence it was the master's money; for the statute gives restitution to the party robbed or owner. *Stamf. P. C. p. 167.*

If *A.* be robbed by *B.* and *C.* and *B.* only is convict of the robbery by the evidence of *A.* he shall have restitution, for so he should have had in case of an appeal.

If *A.* be robbed of an ox by *B.* who sells him to *C.* who keeps the money in his hands, and after kills the ox, and sells the flesh, or if the money be seized in the hands of the thief, *A.* may, if he pleases, have a writ of restitution for the money. *Noy's reports, Harris's case. (c)*

So if money be stolen, and the thief taken, and the money seized, he shall have restitution of the money.

The testator is robbed, the thief is convict upon the procurement of the executor, he shall have restitution. *3 Eliz. Benl. 87. Dy. 201. 6 Co. Rep. 80.*

It hath been a great question, if goods be stolen, and by the thief sold in a market-overt, whether the thief being convicted upon the evidence of the party robbed, he shall have restitution upon this statute of the thing sold or not, the buyer not being privy to the felony: those that held he should not, ground themselves upon the book of *12 H. 8. 10.* Mr. *Dalton's* opinion, *cap. 111. p. [543] 229. (d)* upon the resolution in the case of *market-overt*, *5 Co. Rep. 83. b.* which was upon occasion of a writ of restitution, *(e)* where it is held, that the sale in market-overt is a bar to the restitution; and upon the statute of *31 Eliz. cap. 12.* where it is specially provided, that notwithstanding a sale of a horse in market-overt the owner may take him within six months after the felony upon proof of his property, which evidenceth, that after the six months he shall not have restitution; and of this opinion was *Hyde* justice *(f)* at the sessions held after *Trin. 13. Car. Brown* justice *dissentiente.*

But it seems he shall have restitution upon this statute, notwithstanding the sale in market-overt of the goods stolen, and as to the authorities, the *12 H. 8. 10.* was before the statute of *21 H. 8.* and Mr. *Dalton's* opinion seems to be grounded upon it; the case of *market-overt*, *5 Co. Rep.* it is true seems to be against the restitution, tho the case fell off upon this, that the scrivener's shop was no market-overt by the custom of *London.*

As to the statute of *31 Eliz.* to which I may add also the statute of *1 Jac. cap. 21.* that enacts, "No sale of stolen goods in *London, Westminster, or Southwark,* or within two miles to a broker, shall make any change or alteration of the property or interest:" These statutes make nothing as to the case in question, for without question the sale in market-overt changeth the property in those cases, wherein these and the like statutes have not enacted the contrary, and therefore the party cannot take them again from the buyer, unless in case of brokers and stolen horses, *ut supra:* but this comes not to the

(c) *Noy* 128.(d) *New Edit. cap. 164. p. 543.*(e) *1 And. 344.*(f) *Kel. 35.*

quired by inquest taken *ex officio* by the judge. 1 *H.* 4. 5. *a.* 2. *R.* 3. 12. 3 *H.* 7. 12. *b.*

3. Of what things he is to have restitution.

If a felon waive the goods stolen without any pursuit after him, those goods are not in law *bona waiviata*, nor forfeit to the king or lord of a franchise; but if he waive them upon a pursuit of him, then they are *bona waiviata*, and forfeit to the king or lord of the liberty; *quod vide* 5 *Co. Rep.* 109. *a.* *Foxley's case.*

And this forfeiture is not like a stray, where tho the lord may seize, yet the party, who is the owner, may retake them within the year and day, but here the true owner cannot seize his own goods, tho upon fresh suit within the year and day. 8 *E.* 3. 11. *a.* *Avowry* 151. 3 *E.* 3. *Cor.* 162.

But yet this is not an absolute loss of the owner's goods, but rather an expedient settled by law to drive the owner to convict the felon by prosecuting his appeal, and therefore if he make fresh suit, and prosecute his appeal, and the felon be thereupon convict and attain, and the fresh suit be inquired and found by verdict or inquest of office, he shall have restitution of the goods so waived. 5 *Co. Rep.* 109. *Foxley's case*, 3 *E.* 3. *Coron.* 162.

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Rep. 83. b. which was upon occasion of a writ of restitution, *(e)* where it is held, that the sale in market-overt is a bar to the restitution; and upon the statute of 31 *Eliz. cap. 12.* where it is specially provided, that notwithstanding a sale of a horse in market-overt the owner may take him within six months after the felony upon proof of his property, which evidenceth, that after the six months he shall not have restitution; and of this opinion was *Hyde* justice *(f)* at the sessions held after *Trin. 13. Car. Brown* justice *dissentiente.*

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(c) *Noy* 128.(d) *New Edit. cap. 154. p. 543.*(e) 1 *And. 344.*(f) *Kel. 35.*

B. take his goods of *A.* again to the intent to favour him or maintain him, this is unlawful and punishable by fine and imprisonment,^(l) but if he take them again without any such intent, it is no offense. *Mich. 16 Jac. B. R. Higgins and Andrews,*^(m) but justifiable.

But after the felon is convicted, it can be no colour of crime to take his goods again, where he finds them, because he hath pursued the law upon him, and may have his writ of restitution, if he please.

2. By course of common law: *A.* steals the goods of *B. viz.* fifty pounds in money, *A.* is convicted, and hath his clergy upon the prosecution of *B.* *B.* brings a *trover* and conversion for this fifty pounds, and upon not guilty pleaded this special matter is found, and adjudged for the plaintiff, because now the party hath prosecuted the law against him, and no mischief to the commonwealth; but it was held, that if a man feloniously steal goods, and before prosecution by indictment the party robbed brings *trover*, it lies not, for so felonies should be healed. *M. 1652. B. R. Dawkes and Coveleigh;*⁽ⁿ⁾ vide *accordant Noyes reports,*^(o) *Markham and Cob;* but if the [547] plaintiff had not given evidence upon the conviction, it was held, that the action lay not, but the goods were confiscate to the king, and for want of that averment in the case of *Markham*, judgment was given for the defendant in trespass.

CHAPTER XLVIII.

OF BURGLARY, THE KINDS, AND PUNISHMENT.

I COME to those crimes that specially concern the habitation of a man, to which the laws of this kingdom have a special respect, because every man by the law hath a special protection in reference to his house and dwelling.^(a)

And that is the reason, that a man may assemble people together for the safeguard of his house, which he could not do in relation to travel, or a journey. 21 *H. 7. 39. a.*

And upon the same reason it is, that not only by the statute of 24 *H. 8. cap. 5.* but even by the common law, if any come to commit a felony upon me in my house, and I kill him, it is no felony, nor induceth any forfeiture; *quod vide supra, p. 487. vide Sir Henry*

^(l) And so seems the practice of advertising a reward for bringing goods stolen, and no questions asked, which I have heard lord chancellor *Macclesfield* declare to be highly criminal, as being a sort of compounding of felony, for the goods by that means returning to the right owner, a stop is put to the inquiry and prosecution of the felon, and thereby great encouragement is given to the commission of such offences. See *postea, cap. 56.*

^(m) 2 *Rel. Rep. 55.*

⁽ⁿ⁾ *Style 346.*

^(o) *Noy 82.*

^(a) That this was the notion among the *Romans* also appears from *Cicero* in *oratione pro domo*, cap. 41. *Quid enim sanctius, quid omni religione munitius, quam domus uniuscujusque civium? hic ara sunt, hic soci,—hoc perfugium est ita sanctum omnibus, ut inde abripi neminem fas sit.*

Spelman Gloss. tit. Hamsecken, & ibidem tit. Burglaria, whereby it appears, that by the antient laws of *Canutus*,^(b) and of *H. 1.*^(c) it was punished with death.

The common genus of offenses that comes under the name of *Hamsecken*, is that which is usually called house-breaking, which sometimes comes under the common appellation of *burglary*, whether committed in the day or night to the intent to com- [548] mit felony, so that house-breaking of this kind is of two natures.

1. That which in a vulgar and improper acceptation is sometimes called burglary. And,

2. That which in a strict and legal acceptation is so called.

1. As to the former of these, *hamsacken*, house-breaking, or burglary in a vulgar acceptation is of several kinds.

1. Robbing any person by day or night in his dwelling-house, the dweller, his wife, children, or servants being in the house, and put in fear; this requires that there be something taken, but it requires not an actual breach of the house; but it is all one, whether he actually breaks the house, or enters *per ostia aperta*, for it is in truth robbery either way, and from this offense clergy is taken away by the statute of 23 *H. 8. cap. 1.* and 25 *H. 8. cap. 3.* from the principal, and by the statute of 4 & 5 *P. & M. cap. 4.* from the accessory.

2. Robbing a person by day or night in his dwelling-house, the dweller, his wife or children being in the house, and not put in fear; this requires, 1. An actual breaking of the house. 2. An actual taking of something; but the persons need not be put in fear; and by the statute of 5 & 6 *E. 6. cap. 9.* clergy is in this case taken from the principal, that enters the house; and by the statute of 4 & 5 *P. & M. cap. 4.* from the accessory before.

3. Robbing a dwelling-house by day or night, and taking away goods, none being in the house; this requires an actual breaking, and an actual taking of something, and without the latter it is not felony, but if accompanied with both, and the taking of goods be of the value of five shillings, it is excluded from clergy by 39 *Eliz. cap. 15.*

4. A breaking of the house in the day or night to the intent to steal or commit a felony, [1] any person being in the house, and put

(b) l. 61. reckons *irruptio in domum* among the *scelerata inexcusabilia*.

(c) l. 80. See *Wilk. Leg. Anglo-Sax. p. 273.*

[1] Whoever in the night time breaks and enters the dwelling-house of another, with intent to commit murder, rape, arson, robbery, or larceny, within the same; or by day or night enters the same with such intent, and in the night, breaks with such intent any apartment thereof; or in the night enters the same with such intent, and in the night breaks out of such dwelling-house, or being an inmate therein, in the night breaks and enters, with such intent, any apartment thereof, without any right or authority to enter the same, at the time, is guilty of burglary. *Mass. Penal Code. Tit. Burglary.*

According to the law of *England*, there are six ways of committing Burglary:

1. By breaking and entry from without, with intent, &c.
2. By entry from without, &c. and breaking some apartment within, with intent, &c.
3. By breaking and entry of an inner apartment, by an inmate, with intent, &c.

in fear, tho nothing be actually taken, this is burglary by the common law, if it is in the night, and felony by the statute of 1 E. 6 cap. 12. tho in the day, and is excluded from clergy by the statute of 1 E. 6. whether by day or by night, but then it requires, 1. An actual breaking of the house, and not an entry *per ostia aperta*. 2. An [549] entry with intent to commit a felony, and so laid in the indictment. *Poulter's case*, 11 Co. Rep. 31. b.[2]

3. A putting in fear, but accessaries have clergy.[3]

II. Legal or proper burglary is of two kinds, viz. 1. Complicated and mixed with another felony, as breaking the house, and stealing goods, either with putting in fear or without putting in fear, somebody in the house, or nobody in the house, which requires, 1. That it be done in the night. 2. That there be an actual breaking.

2. Simple burglary, and that either, 1. With putting in fear, and then the principal is excluded of clergy by the statute of 1 E. 6. and also by the statute of 18 Eliz. or, 2. Without putting in fear, and then he is excluded of clergy by the statute of 18 Eliz.

And this chapter speaks only of proper or legal burglaries, of those improper burglaries I have spoken before.

Burglary is described by Sir Henry Spelman(e) to be *nocturna diruptio alicujus habitaculi vel ecclesiæ, etiam murorum portarumve civitatis aut burgi ad feloniam perpetranda*.

My lord Coke P. C. cap. 14. p. 63. more fully describes it. "A burglar is he, that in the night-time breaketh and entreth into a mansion-house of another of intent to kill some reasonable creature, or to commit some other felony within the same, whether his felonious intent be executed or not.

And accordingly the indictment runs, quod J. S. 1 die Julii anno &c. in nocte ejusdem diei vi & armis domum mansionalem A. B.

(e) *In verbo burglaria*,

4. By entry, with intent, &c., and breaking out.

5. By entry and actual commission of felony within, and breaking out.

6. By breaking and entry, and actual commission of felony within.

The first three and the sixth offences (12 East, 519.) are burglary at common law. It is uncertain whether the fourth is burglary at common law or not. *Hale* denies it to be burglary, (page 554.) where the breaking out was with intent to escape only. The general doctrine is, that both the breaking and entry must be with felonious intent. If this case is not an exception, (and we are by no means ready to conclude that it is,) breaking out; if a. breaking at all, at common law, can be so only when the offender pursues his felonious intent; as when he carries away something stolen, or pursues some one with intent to murder, &c. But both the fourth and fifth are burglary, by statute 17 Anne, c. 7. re-enacted in words a little varied in 7 & 8 Geo. IV. c. 29. s. 11.

"If any person shall enter the dwelling-house of another with intent to commit felony, or being in such dwelling-house, shall commit any felony, and shall, in either case, break out of the said dwelling-house in the night time, such person shall be deemed guilty of burglary." Such is generally the state of the law of burglary in England. *Mass. Com. Rep.* See *Rex v. Hanson*, 1 Root's Rep. 59. *The State v. Wilson*, Cox's N. J. Rep. 441. *Com. v. Newell*, 7 Mass. R. 247. *Com. v. Brown*, 3 Rawle Rep. 207.

[2] *State v. Wilson Cox's*, N. J. Rep. 441. *Com. v. Newell*, 7 Mass. R. 247. *Rex v. Hanson*, 1 Root's R. 59.

[3] As to clergy, see *ante* ch. 44.

felonice & burglariter fregit & intravit, ac ad tunc & ibidem unum scyphum argenteum &c. de bonis & catallis ejusdem *A. B.* in eadem domo invent' felonice & burglariter furatus fuit, cepit & asportavit; *or if no theft were actually committed, then* ex intentione ad bona & catalla ejusdem *A. B.* in eadem domo existent' felonice & burglariter furandum, capiendum & asportandum, *or eā* intentione ad ipsum *A. B.* ibidem felonice interficiendum contra pacem &c.

And note, that these several clauses in the indictment are essential to the constitution of burglary, 1. That it be said *noctanter*, or in *nocte ejusdem diei(f)* for if it be in the day-time, it is not burglary. 2. That it be said in the indictment *burglariter*, [550] for it is a legal word of art, without which burglary cannot be expressed with any kind of other word or other circumlocution, and therefore, where the indictment is *burgaliter* instead of *burglariter*, it makes no indictment of burglary, so if it be *burgenter*. 4 *Co. Rep.* 39. *b.(g)*

3. It must be *fregit & intravit*, for it is held, that breaking without entering, or entering without breaking makes not burglary, *sed de hoc infra*; yet *Trin.* 5 *Jac. B. R.* an indictment, *quod felonice & burglariter fregit domum mansionalem, &c.* was a good indictment of burglary, and that the entry is sufficiently implied, even in an indictment, by the words *burglariter fregit*, but the safest and common way is to say *fregit & intravit*.

4. It must be said *domum mansionalem*, where burglary is committed in a house, and not generally *domum*, for that is too uncertain, and at large.

5. It must be alleged, that he committed a felony in the same house, or that he brake and entered the house to the intent to commit a felony, but these things will be fuller examined, when we come to particulars.

1. Therefore the time, wherein it must be committed to make it burglary, must be in the night.[4]

(f) See 9 *Co.* 66. *b.*

(g) See also 5 *Co.* 121. *b.*

[4] See 4 *Bl. Com.* 224. But now in *England*, as to what shall be held day and what night, see 7 *Will. IV.* & 1 *Vict. c.* 86, *s.* 4, which enacts, that 9 o'clock in the evening of one day until 6 o'clock in the morning of the succeeding day, shall be considered night.

Anciently, the day was accounted to begin only at sun-rising, and to end immediately at sun-set, as stated by Lord *Hale, infra*; but the opinion usually held was, that if there be daylight, or *crepusculum*, twilight, enough to discern a man's face, it was no burglary. 3 *Inst.* 63; 2 *East's, P. C.* 509. But this did not extend to moonlight, for then many midnight burglaries would go unpunished. 4 *Blac. sup.* The breaking and entering must both be committed in the night time. But the breaking may be committed in one night, and the entering in another. *Rex v. Jordan*, 7 *Car. & P.* 432. The breaking, however, must be with intent to enter, and the entry with intent to commit a felony. *Rex v. Smith, R. & R.* 417.

If there be daylight or twilight enough begun or left, whereby the countenance of a person may be reasonably discerned, a breaking and entry is not burglary by the common law. 7 *Dane's Abr.* 134. Hence an indictment, which alleged the crime to have been committed between the hours of 12 at night and 9 of the succeeding evening, will

It hath been antiently held, that after sun-set, tho day-light be not quite gone, or before sun-rising is *noctanter* to make a burglary; *Dalt. cap. 99. p. 352, (h)* and accordingly cited by *Crompt. fol. 32. b.* to have been judged by *Portman, 3 E. 6., (i)* and the felons executed, and *21 H. 7. Kelw. 75. a.*

But the latter opinion hath been and still obtaineth, that if the sun be set, yet if the countenance of a party can be reasonably discerned by the light of the sun or *crepusculum*, it is not night, nor *noctanter* to make a burglary; and with this agrees *Co. P. C. p. 63.* and hence it is, that altho a town unwall'd shall not be amerced for the escape of a murderer, if the murder were committed in the night, yet if it were done only *in vespere dici*, the township shall be amerced. *3 E. 3. Coron. 293.* And if a [551] a robbery be committed before sun-rising, or after sun-set, and whilst it is so far day-light, that the countenance of a man can be reasonably discerned by the light of the day, yet the hundred shall be charged, otherwise where it is done in the night, *7 Co. Rep. 34. Milburn's case*: but this is not intended of moon-light, for then midnight house-breaking should be no burglary; and the word *noctanter* is to be applied to all that follows, *viz. fregit & intravit*, if the breaking of the house were in the day-time, and the entring in the night, or the breaking in the night, and entring in the day, this will not be burglary, for both make the offense, and both must be *noctanter*: *vide Crompt. 33. a. ex 8 E. 4. (k)*

But if they break a hole in the house one night, to the intent to enter another night and commit felony, and accordingly they come at another night, and commit a felony through the hole they so made the night before, this seems to be burglary, for the breaking and entring were both *noctanter*, tho not the same night; and it shall be supposed, that they brake and entred the night when they entred, for the breaking makes not the burglary till the entry.

2. There must be a breaking and an entry to make the burglary, and therefore I shall speak of them both together. [5]

(h) *New Edit. cap. 151. p. 486.*

(i) See the like judgment *per Finesux, Crompt. 33. a.*

(k) This case does not fully prove the point it is brought for, for the resolution there was only, that if thieves enter in by night at an hole in the wall, which was there before, it is not burglary, but it does not appear who made the hole.

be quashed for want of a *noctanter*. *The State v. Mather, N. Chipm. R. 32; The State v. Bancroft, 10 Mass. R. 105; The State v. G. S. 1 Tyler, Vermt. R. 295; Com. v. Chevalier, 7 Dane's Abr. 134; sed vide Thomas v. The State, 5 How. (Miss.) Rep. 20.*

[5] It is deemed an entry, when the thief breaketh the house, and his body, or any part thereof, as his foot or his arm, is within any part of the house, or when he putteth a gun into a window which he hath broken, (though the hand be not in,) or into a hole of the house, which he hath made with intent to murder or kill, this is an entry and breaking of the house; but, if he doth barely break the house, without any such entry at all, this is no burglary. *3 Inst. 64. 2 East's P. C. 490.*

Thieves came by night to rob a house. The owner went out and struck one of them; another made a pass with a sword at persons he saw in the entry, and in so doing, his

Antiently the law was so strict against burglary, that the very coming to a house with intent to commit a burglary was held punishable with death, *Crompt. 31.* by Sir *Anthony Brown*; but that obtains not now for law without a burglary committed.

hand was over the threshold. This was adjudged burglary by great advice. *2 East's P. C. 490.*

In the case of *George Gibbons, Old Bailey, June 1752, (Foot. 107. 2 East's P. C. 490.)* which was indicted for burglary in the dwelling-house of *John Allan*, it appeared in evidence, that the prisoner, in the night time, cut a hole in the window shutters of the prosecutor's shop, which was part of his dwelling-house, and putting his hand through the hole, took out watches and other things, which hung in the shop within his reach. but no entry was proved, otherwise than by putting his hand through the hole. This was held to be burglary, and the prisoner was convicted. Introducing the hand through a pane of glass, broken by the prisoner, between an outer window and an inner shutter, for the purpose of undoing the window latch, is a sufficient entry. *R. v. Baily, R. & R. 341.* So would the mere introduction of the offender's finger. *R. v. Davis, R. & R. 499.*, and see *ante*, 533.

But an entry through a hole in the roof, left for the purpose of admitting light, is not a sufficient entry to constitute burglary; for a chimney is a necessary opening and needs protection; whereas, if a man choose to leave a hole in the wall or roof of his house, instead of a fastened window, he must take the consequences. *R. v. Spriggs, 1 Moo. & Rob. 357. Com. v. Stewart, 7 Dane's Abr. 136.*

If the instrument with which the house is broken, happen to enter the house, but without any intention on the part of the burglar to effect his felonious intent, (as for instance, to draw out the goods,) with it, this will not be a sufficient entry to constitute a burglary. *Rex v. Hughes et al., 1 Leach, 496. See R. v. Roberts, 2 East's P. C. 487.*

The prisoner raised a window, which was not bolted, and he thrust a crow-bar under the bottom of the shutter, (which was about half a foot within the window,) so as to make an indentation on the inside of the shutter, but from the length of the bar, his hand was not inside the house. This was held not to be a sufficient entry to constitute a burglary. *R. v. Rust & Ford, R. & M. 184. Car. C. L. 293. S. C. by the name of R. v. Roberts.*

Where the house was broken, but not entered, and the owner, for fear, throw out his money, it was holden to be no burglary, though clearly robbery, if taken in the presence of the owner. *2 East's P. C. 490.*

Where thieves bored a hole through the door with a centre-bit, and part of the chips were found in the inside of the house, by which it was apparent that the end of the centre-bit had penetrated into the house; yet, as the instrument had not been introduced for the purpose of taking the property or committing any other felony, it was decided, that this was not sufficient to constitute burglary. *R. v. Hughes, 2 East's P. C. 491.*

If divers come in the night to do a burglary, and one of them break and enter, the rest of them standing to watch at a distance, this is burglary in all. *3 Inst. 64.*

A breaking may be actual or constructive: an actual breaking may be made by breaking the substance of a door or window, as the glass or panes. *Com. v. Stevenson, 8 Pick. R. 354. Rex v. McKearney, Jebb's Cas. 99.*

By unfastening either door or window and opening it. *Rex v. Robinson, Mood. C. C. 337. State v. Wilson, Coxe's N. J. R. 439. Com. v. Stewart, 7 Dane's Abr. 136.*

By breaking away the sides of an aperture, so as to enlarge it. *Rex v. Robinson, Mood. C. C. 327.*

By raising a sash or trap-door, or pushing open a door. *Rex v. Hyam, 7 C. & P. 441. Rex v. Haynes, R. & R. 451. Rex v. Brown, 2 East's P. C. 487. Rex v. Callar, R. & R. 157. Rex v. Russell, Mood. 377. Sed vide Rex v. Laurence, 4 C. & P. 231.*

And it is a breaking, although there be an outside door or shutter to the same opening, which is not broken. *Rex v. Bailey, R. & R. 341. Rex v. Parkes, 1 C. & P. 300. Rex v. Roberts, 2 East's P. C. 487. nor even closed, Rex v. Haynes, R. & Ry. 451.*

By breaking, removing, or opening the roof, wall, ceiling, floor, or any defence or barrier against entry, which is parcel of the dwelling-house. *2 Russ. on C. 3.*

But it seems the entering any aperture, found open, is not a breaking. *Com. v. Steward, 7 Dane's Abr. 136. Rex v. Spriggs, cited sup. Rex v. Lewis, 2 C. & P. 628.*

It is a constructive breaking, if an entry is actually made, and the means of entrance

Fregit, there is a double kind of breaking, 1. In law, and thus every one that enters into another's house against his will, or to commit a felony, tho the doors be open, doth in law break the house. 2. There is a breaking in fact an actual force upon the house, as by opening a door, breaking a window, &c.

And altho, in the remembrance of some yet alive, Sir N. H. (1) chief justice did hold, that a breaking in law was sufficient to make a burglary, as if a man entred into the house by the doors [552] open in the night, and stole goods, that this is burglary, and accordingly is *Crompt. 32. a. 27 Assiz 38.* yet the law is, that a bare breaking in law, viz. an entry by the doors or windows open is not sufficient to make burglary without an actual breaking, *Co. P. C. p. 64.* and so the law hath been generally taken to this day in case of burglary. (m)

And these acts amount to an actual breaking, viz. opening the casement, or breaking the glass window, picking open a lock of a door with a false key, or putting back the lock with a knife or dagger, unlatching the door that is only latched, to put back the leaf of a window with a dagger, *Dalt. cap. 99. (n) Crompt. 33. a.* and so is common experience. [6]

To take down a pane of glass of a glass-window by taking out or bending aside the nails that fasten it is a breaking of a house within this law, because the glass-window is parcel of the house.

It was held by *Manwood* chief baron, that if a thief goes down a chimney to steal, this is a breaking and entring, *Crompt. fol. 32. b.* and hereunto agrees Mr. *Dalton*, p. 253. (o) [7]

(1) Sir Nicholas Hyde, see *Cro. Car. 65. 225.*

(m) See *Kel. 67 & 70.*

(n) *New Edit. p. 487.*

(o) The reason of this seems to be, because it is as much shut as the nature of the thing will admit.

are obtained by frightful noises, showing dangerous weapons, or attacks on the house. *Rex v. Swallow, 2 Russ. C. & M. 8. 2 East's P. C. 486.*

By any fraud or trick practised to obtain admission; as by abuse of process or legal authority; or under pretence of business with some one within; or by fraudulently persuading another to give admission; or by knocking or otherwise pretending a right or lawful occasion to enter; or under any pretence of a similar character. *Rex v. Gascoigne, 1 Leach, C. C. 284. McGregor's case, Hume's Crim. Law, 98. Browne's case, 11. 4 Bl. Com. 226.*

[6] *Pugh v. Griffiths, 7 Ad. & El. 836; Rex v. Urdan, 7 Car. & P. 432; Rex v. Wheldon, 8 Car. & P. 241; Rex v. Hyams, 7 Car. & Pay. 441.*

[7] If the thief enter by the chimney, it is a breaking; for that is as much closed as the nature of things will permit. 1 *Hawk, c. 38, s. 4. 4 Bl. Com. 226.*

And it would be a burglarious breaking to constitute burglary, though the party does not enter any of the rooms of the house. Thus in *Rex v. Brice, R. & R. 450*, the prisoner got in at a chimney and lowered himself a considerable way down just above a mantel-piece of a room on the ground floor. *Holroyd and Burroughs, JJ.* thought this was not a breaking and entering of the dwelling-house, on the ground that he was not within the dwelling-house, till he was below the chimney-piece. The rest of the judges, however, held otherwise; for that the chimney was part of the dwelling-house, that the getting in at the top was a breaking of the dwelling-house, and that the lowering himself was an entry therein.

There are two cases in the *Scotch* law, which are somewhat analogous to the entry

There was one arraigned before me at *Cambridge* for burglary, and upon the evidence it appeared, that he crept down a chimney; I was doubtful whether this were burglary, and so were some others; but upon examination it appeared, that in his creeping down some of the

into a chimney, which have been decided to be breakings. The one where the defendant entered a sewer, which issued from a cellar, and passed under ground. *Hume's Crim. Law of Scot.* § 97; and the other, where he entered a paper-mill by the race-way of the water-wheel. *Id. note* (3.) In the former case, it is not settled, whether the passing into the sewer, or passing that part of it which enters the walls of the house, or, passing out of it into the house constituted the offence. The latter could only apply in burglary, where such a building had a covered communication with a dwelling-house.

Where the prisoner effected an entry by pulling down the upper sash of a window which had not been fastened, but merely kept in its place by the pulley-weight, the judges held this to be a sufficient breaking to constitute burglary, even although it also appeared that an outside shutter, by which the window was usually secured, was not closed or fastened at the time. *R. v. Haines and Harrison*, *R. & R.* 451; and see *R. v. Hyams*, 7 *C. & P.* 441.

Where an entry was first into an outer cellar by lifting up a heavy iron grating that led into it, and then into the house by a window, and it appeared that the window, which opened by hinges, had been fastened by means of two nails as wedges, but could, notwithstanding, easily be opened by pushing; the judges held, that opening the window so secured, was a breaking sufficient to constitute burglary. *Rex v. Hall*, *R. & R.* 355. So where a party thrust his arm through the broken pane of a window, and in so doing broke some more of the pane, and removed the fastenings of the window and opened it, *R. v. Robinson*, *R. & M.* 327. And see *R. v. Bird*, 9 *C. & P.* 44.

But if a window thus opening on hinges, or a door, be not fastened at all, opening them would not be a breaking within the definition of burglary. Even where the heavy flat-door of a cellar which would keep closed by its own weight, and would require some degree of force to raise it, was opened; it had bolts by which it might have been fastened on the inside, but it did not appear it was so fastened at the time: the judges were divided in opinion, whether opening of this door was such a breaking of the house as constituted burglary. *R. v. Cullan*, *R. & R.* 157. It was holden in *Brown's case*, (2 *East*, *P. C.* 487.) that it was.

It seems the only difference between these two cases is, that in *Brown's case* there was no interior fastenings, but in *Cullan's* there were, though not used. In a later case it has been held by *Bolland*, B. that the lifting up of a trap-door covering a cellar which was merely kept in its place by its own weight, and which had no fastenings, because it being a new trap-door, they had not been put on, is not a sufficient breaking to constitute a burglary. *Rex v. Lawrence*, 4 *C. & P.* 231. See *R. v. Russell*, *R. & M.* 377.

When the offender, with intent to commit a felony, obtains admission by some artifice or trick for the purpose of effecting it, he will be guilty of burglary, for this is a constructive breaking. Thus where thieves, having an intent to rob, raised the hue and cry, and brought the constable, to whom the owner opened the door; and when they came in they bound the constable and robbed the owner; this was held a burglary. So if admission be gained under pretence of business; or if one take lodgings with a like felonious intent, and afterwards rob the landlord; or get possession of a dwelling-house by false affidavits without any colour of title, and then rifle the house; such entrance being gained by fraud, will be burglarious. 2 *East's P. C.* 485. So in *A. Hawkins's case*, *O. B.* 1704, 2 *East's P. C.* 485, she was indicted for burglary; upon evidence it appeared that she was acquainted with the house, and knew that the family were in the country; and meeting with the boy who kept the key, she prevailed upon him to go with her to the house by the promise of a pot of ale, robbed the house and went off; and this being in the night time, it was adjudged that the prisoner was clearly guilty of burglary. And see *Doe v. Carter*, 8 *T. R.* 302.

A breaking may be also constructive, as where in consequence of violence commenced or threatened in order to obtain entrance, the owner, either from apprehension of the force, or with a view more effectually to repel it, opens the door through which the robber enters. But where no fraud or conspiracy is made use of, or violence commenced or threatened in order to obtain an entrance, there must be an actual breach of some part

bricks of the chimney were loosened, and fell down in the room, which put it out of question, and direction was given to find it burglary; but the jury acquitted him of the whole fact.

In some cases there may be a burglary committed by a man without an actual breaking.

Thieves come with a pretended hue and cry, and require the constable to go along with them to search for felons, and whilst he goes with them into a man's house, they bind the constable and dweller, and rob him, this is burglary, *(p) Co. P. C. p. 64.* The like hap-

(p) Because in *fraudem legis*; for the same reason it is burglary, where the thieves gain entrance by pretenses of business with one in the house, *Kel. 42*, or of executing any process, or the like, *Kel. 43, 44. 62. 82.*

of the house, though it need not be accompanied with any violence as to the manner of executing it. *2 East's P. C. 486.*

Some parts of the house must be broken, where the prisoner opened the area gate with a skeleton key, and from the area passed into the kitchen through a door, which did not appear to have been shut at the time, the judges held that opening the area gate was not a breaking of the dwelling, as there was no free passage in the time of sleep from the area into the house. *Rex v. Davis, R. & R. 322.*

So breaking a door which formed part of the outward fence of the curtilage of a dwelling-house, and which opened not in any building, but into a yard only, was holden not to be a breaking of the dwelling-house; the premises consisted of a dwelling-house, warehouse, and stables surrounding a yard; there was an immediate entrance to the dwelling-house from the street, and a gate and gateway under one of the warehouses leading into the yard; the prisoner entered the premises by breaking this gate: the judges held that this was not burglary: that breaking this gate, which was part of the outward fence of the curtilage, and not opening into any part of the buildings, was not a breaking of any part of the dwelling-house. *R. v. Bennett, R. & R. 289.*

A shutter-box partly projected from a house, and adjoined the side of the shop window, which side was protected by wooden panelling lined with iron:—*Held*, that the breaking and entering the shutter-box did not constitute burglary. *R. v. Paine, 7 Car & P. 135.*

A burglary may be committed by breaking on the inside, for though a thief enter a dwelling-house in the night time through the outer door being left open, or by an open window, yet if, when within the house, he turn the key or unlatch a chamber-door, with intent to commit felony, this is burglary. (*R. v. Johnson, 2 East's P. C. 488.*) And this may be done by a servant, who sleeps in an adjacent room, unlatching his master's door, and entering his apartment with intent to kill him; (*ante p. 544, 2 East's P. C. 488;*) or to commit a rape upon his mistress; (*Gray's case, 1 Stra. 481.*) But Lord Hale doubts whether a guest at an inn is guilty of burglary, by rising in the night, opening his own door, and stealing goods from other rooms; (*p. 554.*) And it seems certain, that breaking open a chest or trunk is not in itself burglarious; (*Fost. 108, 109, 2 East's P. C. 488;*) and according to the better opinion, the same principle applies to cupboards, presses, and other fixtures which, though attached to the freehold, are intended only the better to supply the place of movable depositories. (*Fost. 109.*) And Mr. J. Foster there says, "in questions between the heir and devisee and the executor;" (*see 2 Vern. 508, 1 P. Wms. 94;*) those fixtures may with propriety enough be considered as annexed to and parts of the freehold. The law will presume, that it was the intention of the owner *under whose bounty the executor claimeth*, that they should be so considered, to the end that the house might remain to those who by operation of law or by his bequest should become entitled to it, in the same plight he put it, or should leave it entire and undefaced. But in capital cases I am of opinion that such fixtures which merely supply the place of chests and other ordinary utensils of household should be considered in no other light than as mere movables partaking of the nature of those utensils, and adapted to the same use. See *2 East's P. C. 489.*

Unlocking and opening a hall door of a house, and running away, is a sufficient breaking out of the house. *Rex v. Lawrence, 4 C. & P. 231.* See *R. v. Compton, 7 C. & P. 139.*

pened in *Black Fryars* 1664, where thieves pretending that *A.* harboured traitors, called the constable to go with them to apprehend him, and the constable entering, they bound the constable, and robbed *A.* and were executed for burglary, and yet in both cases the owner opened the doors of his own accord, at the command of the constable. *Crompt.* 32. *b.*

Thieves come in the night to rob *A.* who, perceiving it, opens his door, and issues out and strikes one of the thieves with a staff, another thief having a pistol in his hand, perceiving others in the entry ready to interrupt them, puts his pistol within the door over the threshold, and shot, so that his hand was over the threshold, but neither his foot, nor the rest of his body, and upon this evidence by great advice it was adjudged burglary, and the thief hanged, and yet he brake not the house. 26 *Eliz.* *Crompt.* 32. *a.*

If *A.* the servant of *B.* conspire with *C.* to let him in to rob *B.* and accordingly *A.* in the night-time opens the door or window, and lets him in, this is burglary in *C.* but larceny in *A.* the servant, *Dalt. cap.* 99. *p.* 253. (*q*) it seems it is burglary in both, for if it be burglary in *C.* it must needs be so in *A.* because he is present, and aiding to *C.* to commit this burglary. [8]

If *A.* enter the house of *B.* in the night-time, the outward door being open, or by an open window, and when he is within the house, turns a key of a door of a chamber, or unlatcheth a chamber door to the intent to steal, this is burglary, tho the outward door were open; and so it was adjudged upon a special verdict before me at the sessions at *Newgate* 1672, by advice of many judges then also present.

And so it is, if a thief be lodged in an inn, and in the night he stealeth goods, and goeth away, or if he enter into the house secretly in the day-time, and there stayeth till night, and then steals goods and goes away, this is not burglary, *Dalt. ubi supra p.* 253. and *Crompt.* 34. *a.* but if in either of the cases they had opened an inner chamber door, and taken the goods, it had been burglary, agreed 1672. (*r*)

The servant lies in one part of the house, the master in another, and the stair-foot door of the master's chamber is [554] latched; the servant came in the night, and unlatched the stair-foot door, and went up into his master's chamber with a hatchet intending to kill him, and wounded him dangerously, but the master escaped. (*s*) Upon this special matter found at *Winchester* assizes, by the advice of the greater number of the judges, *exceptis paucis*, (*t*) it was adjudged burglary, and the offender was executed. *T.* 16 *Jdc.* *Hutt. Rep.* the case of *Haydon* and *Edmunds*. (*u*)

(*q*) *New Edit.* *p.* 487.

(*r*) *Kel.* 69.

(*s*) In old times this would have been adjudged petit treason, for antiently where the intent was so apparent *voluntas reputabatur pro facto.* *Coron.* 383.

(*t*) They all concurred, except *Winch*, who doubted.

(*u*) *Hutt.* 20. *Kel.* 67.

[8] *Rex v. Johnson*, 1 *Car. & Marsh.* 218; *Rex v. Cornwell*, 2 *Str. R.* 880; 19 *State Trials*, 782. note.

If a man enter in the night-time by the doors open, with the intent to steal, and is pursued, whereby he opens another door to make his escape, this I think is not burglary against the opinion of *Dalt. p. 253.*(x) out of Sir *Francis Bacon*, for *fregit & exivit, non fregit & intravit.*(y)

If *A.* be a lodger in an inn, and he goes up to his chamber to bed, and the chamberlain pulls to the door and latcheth it, or *A.* himself locks it, and in the night he riseth, openeth his chamber door, steals goods in the house, and goes away, it may be a question, whether this be burglary; it seems not, because he had a kind of special interest in his chamber, and so the opening of his own door was no breaking of the inn-keeper's house, for *A.* hath a special property in his chamber; but if he had opened the chamber of *B.* a lodger in the inn to steal his goods, this had been burglary.

And in that case of a lodger, tho he hath a special interest in the chamber, yet he being but a lodger, and in an inn, the burglary must be supposed of the mansion-house of the inn-keeper: (z) *vide plus infra.*

If *A.* enter into the house of *B.* in the night, by the doors open, and breaks open a chest, and takes away goods without breaking open of an inner door, this is no burglary, because the chest is no part of the house. (a)

But if he breaks open a study or counting-house, or shop [555.] within the house, this is burglary, tho none usually lodge in the study; and the same law seems to be, if he break open a cupboard or counter fixed to the house; (b) *quære.*

3. *Fregit & intravit.* There must be an entry as well as a breaking, and both must be in the night, and with an intent to steal, otherwise it is no burglary. [9]

A. intending to rob *B.* breaks a hole in his house, but enters not, *B.* for fear, throws out his money to him, *A.* takes it and carries it away, this is certainly robbery, and some have held it burglary, tho *A.* never entred the house; and so it is reported to have been adjudged by *Saunders* chief baron. *Crompt. 31. b. tamen quære.* (c)

If *A.* breaks the house of *B.* in the night-time, with intent to steal goods, and breaks the window, and puts in his hand, or puts in a hook, or other engine to reach out goods, or puts a pistol in at the window with an intent to kill, tho his hand be not within the window, this is burglary. *Co. P. C. p. 64. Vide infra.*

(x) *New Edit. p. 487.*

(y) But now this doubt is settled by 12. *Ann. cap. 7.* whereby breaking to get out is put upon the same foot with breaking to get in. And see 7 & 8 *W. IV. c. 29. s. 11.*

(z) *Kel. 83.*

(a) *Kel. 69.* But it is a felony, for which the offender is ousted of his clergy, by 3 & 4 *W. & M. cap. 9.*

(b) *Kel. ubi supra.*

(c) It was adjudged by *Mountague* chief justice *C. B.* and *Saunders* only related it.

But if he shoots without the window, and the bullet comes in, this seems to be no entry to make burglary; *quære*. [10]

A. B. and *C.* come in the night by consent to break and enter the house of *D.* to commit a felony, *A.* only actually breaks and enters the house, and *B.* stands near the door, but actually enters not, *C.* stands at the lane's end, or orchard gate, or field gate, or the like, to watch that no help come to aid the owner or dweller, or to give notice to the others, if help comes, this is burglary in them all, tho *A.* only actually brake and entered the house, and they all, in law, are principals, and excluded from clergy by the statute of 18 *Elix. cap. 7.* and so it is in robbery, as hath been said, 11 *H. 4.* 13. *b. Cromp* 32. *a. Co. P. C. p.* 64.

If *A.* being a man of full age, take a child of seven or eight years old well instructed by him in this villainous art, as some such there be, and the child goes in at the window, takes goods out, and delivers them to *A.* who carries them away this is burglary in *A.* tho the child that made the entry, be not guilty by [556] reason of his infancy.

So if the wife, in the presence of the husband, by his threats or coercion breaks and enters the house of *B.* in the night, this is burglary in the husband, tho the wife, that is the immediate actor, is excused by the coercion of her husband.

4. *Domum mansionalem*: what shall be so said. [11]

[10] See note (5) p. 551. It is essential to burglary that there should be an entry, which may be made by introducing any part of the body into the house entered. *Rex v. Davis, R. & R.* 499; *Rex v. Bailey, Id.* 341; *Rex v. Parkes, 1 C. & P.* 300; *Rex v. Roberts, 2 East's P. C.* 487. By discharging or throwing any missile into the house, or by introducing any instrument into the house, provided, that such instrument or missile be used as a means of committing or attempting to commit a felony. *Rex v. Hughes, 1 Leach, C. C.* 406; *Pickering v. Rudd, 4 Camp. R.* 220; *Rex v. Rust, Mood. C. C.* 183. An entry may be by a door or window, although there be an inside door or shutter to the same opening which is not broken, or an outside door or shutter which is not closed. *Rex v. Bailey, Rex v. Parkes, and Rex v. Heines* before cited.

[11] *As to the Dwelling-house and Residence.*—A dwelling-house includes,

1. All apartments under the same roof having a closed and covered communication with the dwelling-house, whether the occupants of the apartments reside within the dwelling-house or not. *Sefton's case, R. & R.* 202; *Com v. Chevalier, 1 Dane's Abr.* 134; *Carrel's case, 1 Leach, 237*; *Rex v. Bailey, Moody, 23*; *Stack's case, R. & R.* 185; *2 Taunt. R.* 339.

2. All apartments under the same roof, the occupant of which resides in the dwelling-house, whether they have a closed and covered communication with the dwelling-house or not. *Rex v. Burrowes, Moody, 274. Kel. 84. Brown's case, 2 East, P. C.* 501. *2 Russ. 22. 2 Leach, 1016. note.*

3. Any building within the curtilage of the dwelling-house, although not under the same roof, nor adjoining the dwelling-house, nor having any closed and covered communication with it, provided it be occupied with it. *Gibson's case, 2 East, 508. Hancock's case, R. & R.* 170. *Lithgo's case, Id.* 357. *Rex v. Chalking, Id.* 334. *Walter's case, Moody, 13. Clayburn's case, R. & R.* 360. *Thompson's case, 1 Lew. 32.*

4. It seems that a building or apartment is not excluded from being part of a dwelling-house merely because held by a different title. *2 Russ. 16. 2 East, P. C.* 494. *contra infra, p.* 559.

But a dwelling-house does not include,

5. An adjoining building not being within the curtilage of, nor having any closed or covered communication with the dwelling-house; although this may not be settled when

An indictment, *quod felonice & burglariter fregit & intravit ecclesiam prochialem de D. ea intentione, &c.* is a good indictment of burglary, for *ecclesia* is *domus mansionatis*, *Co. P. C. p. 64. Dy. 99. a.(d)*

(d) Lord Coke says it is the mansion-house of Almighty God, but this is only a quaint turn without any argument, and seems invented to suit his definition of burglary, viz. the breaking into a mansion-house, whereas it appears from *Spekman loco supra citato*, and 22 *Assiz. 95.* that it is not necessary to burglary, that a mansion-house be broken, for the breaking of churches, the walls or the gates of the city is also burglary, and the word *mansionalis* is only applicable to one kind of burglary, viz. the breaking of a private-house, in which case it must be a dwelling-house.

the occupant of the building resides in the dwelling-house. *Egginton's case*, 2 *Leach*, 913. 2 *Russ. 57.* *Gibson's case*, 1 *Leach*, 357. 2 *East*, P. C. 507. *Brown's case*, 2 *East*, 501. *Somerville's case*, 2 *Deacon's Abr.* 1510.

6. Nor any other building not within the curtilage. *Ellison's case*, *Moody*, 336. *Hiles v. H'd. of Shrewsbury*, 3 *East R.* 457.

7. Nor any building or apartment so occupied as to be the dwelling of another.

8. A building is within the curtilage of a dwelling-house when it is within the same enclosure with it; (2 *East*, 493; 4 *Black. Com.* 225; *Garland's case*, 1 *Leach*, 144. 2 *East*, P. C. 493; *Westwood's case*, R. & R. 495; *Parker's case*, 4 *John's R.* 423;) or when it is within an enclosure of which the dwelling-house makes part, and both open into the enclosure; (*Stallion's case*, *Mood.* 398.) or when it makes part of an enclosure surrounding the dwelling-house, and opens into such enclosure; (*Hancock's case*, R. & R. 170.) or when the dwelling-house or building make part of the enclosure; (*Gibson's case*, 2 *East*, P. C. 508; *Lithgo's case*, R. & R. 357; *Walter's case*, *Moody*, 13; *Clayburn's case*, R. & R. 360; *contra Twitty's case*, 1 *Hayw.* 102; *Wilson's Ib.* 242; *Gunn's case*, 1 *Nott & McCord*, 583.) and open into it, provided in each case that the enclosure is the enclosure of the dwelling-house. See the *Mass. Commissioners' Rep. Tit. "Burglary," pp. 8, 9, 10, 13, 14, 15*, where the subject is much discussed in the notes.

The breaking and entering, to constitute a burglary, must be into the dwelling-house of another, that is to say, a house in which the occupier or his family usually reside, or in other words, dwell and lie in.

It has been said that a church may be the subject of burglary, (3 *Inst.* 64; *Hale, infra*, p. 556.) but this seems questionable. (see 1 *Hawk. c.* 38. s. 17.) the act 7 & 8 *Geo. IV. c.* 29. s. 11. merely mentions "*dwelling-house*." There is an express provision as to breaking and entering into and stealing chattels in a church, 7 & 8 *Geo. IV. c.* 29. s. 10.

A house under repair, or a building intended for and constructed as a dwelling-house, in which no one lives, though the owner's property is deposited there, is not a place in which burglary can be committed, for it cannot be deemed his dwelling-house until he has taken possession and began to inhabit it, (1 *Leach*, 185, *Fuller's case*, 2 *East's P. C.* 498; 1 *Leach*, 196, n.; *Elmore v. St. Briavells*, 2 *M. & R.* 514. 8 *B. & Cress.* 461. S. C.) nor will it make any difference if one of the workmen engaged in the repairs sleep there in order to protect it; (1 *Leach*, 186, in *notis*;) nor though the house is ready for the reception of the owner, and he sent his property into it preparatory to his own removal, will it become for this purpose his mansion. *Rex v. Hallard*, 2 *East*, P. C. 498. *R. v. Thompson*, *Ib.* 2 *Leach*, 771.

So if the landlord of a house purchase the furniture of his outgoing tenant, and procure a servant to sleep there in order to guard it, but without any intention of making it his own residence, a breaking into the house will not amount to burglary. *R. v. Davis*, 2 *Leach*, 876. *Rex v. Smith*, 2 *East's P. C.* 497. *Rex v. Fuller*, *Id.* 498. 1 *Leach*, 196. n.

Where neither the owner nor any of the family have slept in the house, it is not his dwelling-house so as to make the breaking into it burglary, though he had used it for his meals and all purposes of his business. *Rex v. Martin*, R. & R. 108.

If a man dies in his leasehold house, and his executors put servants in it, and keep them there at board and wages, burglary may be committed in breaking it, and it may be laid to be the executor's property. 2 *East's P. C.* 499.

It is not absolutely necessary to make it burglary that any person should be actually within the house at the time the offence is committed. For if the owner leaves it

If *A.* have a dwelling-house, and upon occasion he and all his family are absent a night or more, and in their absence in the night a thief breaks and enters the house to commit felony, this is burglary.

Co. P. C. ubi supra.

So if *A.* have two mansion houses, and is sometimes with his fa-

anime revertendi, though no person resides there in his absence, it will still be his mansion. 1 *Hawk. c. 37. s. 11.*

As if a man has a house in town and another in the country, and goes to the latter in the summer, the nocturnal breaking into either with a felonious design will be burglariops. *Fest. 77. Nutbrown's case; 2 East's P. C. 496. Com. v. Brown, 3 Rawle R. 207.* so if he goes a journey. *R. v. Murray, 2 East's P. C. 496.*

And though a man leaves his house, and never means to live in it again, yet if he uses part of it as a shop, and lets his servant and family live and sleep in another part of it for fear the place should be robbed, and lets the rest to lodgers, the habitation, by his servant and family, will be a habitation by him, and the shop may still be considered as part of his dwelling-house. *R. v. Gibbons, R. & R. 442.*

But where the prosecutor, an upholsterer, left the house in which he resided with his family, without any intent of returning to live in it, and took a dwelling-house elsewhere, but still retained the former house as a warehouse and workshop, two women employed by him as workwomen in his business, and not as domestic servants, slept there to take care of the house, but did not have their meals there, or use the house for any other purpose than sleeping in it as a security to the house, the judges held that this was not properly described as the dwelling-house of the prosecutor. *Rex v. Flannagan, R. & R. 187. Forsythe v. The State, 6 Ham. 22.*

The occupation of a servant in that capacity, and not as tenant, is in many cases the occupation of the master, and will be a sufficient residence to render it the dwelling-house of the master. *Rex v. Stock, R. & R. 185. Rex v. Wilson, R. & R. 115.*

Where the prisoner was indicted for burglary in the dwelling-house of *J. B.*; *J. B.* worked for one *W.* who did carpenter's work for a public company, and put *J. B.* into the house in question, which belonged to the company, to take care of it, and some mills adjoining. *J. B.* received no more wages after than before he went to live in the house. It was held not rightly laid. *R. v. Raulings, 7 Car. & P. 150.*

If a servant live in the house of his master, at a yearly rent, the house cannot be described as the master's house, though it is on the premises where the master's business is carried on, although the servant has it because of his service. The servant is in such a case the tenant of the master, who might have distrained for rent, and could not arbitrarily have removed him; and consequently, the occupation of the servant cannot be deemed the occupation of the master. *R. v. Jains et al. R. & M. 7.*

Every permanent building, in which a party may dwell and lie, is deemed a dwelling-house, and burglary may be committed in it. A set of chambers in an inn of court or college is deemed a distinct dwelling-house for this purpose. 1 *Hale, infra, 1 Hawk. c. 38. s. 11.*

So even a loft over a stable, used for the abode of a coachman, which he rents for his own use, and that of his family, is a place which may be burglariously broken. *Rex v. Turner, 1 Leach, 305.*

So also burglary may be committed in a lodging-room, (1 *Leach, 89.*) or in a garret used for a workshop, and rented together with an apartment for sleeping, and if the landlord does not sleep under the same roof, the place may be laid as the mansion of the lodger. 1 *Leach, 237.*

But burglary cannot be committed in a tent or a booth, in a market or fair, even although the owner lodge in it. (1 *Hawk. c. 38. s. 35. infra 557.*) because it is a temporary, not a permanent edifice. But if it be a permanent building, though used only for the purposes of a fair, it is a dwelling-house. *Rex v. Smith, 1 M. & Rob. 256. The State v. Wilson, 1 Hayw. 242. State v. Twitty, Id. 102. State v. Carrier, 5 Day. R. 131. State v. Brooks, 4 Conn. R. 446. State v. Bailey, 10 Id. 144.*

And all outhouses, within the same curtilage with the dwelling-house, occupied and immediately connected, and communicating with it, may be the subject of burglary, and the burglary in such cases may be alleged to have been in the dwelling-house. Formerly this was the case, in respect to all buildings within the curtilage. But by stat. 7 & 8

mily at one, and sometimes at the other, the breach of one of them in the absence of his family from thence is burglary. (e) 4 Co. Rep. 40. a. 39 Eliz. Dult. cap. 99. p. 254. (f)

If A. have a chamber in a college or inn of court, where he

(e) Even tho he had never lodged in it, but was removing his goods there in order to lodge in it. *Kel.* 46.

(f) *New Edit.* p. 488. See also *Poph.* 52. *Mo.* 660.

*Geo. IV. c. 29. s. 13,** "No building, although within the same curtilage with the dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for the purpose of burglary, or for any of the purposes aforesaid, unless there shall be a communication between such building and dwelling-house either immediate or by means of a covered and inclosed passage leading from the one to the other." This provision made an important alteration in the law, as it previously stood, for no communication as that pointed out by the act was absolutely necessary at common law, to constitute burglary. Where the prosecutor's house consisted of two rooms for living in, another room used as a cellar, and a wash-house on the ground floor, and of three bedrooms up stairs, one of them over the wash-house, and the bed-room over the house-place communicated with that over the wash-house, but there was no internal communication between the wash-house and any of the rooms of the house, but the whole was under the same roof, and the defendant broke into the wash-house, and was breaking through the partition wall between the wash-house and the house-place; it was holden that the defendant was properly convicted of burglary in breaking the house. *R. v. Burrows, R. & M.* 274.

To be within the meaning of the statute, the building must be occupied with the house in the same right, and therefore where a house let to, and occupied by A. adjoined and communicated with a building let to, and occupied by A. & B., it was holden that the building could not be considered a part of the dwelling-house of A. *Rex v. Jenkins, R. & R.* 244.

If there be any doubt as to the nature of the building broken and entered, a count may be inserted for breaking and entering a building within the curtilage.

Persons may temporarily lodge or sleep by night in a building for some particular purpose, or on some special occasion, without thereby necessarily making the same, or any part thereof a dwelling-house. The cases upon which this doctrine is founded are as follows: *William Fuller* was indicted for burglary in the house of Mr. *Holland*. The house was a new one, finished all but painting and glazing. A workman who was constantly employed by Mr. *Holland*, but not one of his family, slept in it for the purpose of protection; but no part of Mr. *Holland's* domestic family had yet taken possession of it. 1782, 2 *East, P. C.* 498; 2 *Russ.* 17; 1 *Leach*, 186. note. The prosecutor had hired the house, and put sundry articles of merchandize into it, and on the night of the offence, and six nights before, had procured two hair-dressers (none of his own family) to sleep there to take care of the goods and merchandize; but neither he nor any of his family had ever slept there. 1765, *Harris's case*, 2 *East, P. C.* 498; 2 *Leach*, 701. *Davis* was indicted for larceny in the house of *Thomas Pierce*. *Pierce* purchased furniture of a tenant who had just left his house, for the use of his future tenants; not intending to reside there himself. He put in his man to take care of the furniture until a new tenant should take possession. It does not appear that he was a domestic servant. 1800, *Davis's case*, 2 *Leach*, 876; 2 *East, P. C.* 499; 2 *Russ.* 17.

A tradesman removed to another house, and intending to keep the house which he had left as a warehouse and workshop, he put into it two women who worked with him at his business as an upholsterer, to sleep there and take care of the house. 1810, *Flanagan's case, R. & R.* 187.

The exact point decided in these cases, was that the houses were not the dwelling-houses of the prosecutor. But they are sometimes cited to show that the houses were

* The following decisions will show how the law was before the passing of this act. *Rex v. Lithgo, R. & R.* 357. *Rex v. Chalking, R. & R.* 334. *Rex v. Clayburn, Id.* 360. *Egginton's case*, 2 *East's P. C.* 424. 2 *B. & P.* 508. 2 *Leach, C. C.* 913. *S. C. Ry & Mead, C. C.* 13. *Brown's case*, 2 *East's P. C.* 493. *Garland's case, Id.* 493. 1 *Leach*, 144. *Rex v. Westnord, R. & R.* 495. *Rex v. Bennett, Id.* 289. *Rex v. Duns, Idem.* 322.

usually lodgeth in term-time, and in his absence in the vacation his chamber or study be broken open, &c. this is burglary, and the indictment shall suppose it *domus mansionalis* *A. Co. P. C. p. 65.* 14 *Car. 1.* *Audley's* case before cited. (g)

(g) *Cre. Car. 473.* by the name of *Evans* and *Finch.*

not dwelling-houses at all, and the statement of some of the cases renders it probable that such was the opinion of the court.

Upon the first three of these cases, the fifth report of the *English Commissioners on Criminal Law* contains the following remarks, (p. 4.) :—" In some of the cases in which this point" (what constitutes a dwelling-house,) " has been discussed, the house was slept in, not by the owner, but by a person employed by him for a particular purpose, viz. the protection of the goods, and it was held, that as neither the owner nor any of his family had slept there, the house could not be regarded as such a dwelling-house as could be made the subject of burglary. We do not conceive that these decisions are supported by just principles. It appears to us that every one who inhabits, lodges in, or uses a house as his dwelling in the night-time, is entitled to the protection of the law; and that he is equally so entitled, although his object in being there may be solely to protect the property; and farther, that such protection ought equally to be afforded, whether the owner or occupier himself lodge there, or employ an agent or servant to do so for the same purpose. The fundamental principle of the law is the protection of the dwelling-house; the proper and obvious tests for deciding whether a building be or be not a dwelling-house, must consist in its having been actually used as such, and the continuing intention still to use it as such. Upon the question, what kind of use ought to give the character of a dwelling-house to a building, we conceive the proper answer to be, as regards the crime of burglary, the protection of its inmates from violence during the season of natural repose."

" It cannot, however, be doubted, that to make the question of dwelling-house or no dwelling-house to depend upon the particular duties to be performed by a party sleeping in a house, would be inconvenient, and to deny protection because the agent employed was not a domestic servant, or because he was placed there to discharge a particular duty, would be unreasonable; and we have therefore ventured to suggest a more certain rule."

The rules on this subject reported by the *English Commissioners* are as follows :—

Art. 14. The motive or object for using such building for the purpose in the last preceding article mentioned, (of lodging or dwelling therein by night,) shall not be deemed material to the offence.

Art. 16. The mere casual occupation of any such building, without the consent or license of the owner or occupier thereof, that such building should be used, either continuously or at intervals, for the purpose of dwelling or lodging therein by night, shall not constitute such building a dwelling-house.

As to Ownership in the House.—It is necessary to ascertain to whom the mansion belongs, and to state it with accuracy in the indictment. If the rule, observes *Mr. East*, (*2 East's, P. C. 499, 500;*) by which to ascertain this ownership may be compressed with sufficient discrimination into a small compass, I should say, generally, that where the legal title to the whole mansion remains in the same person, there if he inhabit it either by himself, his family or servants, or even by his guests, the indictment must lay the offence to be committed against his mansion. And so it is if he let out apartments to inmates who have a separate interest therein, if they have the same outer door or entrance into the mansion in common with himself. But if distinct families be in the exclusive occupation of the house, and have their ordinary residence or domicile there without any interference on the part of the proper owner, or if they be only in possession of parts of the house, as inmates to the owners, and have a distinct and separate entrance, then the offence of breaking, &c. their separate apartments must be laid to be done against the mansion-house of such occupiers respectively.

Nice questions frequently arise as to whether a party dwells in and occupies a house in his own right or as the servant of another. A workman was employed at 15s. a week wages, and a cottage free of rent and taxes for himself and family to dwell in, upon an indictment for burglary, the judge at the trial held, that as the workman occu-

So it is, if *A.* hires a chamber in the house of *B.* for a certain time wherein he lodgeth, and during the time contracted for, it is broken open, &c. this is burglary, and the indictment shall suppose it to be *domum mansionalem* of *A.* (h)

(h) Chief Justice Keeling was of a different opinion, and thought in such case the indictment ought to be laid for breaking *domum mansionalem* of *B.* for while there is but one entrance, it is but one dwelling-house, tho there be several inmates, but otherwise it is, if a man divides some rooms from the rest of the house, and make another door to those rooms, *Kel. 83. &c.*

pied this cottage for his own benefit, and not for the use or benefit of his master, it was well described as the dwelling-house of the workman; and upon a reference to the judges, they were of the same opinion. *R. v. Joblin, R. & R. 525;* and see *R. v. Smythe, 5 Car. & P. 202;* *R. v. Jarvis, R. & M. 7.*

Where a toll-gate house, erected by the trustees of a turnpike, as and for the dwelling-house of the person who might be employed to collect the tolls at a particular gate, was broken and entered in the night-time; and upon an indictment for the burglary it appeared, that the trustees had let the tolls to *Ward*, and *Ward* had employed *Ellis* (at weekly wages, with the privilege of living in the toll-house in question) to collect them, and that *Ellis* dwelt in the house for that purpose, the indictment having described this as the dwelling-house of *Ellis*, the judges held the description to be correct, for *Ellis* had the exclusive possession, it was unconnected with any premises of *Ward's*, and *Ward* did not appear to have any interest whatever. *Rex v. Camfield, R. & M. 42.*

And where a servant lived rent-free in a house belonging to his master, and his master paid the taxes, and his master's business was carried on in the house, but the servant and his family were the only persons who slept in the house, and that part of the house in which his master's business was carried on was at all times open to those parts in which the servant lived; upon an indictment for breaking and entering that part of the house in which the master's business was carried on, it was held, that it might be described as the servant's house, but it was not decided that it might not also be described as the house of the master. *Rex v. Witt, R. & M. 248.*

If a servant live in the house of his master at a yearly rent, the house cannot be described as the master's house, though it be on the premises where the master's business is carried on, and although the servant has it because of his service. *Rex v. Jarvis, R. & M. 7;* and see *R. v. Smythe, 5 Car. & P. 202.*

G. Brown was indicted for burglary in the dwelling-house of *M. Graydon*, and stealing thereout oats. A second count stated it to be in the dwelling-house of *T. Trumbull*. *Graydon*, a farmer, had a dwelling-house in which he lived, a stable, cow-house, cottage, and barn, all in one range of buildings in the order mentioned and under one roof, but they were not inclosed by any wall or court-yard, nor was there any communication from one to the other within. *Trumbull's* family resided in the cottage by agreement with *Graydon* when he went into his service; but *Trumbull* paid no rent, only an abatement was made in his wages on account of his family residing in the cottage. Some corn having been missed out of the barn, *Trumbull* and another person put a bed in the barn and slept there, and a few nights after they had so done, the prisoner unlocked the barn-door and took away a quantity of oats. After conviction judgment was respited, upon a doubt whether it could be considered as the dwelling-house either of *Graydon* or *Trumbull*; upon a reference it was agreed (*Mich. T. 1787*) by all the judges, that the sleeping in the barn made no difference. But they held, (*Buller, J.* doubting,) that this was no more than a license to *Trumbull* and servant to lodge in the cottage, and not a letting it to him, and that the barn, as well as the rest of the buildings, being under the same roof, continued parts of the mansion-house of *Graydon*. And many of the judges inclined to think, that if there had been a demise of the cottage to *Trumbull*, the barn would still have continued part of *Graydon's* dwelling-house in point of law. *G. Brown's case, 2 East's P. C. 501.*

So in another case, where the servant of three partners in trade had weekly wages and particular rooms assigned to him as lodging for himself and his family over the bank and brewery office of his employer, with which his lodging communicated by a trap-door and a ladder, it was holden by the twelve judges that a burglary committed in the banking-

But if, in the king's house at *Whitehall*, or in the great house of any nobleman, there be apartments or lodgings assigned to the jeweller, treasurer, steward, chamberlain, &c. and any of these lodgings be broken up burglarily, the indictment must suppose it to be

room was well laid as in the dwelling-house of the three partners, *Rex v. Stockton and others*, 2 Taunt. 339. 2 Leach, 1015. Russ. & Ry. 185. S. C. nom. *Rex v. Stock*.

A gardener lived in the house of his master, quite separate from the dwelling-house of his master, and the gardener had the entire control of the house he lived in, and kept the key, it was held that on an indictment for burglary, the gardener's house might be laid either as his or his master's. *Reg. v. Rees*, 7 Car. & P. 568.

If a house be tenanted by a married woman, it must, in all cases, be deemed the house of her husband, and not of her, even although she live separate from her husband. *Farr's case*, Kel. 43. 2 East's P. C. 504. and see *Boggett v. Frier*, 1 East, 301. *Rex v. Smythe*, 5 Car. & P. 202.

Where a married woman lived apart from her husband, upon an income arising from property vested in trustees, for her separate use, the judges held that a house which she had lived in, was properly described as her husband's dwelling-house, though she paid the rent out of her separate property, and the husband had never been in it. *Rex v. French*, Russ. & Ry. 491.

Upon an indictment for burglary in the dwelling-house of *George Gillings*, it appeared, that *Gillings* owned and had built the house in question, but had never lived in it, that suspecting his wife of infidelity with one *Websdale*, they agreed to separate, and he told her she might live in the house in question, and gave her a bed and bedding, &c., for the purpose; she afterwards lived and cohabited with *Websdale* in the house with the knowledge of her husband; *Websdale* paid the expenses of housekeeping, but never paid any rent for the house to *Gillings*. The judges held that the house was properly described as the dwelling-house of *Gillings*. *R. v. Wilford*, Russ. & Ry. 517.

A prisoner was indicted for breaking into the house of *Elizabeth A.* and stealing her goods. There was a second count, laying the property of the goods in the Queen. It was shown by proof of the record, that the husband of *Elizabeth A.* had been convicted of felony, and it was also proved that he was still in prison, under the sentence, and that the articles stolen were his before his conviction, and had remained in the house from the time of his apprehension, and that the wife continued in possession of the house and goods till they were stolen by the prisoner. It was held that the prisoner might be properly convicted of larceny on the second count, which laid the property of the goods in the queen, although there had been no office found, and that he could not be convicted of housebreaking, as that part of the indictment which laid the goods and the house to be those of *Elizabeth A.* could not be supported. *Reg. v. Whitehead*, 9 Car. & P. 429.

A house, in part of which a man lives, and other parts of which he lets to lodgers, may be considered and described as his house, though he has taken the benefit of the Insolvent Debtor's Act, and executed an assignment, including the house, if the assignee has not taken possession: at least, no objection can be made, if in other counts it be stated as the house of the assignee, and in others of the lodger, in whose room the offence was committed. *Rex v. Ball*, R. & M. C. C. 30.

In the case of persons employed by the crown or public companies, the same rule prevails as in other cases. If burglary be committed in the Invalid Office at *Chelsea*, in *Somerset House* in *Whitehall*, in any of the public offices or royal palaces, the mansion must be laid as the Queen's. 1 Leach, 324, and in *notis*, *Rex v. Williams*, ante p. 522.

The same principle applies to corporations, for if a burglary be laid to be in a dwelling-house of one of the officers belonging to the African Company, it will be bad, although a corporation cannot be resident. Kel. 37. 1 Leach, 324, in *notis*. 2 East's P. C. 504.

But it has been holden that if the agent of a trading company reside in the house of his employers in town, it may properly be laid as his dwelling. *Rex v. Margethe*, 2 Leach, 930.

So a city hall may be described as the residence of the clerk to the company to whom it belongs. *Id.* in *notis*.

The ground for these two last decisions is stated to be that the punishment of burglary was intended to protect the actual occupant from the terror of disturbance during the hours of darkness and repose, but it would be absurd to suppose that that terror, which is

domus mansionalis of the king, or of him that is truly lord or proprietor of the house, for they have the use of the lodgings as servants only, and not as owners: *Hungate's case* before cited. (i)

(i) p. 522.

of the essence of the crime could, from a breaking and entry in one place, produce an effect in another. 2 *Leach*, 931.

J. Picket was indicted for burglary in the dwelling-house of the *East India Company*, which is inhabited by their servants, and he was convicted and executed. O. B. April, 1765. 2 *East's P. C.* 501.

C. Maynard was indicted for burglary in the mansion-house of the master, fellows and scholars of *Bennet College* in *Cambridge*. It appeared that he broke into the buttery of the college, and there stole some money; and it was agreed by all the judges, upon a reference to them, that it was burglary. *C. Maynard's case*, 2 *East's P. C.* 501.

If, by an actual severance, all internal communication be cut off, the partitions become distinct houses, so that if one house is divided to accommodate the families of two partners, though the rent and taxes of the whole are paid out of the common fund, each part will be regarded as a mansion. *R. v. Jones*, 1 *Leach*, 537. 2 *East's P. C.* 504. *Tracy v. Talbot*, *Salk.* 532.

But a house, the joint property of partners in trade, in which their business is carried on may be described as the dwelling-house of all the partners, though only one of the partners reside in it. *Rex v. Athea*, *R & M.* 329.

Where inmates have several rooms in a house of which they keep the keys and inhabit them severally with their families, yet if they enter at one outer door with the owner, these rooms cannot be said to be the dwelling-houses of the inmates, but the indictment ought to be for breaking the house of the owner. But if the owner inhabits no part of the house, or even if he occupy a shop or a cellar in it, but do not sleep therein, the apartments of such shall be considered as their respective dwelling-houses. *Carrell's case*, 1 *Leach*, 237. *Trapshaw's case*, 1 *Leach*, 427. and see 1 *Hawk. c.* 38. s. 26.

If the owner who lets out apartments in his house to other persons, sleep under the same roof, and have but one outer door common to him and his lodgers, who are only inmates, all their apartments are parcel of the one dwelling-house of the owner. *Kel.* 84. But if the owner do not lodge in the same house, or if he and the lodgers enter by different outer doors, the apartments so let out are the mansion for the time being of each lodger respectively, even though the rooms are let by the year. 2 *East's P. C.* 505.

Where a servant of the prosecutor dwelt in a part of the house, and the rest (excepting the shop) was let off to lodgers; the judges held that the shop, which was in the prosecutor's occupation, was properly described as the dwelling-house of the prosecutor. *Rex v. Gibbons*, *Russ. & Ry.* 442.

Where the prosecutor having a dwelling-house with a shop adjoining it, with separate entrances from the street, but the shop having a back door into a passage in the house, let the shop to his son, who used it as a place of business only, and did not reside there; a burglary having been committed in the shop, the judges held that it was properly described in the indictment as the dwelling of the father. *Rex v. Seyton*, *Russ. & Ry.* 202.

If the owner let off a part, but do not dwell in the part he reserves for himself, then the part let off is deemed, in law the dwelling-house of the party who dwells in it, whether it communicates internally with the other part or not; but the part he has reserved for himself is not the subject of burglary, it is not his dwelling-house, for he does not dwell in it, nor can it be deemed the dwelling-house of the tenant, for it forms no part of his lodging. 1 *Leach*, 89, 237, 437.

Where the coachman rented the loft over a coach-house and stables, and he and his family resided in it, a burglary committed in it was holden to be well laid, to have been committed in the dwelling-house of the coachman. *Rex v. Turner*, 1 *Leach*, 305.

The governor of the workhouse at *Birmingham*, under a contract for seven years, with the guardians and overseers of that place, occupied and dwelt in the governor's house with the exception of one room, which the guardians and overseers reserved for themselves as an office, and three other rooms as store rooms: the clerk of the guardians and overseers kept one key of the office, the governor another, for the purpose of securing the effects in case of fire, and the room was cleaned and taken care of by the governor's

And so it is, if *A.* comes to the inn of *B.* and there hath a chamber appointed for his lodging, and this chamber is broken up burglarily, it shall suppose it to be *domus mansionalis* of *B.* the inn-keeper, because the interest is in him, and *A.* hath only the use of it for his lodging, without any certain interest.

A tent or booth in a fair or market is not such a *domus mansionalis*, wherein burglary may be committed, but robbery therein committed, the owner, his wife or servants being therein, is specially exempted from clergy by the statute of 5 & 6 *E. 6. cap. 9.* before mention'd. *Co. P. C. p. 64.*

If *A.* have a shop parcel of his mansion-house, and it be broken open in the night, &c. it is a burglary, and the indictment shall suppose, that he brake and entred *domum mansionalem* of *A.* for it is parcel thereof.

But if *A.* let the shop to *B.* for a year, and *B.* holds it, and works or trades in it, but lodgeth in his own house at night, and this shop

servant, this office being broken and entered in the night time, ten of the judges held that it could not be described as the dwelling-house of the governor. *Rex v. Wilson, Russ. & Ry. 115.*

So where the owner of a dwelling-house, warehouse, and counting-house within the same curtilage, let his dwelling-house to his warehouseman, at a yearly rent, the counting-house and warehouse being broken and entered in the night time, the judges held, that this was not burglary, that the counting-house and warehouse could not be described as the dwelling house of the master, because the dwelling-house was occupied by the warehouseman as tenant and not as servant, nor could they be described as the dwelling-house of the tenant, for they formed no part of his holding. *Rex v. Jarvis, R. & M. See R. v. Smythe, 5 Car. & P. 202.*

If the owner let the whole of a dwelling-house, retaining no part of it for his or his family's dwelling, the part each tenant occupies and dwells in is deemed in law to be the dwelling-house of each tenant, whether the parts holden by the respective tenants communicate with each other internally or not. Thus, where the owners of a house divided a shop into two by a partition, each having a door opening into the street, and let one of them and some rooms in the house to *Choice*, and the other with the remainder of the house, to *Ryan*, at the end of each shop was a door opening into a common passage that led to one common staircase. *Choice* paid £100 a year, and the taxes for the whole house, for his part. *Ryan* paid £80 a year for his: each had his separate family, separate kitchen, &c.; but the rooms occupied by each opened on the common staircase above-mentioned. Upon an indictment for burglary, it appeared that the prisoner entered at the window of the common staircase, unlocked the door of *Ryan's* shop, and entered it. The judges held, that the place was rightly described in the indictment as the dwelling-house of *Ryan*. *Rex v. Bailly, R. & M. 23.*

One *Richards* let her dwelling-house to her son *Josiah*, and a warehouse communicating internally with the dwelling-house to *Josiah* and his younger brother, at a separate rent. *Josiah* lived in the dwelling-house, and constantly used the communication between that and the warehouse, both brothers carried on their joint business in the warehouse: the warehouse being broken and entered in the night time, the judges held that it could not be deemed a part of the dwelling-house, as the dwelling-house was holden under a demise to *Josiah* alone, and he alone dwelt in it, and the warehouse was holden under a distinct demise to himself and his brother. *Rex v. Jenkins, R. & R. 244.*

Where a lodger occupied a sleeping-room on the first floor and a workshop in the attic, and the rest of the house was occupied by other lodgers, a burglary in the workshop was holden by the judges to be well laid, to have been committed in the dwelling-house of the lodger who rented it. *Rex v. Carrell, 1 Leach, 237.*

A man cannot be indicted for burglary in his own house; therefore, if the owner of a house break and enter into the room of his lodger, and steal his goods, he can only be convicted of the larceny. *Kel. 84. 2 East's P. C. 502, 506.*

is broken open, &c. the indictment cannot be, that *domum mansionalis* of *A.* *fregit*, for it was severed by the lease during the time, (k) but then whether he may be indicted for burglary as in the *domus mansionalis* of *B.*? and certainly it is agreed on all hands, if *B.* or his servant sometimes lodge in the shop, it is burglary, and it shall be supposed *domus mansionalis* of *B.* and this is common experience.

But suppose he never lodges there, but only works or [558] trades therein in the day time, and he or his servants never lodge there at night, whether this be a burglary to break and enter this shop to commit a felony?

And certainly it was in this case antiently held burglary, *M. 37 & 38 Eliz. B. R. Cole's case*, (m) an indictment, *quod shopam cujusdam Ricardi burglariter et felonice fregit & intravit &c.* it was admitted, for the matter, by the court of king's bench to be good; but doubted, whether it was good, because it was *cujusdam Ricardi* without mentioning his surname, and with this also agrees my lord Coke in *terminis*, *Co. P. C. p. 64.* in these words. *But a shop wherein any person doth converse, being parcel of a mansion-house or not parcel, is taken for a mansion-house.*

But *T. 17 Jac. Hutton's Rep. 33.* it is ruled to be no burglary to break open such a shop, and accordingly the practice hath always gone at *Newgate* sessions since my time or observation, and to this day it is holden no burglary to break open such a shop; but if the shop keeper, or his servant, usually or often lodge in the shop at night it is then *domus mansionalis*, in which a burglary may be committed.

Domus mansionalis doth not only include the dwelling-house, but also the out-houses, that are parcel thereof, as barn, stable, cow-houses, dairy-houses, if they are parcel of the messuage, tho they are not under the same roof, or joining contiguous to it; and therefore, if such stable or out-house belonging to the dwelling-house be broken open in the night-time with intent to steal, it is burglary, and with this agrees *Co. P. C. p. 64, 65. Dalt. cap. 99. p. 254, 255.* where for breaking open a back-house of *Robert Castle's*, eight or nine yards distant from the dwelling-house, only a pale reaching between them, two were arraigned and condemned for burglary; and so it was agreed by all the judges in the time of chief justice *Hyde* last 1665, and the law was accordingly, and the contrary practice in *one* much blamed; and altho it was said by some, that it had not been so used, and that the statute of 4 & 5 *P. & M. cap. 4.* distinguished between a dwelling-house and a barn, yet at

[559] length all the judges agreed, that the felonious breaking of a barn, parcel of a messuage, to steal corn, was burglary according to my lord Coke, *ubi supra*, and with this agrees 2 *E. 6. B. Corone* 180.

But if the barn, or stable, or cow-house be no parcel of the messuage, as if a man takes a lease of a dwelling-house from *A.* and of

(k) *Kel.* 84.

(m) *Mo.* 466.

a barn from *B.* or if it be far-remote from the dwelling-house, and not so near to it as to be reasonably esteemed parcel thereof; as if it stands a bow-shot off from the house, and not within, or near the curtilage of the chief house; then the breaking of it is not burglary, for it is not *domus mansionalis*, nor any part thereof.

An indictment that *noctanter clausum* or *curtilagium felonice & burglariter fregit ad occidendum* or *furandum* is not good, and yet 22 Assiz. 95. burglary is defined *to break houses, churches, walls, courts, or gates in time of peace.*(n)

So that by that book it should seem, that if a man hath a wall about his house for its safeguard, and a thief in the night break the wall or the gate thereof, and finding the doors of the house open, he enters into the house, this is burglary; but otherwise it had been, if he had come over the wall of the court, and found the door of the house open; then it had been no burglary.

5. To make up burglary, it must not be only to break and enter a house in the night-time, but either a felony must be committed in the house, or it must be to the intent to commit a felony.[12]

If the indictment be, *quod domum mansionalem J. S. felonice & burglariter fregit & intravit, & ad tunc & ibidem* certain goods of *J. S. felonice & burglariter furatus fuit, cepit & asportavit*, the indictment compriseth two offenses, viz. burglary and felony, and therefore he may be acquitted of burglary, if the case be so, upon the evidence, and found guilty only of the felony, and then he shall have his clergy.

Or he may be acquitted of the felony, but then *quære*, whether he can be found guilty of the burglary, because [560] tho where the indictment compriseth burglary and felony, the indictment is good, tho it be not supposed in the indictment, that

(n) This was antiently understood only of the walls or gates of the city: vide Spelman in verbo *burglaria*; if so, it will not support our author's following conclusion, wherein he applies it to the wall of a private house.

[12] See ante, note [1] p. 548. The punishment for this offence in England is now regulated by 7 Will. IV. & 1 Vict. c. 86, s. 3, by which it is enacted, "That whosoever shall be convicted of the crime of burglary shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than ten years, or to be imprisoned for any term not exceeding three years."

To the punishment of imprisonment may be added hard labour, with or without solitary confinement: such confinement not exceeding one month at any one time, nor three months in any one year. *Id.* sect. 7.

For burglary and assaulting with intent to murder, &c. the offender shall suffer death. 7 Will. IV. & 1 Vict. c. 86, sect. 2; see *Reg. v. Watkins*, 2 Mood. C. C. 217; *Reg. v. Polly*, 1 Car. & Kir. 77.

For the U. S. Statutes see the act of March 3d, 1825, sect. 4; *Peters's Statutes at Large*, vol. 4, p. 107. For the statutes of Massachusetts, see *Rev. Stat. c. 126, sects. 9, 10*. For the statutes of New York, see 2 *Rev. Stat. 668, s. 10, et seq.* For the statutes of New Jersey, see *Statutes of New Jersey, 1847, Tit. Crimes and Punishments, § 33, p. 266*. For the statutes of Pennsylvania, see *Act of 31st May, 1718, Stroud's Pard. 144 6th Ed., 155 7th Ed. Tit. Burglary*. For the statutes of Virginia, see 1 *Rev. Code*, ch. 17, s. 24.

it was *ad intentione ad bona furandum*, for the act of theft being charged at the same time, it is a sufficient evidence of his intention; but when he is acquitted of the felony, then, there being nothing expressly charged in the indictment, that *burglariter fregit, &c. ad intentione ad bona &c. felonice furandum*, it stands single as if the indictment had been of single burglary, in which case the clause of *ad intentione ad furandum &c.* had been necessary to complete a single burglary.

It seems therefore necessary in such case not only to charge him, that *in nocte & burglariter & felonice domum, &c. fregit & intravit, & bona &c. cepit*, but also farther to say *ad intentione ad bona & catalla &c. in eadem domo existentia felonice & burglariter furandum*, and to add also the particular felony, & *ad tunc & ibidem unum scyphum argenteum &c.* and then, tho he be acquitted of the felony, the rest of the indictment stands good against him as a simple burglary, and he may be convicted of it, tho acquitted of the felony.

And I think that as the offenses of burglary and felony may be joined in the same indictment, so three offenses may be joined in the same indictment, and if he be acquit of the one, he may be convicted of the other two, and it may be of use to exclude a malefactor of his clergy where the offense is great, as namely for burglary, for felony, and for felony upon the statute of 5 & 6 E. 6. cap. 9. for there may be an offense against that statute, which will exclude from clergy, and yet not amount to burglary; and the form of the indictment may run thus, Quod A. prima die *Februarii* anno regni domini *Caroli* &c. in nocte ejusdem diei vi & armis apud B. felonice & burglariter domum mansionalem fregit & intravit eam intentione ad bona & catalla ejusdem B. in eadem domo existentia felonice & burglariter furandum, capiendum & asportandum, & ad tunc & ibidem vi & armis unum scyphum argenteum ejusdem B. in eadem domo existentem felonice & burglariter furatus fuit, cepit & asportavit, ipso B. ac uxore, liberis & famulis suis in eadem domo tunc existentibus, contra pacem, &c.

And note, that such an indictment need not conclude *contra formam statuti*, it is sufficient that it brings the case so within the statute, as to exclude clergy; and so, upon the statute of 23 H. 8. cap. 1.

And upon this indictment, if it falls out upon the evidence that he is guilty of the burglary, but not guilty of the stealing, he may be convict of the burglary, and so ousted of clergy, tho he be found not guilty of the felony: again, tho he be found not guilty of the burglary, because, it may be, the breach of the house was in the day-time, the dweller, his wife or servants in the house, yet he may be found guilty of the felony within the qualifications contain'd in the indictment pursuant to the statute of 5 & 6 E. 6. and so ousted of his clergy, for that is not confined either to the day or night: again, if upon the evidence it appears not to be burglary, because done in the day-time, nor yet felony so qualified as is excluded from clergy, because either

there was no act of breaking, or if there were, yet the dweller, his wife or servants were not in the house, he may be convict of common larciny, and so have benefit of clergy.

And so much for burglary joined with larciny.

Simple burglary is where the breaking and entering is *ea intentione ad bona & catalla furandum*, or *ad interficiendum*, &c. and this clause, as it is usually added in cases of simple burglary, so it is necessary; and hereupon these things are observable.

1. That altho the breaking and entring be charged to be done *burglariter*, yet if the intention of that entry be either laid in the indictment, or appears upon the evidence to be to the intent only to commit a trespass and not a felony, as *ea intentione ad ipsum A. ad tunc & ibidem verberandum*, it is no burglary, but it must be laid and proved to be *ea intentione* to steal or to kill, or to commit some other felony, for tho the killing or murder may be the consequence of beating, yet, if the primary intention were not to kill, the intention of beating will not make burglary. *Co. P. C. p. 65. 13 H. 4. 7. b.*[13]

2. That if a man in the night break and enters a house to the intent to commit a felony, tho he attains not that intent, but takes or steals nothing, this is burglary, and excluded from [562] clergy. *22 Assiz. 39 & 95. Dy. 99. Crompt. 31. a. Coron. 264. Stamf. P. C. p. 30. a. Co. P. C. p. 63.* and herein it differs from robbery.

3. It seems, that the intention to commit a felony to make a burglary must be an intention of such a fact, as was felony by the common law (and not of a felony newly made by act of parliament,) as larciny, or homicide.

It hath been therefore doubted, whether the breaking of a house in the night with intent to commit a rape be burglary or not, *Crompt. fol. 32.* thinks it is not, because, made felony by the statute of *Westm. 2. cap. 34.*;(p) but *Dalt. cap. 99. p. 255.*(q) thinks it would be burglary; because, rape was felony by the common law, until the statute of *Westm. 1. cap. 13.*(r) which turned it into a trespass punishable by two years imprisonment, and so the statute of *Westm. 2.* was but a restitution of the common law, and a setting aside of the statute of *Westm. 1.* and this seems to be the more warrantable opinion that it is burglary; but of this hereafter.

Now as to clergy in case of burglary.[14]

If it be such a burglary, as is also joined with actual theft or robbery, and that robbery or theft be so laid in the indictment, and proved upon evidence, as answers the statute of *23 H. 8. cap. 1.* or *1 E. 6. cap. 12.* or *5 & 6 E. 6. cap. 9.* whereof enough hath been said before, then the principal in such burglary is in those cases, which

(p) 2 Co. Instit. 433.

(q) New Edit. p. 489.

(r) 2 Co. Inst. 180.

[13] *Rex v. Knight*, 2 East's P. C. 510; *Id.* 513; *Rex v. Smith, R. & R.* 417; *Rex v. Brice, Id.* 450; *The State v. Eaton*, 3 Harringt. R. 554.

[14] See ante note at p. 519.

are within those statutes, ousted of his clergy, and the accessories *before* are ousted of their clergy by the statute of 4 & 5. *P. & M. cap. 4.* but the accessories *after* have their clergy, as hath been said; but in case of simple burglary, or burglary with theft, laid to be only *felonice & burglariter*, the principal is ousted of clergy if outlawed or convict by verdict or confession, but is not ousted of clergy in case of standing mute, not directly answering, or challenging above twenty, by the statute of 18 *Eliz. cap. 7.(s)*

But by the statute of 1 *E. 6. cap. 12.* "If the breaking of the house be in the day, or night time with intent to rob or [563] steal, any person being in the house and put in fear, tho nothing be stolen, yet he shall be ousted of his clergy, if convict by verdict or confession, or stand mute, or challenge peremptorily above twenty;"^(t) for this statute extends to this special kind of burglary, 11 *Co. Rep. 36. b. Poulter's case*, tho nothing be stolen, and so differs from the statutes of 23 and 25 *H. 8.* which require a stealing, as well as a breaking the house.

But tho in case of robbery in any dwelling-house, and therewith putting in fear, according to the statute of 23 *H. 8. cap. 1.* or without putting in fear according to the statute of 5 & 6 *E. 6. cap. 9.* the malicious commanding, hiring or counselling of such offense is put out of clergy, if so specially laid in the indictment, *Dy. 183. b.* by the statute of 4 & 5 *P. & M. cap. 4.* yet such accessories *before*, are not oust of clergy in case of breaking a house to commit a robbery putting in fear, tho the principal be ousted of clergy by 1 *Eliz. cap. 12.*

But accessories before or after are not ousted of clergy by this statute, or the statute of 4 & 5 *P. & M. cap. 4.*

And this statute doth oust of clergy not only those that actually break, or actually enter the house, but also all those that are, in law, principals in burglary, all those that are present, aiding and assisting, or that stand to watch at the field-gate, while the others of the confederacy or company break and enter the house.

And so it differs from the case of robbing of a person in his dwelling-house, none being within, upon the statute of 39 *Eliz. cap. 15.* for that statute excludes from clergy only those persons that actually enter into the house, and not those who, tho of the confederacy, and present aiding and abetting, yet never entered the house; *quod vide supra.*

But as to accessories *before* or *after*, they are not ousted of their clergy by the statute of 18 *Eliz. cap. 7.* nor doth the statute of 4 & 5 *P. & M.* extend to oust accessories *before* of clergy [564] in cases of burglary;^(u) but in cases of robbing of houses within the qualifications and circumstances of the statute

(s) This defect is supplied by 3 & 4 *W. & M. cap. 9.*

(t) This statute does not exclude those who challenge peremptorily above twenty; this, according to our author's opinion, (*vide postea, Lib. II. cap. 48.*) was needless; but they are since excluded by 3 & 4 *W. & M. cap. 9.*

(u) But they are since ousted by 3 & 4 *W. & M. cap. 9.*

of 23 *H. 8. cap. 1.* or 5 & 6 *E. 6. cap. 9.* and not to burglary at large. (x)

And thus far concerning larciny, robbery and burglary, which are felonies by the common law.

[565]

(x) Since our author wrote, there have been other statutes made to take away clergy in cases of larciny committed in dwelling-houses, &c.

By 3 & 4 *W. & M. cap. 9.* "Clergy is ousted from those who shall feloniously take away any goods in any dwelling-house, any person being therein and put in fear, or shall rob any dwelling-house in the day-time, any person being therein; or shall comfort, aid, counsel or command any person to commit any of the said offenses, or to break any dwelling-house, shop or warehouse thereto belonging, and therewith used in the day-time, and feloniously to take away any money or goods to the value of five shillings, altho no person be within such dwelling-house, &c. or shall counsel, hire or command any person to commit any burglary, if they be convicted, stand mute, or challenge peremptorily above twenty."

The design of this clause was to deprive the accessaries *before* of the benefit of the clergy; but this statute not mentioning booths nor out-houses, leaves the accessaries in such cases to their clergy.

The same statute enacts, "That persons indicted for a crime, of which being convict they should not have their clergy by any former statute, shall not have it if they stand mute, or will not answer directly, or challenge peremptorily above twenty, or be outlawed."

"Persons indicted of felony for stealing of goods, &c. if convicted, stand mute, will not directly answer, or challenge peremptorily above twenty, shall lose their clergy, if it appears upon evidence or examination, that the goods were taken in another county in such a manner, whereof, if convicted by a jury of that county they should not have their clergy."

This part of the statute helps the several former acts, which were defective either as to the point of standing mute, or challenging peremptorily, or being outlawed.

By 10 & 11 *W. 3. cap. 23.* "All persons, who by night or by day shall in any shop, ware-house, coach-house or stable privately and feloniously steal any goods, wares or merchandizes of the value of five shillings, or more, tho such shop, &c. be not broke open, and tho the owner, or any other person be not therein, or that shall assist, hire or command any person to commit such offense, being thereof convict or attainted by verdict or confession, or being indicted thereof shall stand mute, or challenge above twenty, shall be excluded from the benefit of clergy."

The uses of this statute are these.

1. By the former statutes (except the case of a booth in a fair or market, by 5 & 6 *E. 6.*) it was necessary, in order to take away clergy, that the robbery should be in a dwelling-house, whereas this statute extends to shops, ware-houses, &c. tho they should not be adjoining to, or be any part of, a mansion-house.

2. The former statutes required there should be an actual breaking or putting in fear, otherwise it would not be a robbery, which is the stealing intended by 39 *Eliz. cap. 15.* as appears from the preamble of that statute; but by this statute, if the goods stolen be of the value of five shillings, the offender is ousted of clergy as to a shop, ware-house, coach-house, or stable, tho there be no breaking or putting in fear.

3. By 23 *H. 8.* and 1 *E. 6.* clergy was not taken away, unless there were some person in the house put in fear, nor by 5 & 6 *E. 6.* unless some of the family were in the house or booth; nor by 39 *Eliz.* unless it were in the day-time, and no person in the house; so that if the offence were committed when any person was in the house, if not put in fear, nor one of the family, or when no body was in the house, if it were in the night-time, in neither of those cases was clergy taken away by those statutes; but this statute takes it away in both those cases as to shops, &c.

But still this statute omitted to mention dwelling-houses or out-houses, wherefore, to supply this omission, another statute was made, viz.

12 *Ann. cap. 7.* by which it is enacted, "That if any person shall feloniously steal any money, goods, or chattles, &c. of the value of forty shillings in any dwelling-house or out-house thereto belonging, altho it be not broken, nor any person therein, or shall assist any person to commit such offense, and shall be convicted by verdict or confession, or stand mute, or will not answer directly, or shall challenge peremptorily above twenty, he shall be debarred from the benefit of clergy." See *ante*, note at p. 519.

But both these statutes seem defective as to persons outlawed.

There are two exceptions, that are added hereunto.

1. The first is really true, namely when it is *tempus belli* within the kingdom, and one enemy either steals, robs, or plunders the house or goods of another, and therefore the book of 22 *Assiz.* 95. adds to the definition of burglary *in time of peace*, for in time of war, tho these kinds of offenses committed by those of the same party, or those that are not in hostility one to another are felonies, yet in time of war, when done by an enemy, they put on another name, as acts of hostility, misprisions, and the like.

Jusque datum sceleri.

2. The second is only supposititious, namely when it is done in case of necessity, (y) as a poor person that in case of necessity for hunger shall break and enter a house for victuals under the value of twelve-pence, which is added as an exception to burglary, by *Crompt. fol. 33. a.* and *Dalt. cap. 99. p. 255, 256.* (z) for tho I do agree a judge ought to be tender in such cases, and use much discretion and moderation, yet this must not pass for law, for then we shall in a little time let loose all the rules of law and government, and burglaries, robberies, yea murders themselves shall be excusable under pretense of necessity, and we shall fall within the wild doctrine of the *Jesuitical* casuists, who of late in *France* and elsewhere, upon those general misapplied maxims of *Quicquid necessitas cogit, defendit*, and in *casu extremæ necessitatis omnia sunt communia*, have [566] advised servants and apprentices, that it is lawful in point of conscience to steal from their masters, or rob them in case they make them not sufficient allowances of meat, drink, or clothes: where laws are settled, there are other remedies appointed for the relief of servants against oppressing masters, and of the poor, by complaint to the magistrates without violating the established laws of kingdoms or states. (*)

(y) See *Grot. de jur. belli ac pacis, Lib. II. cap. 2. §§ 6 & 7.*

(z) *New Edit. p. 489.*

(*) What our author here observes is undoubtedly true, that the plea of necessity ought not in such cases to be allowed, and the reason is, because the law supposes, that no man can in a well governed commonwealth be driven to such a necessity; this supposition is the more reasonable in *England*, where there are so many laws, and such large sums yearly collected for the relief of the poor, as are more than sufficient for that purpose, if rightly applied; yet such is the neglect in the execution of those laws, that it were to be wished some expedient were found out to render that relief more speedy and effectual, lest, while the necessity be real, the relief be only supposititious, which our author himself thought was oft-times the case, notwithstanding the provisions of the law; (see his *preface to his discourse touching the provision for the poor*,) which makes it reasonable it should be allowed as an argument for mercy, tho not as a plea in justification.

CHAPTER XLIX.

OF ARSON, OR WILFUL BURNING OF HOUSES.

THE felony of arson or wilful burning of houses is described by my lord Coke, *cap.* 15. *p.* 66. to be the *malicious and voluntary burning the house of another* by night or by day.

This was felony at common law, (a) and one of the highest nature, and therefore by the statute of *Westm.* 1. *cap.* 15. such offenders were not replevisable; (b) and by *Briton* (c) the offenders herein were burnt to death, but as to that the law is changed, they are to be hanged. *H. 7 E. 2. Coram Rege Rot.* 88. *Norf.* (d)

By the statute of 8 *H. 6. cap.* 6. dispersing of bills of menace to burn houses, if money be not laid down in a cer- [567] tain place, was made high treason, if the houses were burned accordingly: *vide Rot. Par.* 15 *H. 6. n.* 23. but as to the treason it is repealed by the statute of 1 *E. 6. cap.* 12. and 1 *Mar. cap.* 1. but the felony remains still in case the houses be burned. (e) [1]

In cases of wilful burning of houses the indictment runs, *Quod felonice, voluntarie & malitiose combussit domum* without saying *domum mansionalem*, as in case of burglary. *Co. P. C. p.* 67.

And to examine this felony these things are inquirable, *viz.*

(a) 3 *H. 7.* 10. a.

(b) 2 *Co. Instit.* 188.

(c) *cap.* 9.

(d) By the laws of *Ethelstan* it was capital, *incendiarii capitis pena esto*; *vide Leg. Ethelstan.* l. 6. and by the laws of *Cnut* it was one of those capital offenses for which no ransom was allowed. *Leg. Canuti.* l. 61.

(e) But since by the 9 *Geo. I. cap.* 22. it is made felony without benefit of clergy, knowingly to send any letter without a name subscribed, or signed with a fictitious name demanding money, venison or other valuable thing. This statute is amended by *Stat. 27. Geo. 2. c.* 15. knowingly to send any letter without a name, or with a fictitious name, demanding money, venison, or any other valuable thing, or threatening (without any demand) to kill any of the king's subjects, or to fire their houses, out-houses, barns, or ricks, is made felony without benefit of clergy. *Vide 7 & 8 Geo. IV. c.* 29, s. 8. *Archb. Pl. & Ev. in Crim. Law*, 606.

[1] The English statutes in force at present are: 7 *Wm. IV. & 1 Vict. c.* 89. § 3. 5 & 6 *Vict. c.* 38. § 1. 7 & 8 *Vict. c.* 62. § 1, 3, 4. The statute 7 & 8 *Geo. IV. c.* 27, wholly repeals the statute 23 *Hen. VIII. c.* 1. 43 *Eliz. c.* 13. 22 & 23 *Car. II. c.* 7. 9 *Geo. I. c.* 22. (The Black Act) 9 *Geo. III. c.* 29 & 52 *Geo. III. c.* 130; and the statute 9 *Geo. IV. a.* 31, wholly repeals the statute 43 *Geo. III. c.* 58. (Lord Ellenborough's Act.) These statutes do not alter the nature of the offence, or create any new offence, except that they extend to the burning of other buildings than dwelling-houses, or out-houses parcel thereof. See *Burn's Just. Vol. I. Tit. Burning*, 29th Ed. 1845. See *Reg. v. Jones*, 1 *Car. & Kir.* 303. 2 *Mood. C. C.* 308. *Reg. v. England*, 1 *Car. & Kir.* 533. *Reg. v. Paice*, 1 *Id.* 73.

For the United States Statutes, see the Act of March 3, 1825. sects. 1, 2, 11, 3 *Story's U. S. Laws*, c. 276. p. 1999. *Peters's Statutes at Large*, vol. 4, p. 106.

For the Massachusetts statutes, see *Rev. Stat. c.* 126. sects. 1, 2, 3, 4, 5, 6, 7, 8.

For the New York statutes, see *Rev. Stat.* 657. sects. 9 & 10. 2 *Id.* 666. sects. 1, 2, 3, 4, 5, 6, 7, 8, 9.

For the statutes of New Jersey, see *Statutes of New Jersey*, (1847,) Tit. "Crimes and Punishments," p. 265.

For the statutes of Pennsylvania, see *Stroud's Purd. Dig. Tit. "Arson," p.* 80. 6 Ed. p. 83. 7 Ed.

For the statutes of Virginia, see *Rev. Code*, ch. 171. sect. 5.

1. What shall be said *domus*. 2. What *domus* of another. 3. What a malicious and wilful burning. 4. What kind of felony this is. 5. Whether and how clergy is allowable.

1. What shall be said *domus*. [2]

[2] The building in respect of which the offence is committed, must come within the ordinary and established meaning of the words used in the statutes. The mere using the building for a particular purpose, does not necessarily alter the nature of the building. *Elmore v. St. Brisvels*, 2 Man. & Ry. 514; 8 B. & Cr. 461. S. C. An open building in a field, at a distance from and out of sight of the owner's house, though boarded round and covered in, *Rex v. Ellison*, Mood. C. C. 336; a cart-hovel, consisting of a stubbled roof supported by uprights, in a field at a distance from other buildings, *Rex v. Parrott*, 6 Car. & P. 402 was held not to be within the statute of 7 W. IV. & 1 Vict. c. 89. But an open shed in a farm-yard, covered with straw as a roof, was, *Rex v. Stallion*, 1 Mood. C. C. 398; *Rex v. Houghton*, 5 Car. & P. 555; *Rex v. James*, 1 Car. & Kir. 303. A school-room, which was separated from a dwelling-house by a narrow passage, about a yard wide, the roof of which was partly overhung by that of the dwelling-house, the two buildings, together with some others, and the court which enclosed them, being rented by the same person, was ruled to be well described as an *out-house*. *Rex v. Winter*, Russ. & Ry. 295.

As to how far the burning of part of a dwelling-house, &c. (under 9 Geo. I. c. 22.) may be an offence, see *North's case*, 2 East's P. C. 1021.

A common gaol was holden to be a house within the same statute. *Donner's case*, 2 Bl. Rep. 682; 2 East's P. C. 1020. S. C. But where a prisoner set fire to his cell, for the purpose of effecting his escape, and such intent was shown, it was held in *New York* not to be arson. *The People v. Cottrell*, 18 Johns. R. 115; so also in *Virginia*, *Com. v. Pacey*, 4 Call's R. 109.

A cotton-mill was held to be within the meaning of the 9 Geo. III. c. 29. s. 2; *Anon. & Russ.* 493. Burning a school-house is arson within the statutes of Connecticut and Maryland. *State v. O'Brien*, 2 Root R. 516; *Jones v. Hungerford*, 4 G. & J. 402. But is no crime at common law. *Wallace v. Young*, 5 Monr. 156.

Cases in burglary are referred to in the books to settle what is a dwelling-house, with respect to arson. 7 Dane's Abr. 134; 2 East's P. C. 1020; *Rex v. McDonald*, 2 Lew. C. Cas. 46; 2 Russ. on Crimes, 429. note †

1. A dwelling-house, at common law, includes all buildings, and apartments under the same roof, occupied with it for any purpose whatsoever. Thus, a wash-room (*Barrow's case*, Moody's Cas. 274,) under the same roof with the main dwelling, having no internal communication with it, was held to be part of it. And where the principal dwelling and a stable, cow-house, cottage, and barn stood in a line adjoining each other under the same roof, in the order of which they are named, the barn was part of the dwelling-house. *Brown's case*, 2 East, P. C. 501.

2. A dwelling-house includes all buildings and apartments under the same roof, however and by whomsoever occupied, which have a closed and covered communication with it. Thus a son living elsewhere had a shop under the same roof with his father's house, having a communication with it through the cellar, and the shop was held to be part of the father's house. (*Sefton's case*, R. & R. 102.) A tenant had a sleeping-room on the first floor and a work-shop in the garret, (*Carrell's case*, 1 Leach, 237,) and two tenants had each a dwelling-house and shop in the same building, having a communication between the apartments; the shop and workshop were held to be part of the dwelling-house. (*Rex v. Batty*, 1 Mood. 23.) The same point was also settled in *Stock's case*, R. & R. 185; and in *Com. v. Chevalier*, 7 Dane Abr. 134.

3. A dwelling-house comprehends all buildings within its curtilage occupied with it for any purpose, although not under the same roof, nor adjoining to it, nor having any closed or covered communication with it—as a school-room, (*Rex v. Winters*, R. & R. 295;) a warehouse, (*Walter's case*, Moo. 13; *Lithgo's case*, R. & R. 357;) chambers over a press, shop passage and lumber-room, (*Rex v. Hancock*, R. & R. 170;) a workshop, (*Rex v. Chalking*, R. & R. 334;) a goose-house, (*Rex v. Clayburn*, R. & R. 360;) a barn, stable, cow-house, sheep-house, dairy-house, and milk-house. 3 Inst. 67.

4. It comprehends adjoining buildings, used by its occupants for domestic purposes, although not within the curtilage. "All out-buildings, as barns, stables, dairy-houses, adjoining the house, are looked upon as part of it." (1 Bac. Ab. Burg. E.) "Out-houses adjoining to a dwelling-house, and occupied as a parcel thereof, though there be no com-

It extendeth not only to the very dwelling-house, but to all out-houses, that are parcel thereof, tho' not contiguous to it, or under the same roof; as in case of burglary, the barn, stable, cow-house, sheep-house, dairy-house, mill-house. *Ca. P. C. p. 67. 11 H. 7. 1. b.(f)*

(f) The words of the book are, *because the barn was adjoining to the house, it was held to be felony*; to make which serve our author's purpose we are not to understand thereby its being contiguous, but being so near the house, as to be parcel thereof.

mon enclosure or curtilage, may still be considered as parts of the mansion." (2 *East, P. C.* 493.) In *Rex v. Brown*, (2 *East, P. C.* 501,) the principal dwelling-house, stable, cow-house, cottage, and barn adjoining each other, were held to be one dwelling, and although the level of the roof was uniform throughout, yet it is plain that they were distinct buildings. But where an occupant of a dwelling-house occupies an adjoining building for other than domestic purposes, it is not a part of the dwelling-house. This was so held in *Egginton's case*, (2 *Leach*, 913;) the principal building was a manufactory, occupied by a firm, and the dwelling-house of one of the partners was in one of the wings. As there was no communication between them, the manufactory was held to be no part of the dwelling-house. See *ante chap. 48. p. 556, note [11]*.

The question whose house a dwelling-house is in respect to arson, has been much discussed. In *Holme's case*, (2 *East, P. C.* 1027, *S. C. Cro. Car.* 376; *S. C. William Jones*, 351,) it was held, that the malicious burning of his own house by a lessee for years, whereby the buildings of others were in danger of being burnt, was not a felony; that is, was not arson, but was a high misdemeanor, of which the offender was convicted, and for which he was punished under an indictment for a felony. It has been doubted whether he ought to have been convicted under such an indictment, but no question has been made of his being indictable for a misdemeanor. In *Harris's case*, (2 *East*, 1023,) Mr. Justice Foster expressed the opinion, that the burning of a house by the reverser, which was occupied by a tenant under a lease, is not the burning of the dwelling-house of another. In the same case it was held, that where the widow was entitled to dower to whom it had not been set off, and a house which had belonged to her husband subject to a mortgage, being occupied by a lessee, was burnt by her, it was arson. In *Spalding's case*, (2 *East, P. C.* 1025, decided 1780,) after the preceding, it was held not to be arson where the mortgagor, being in possession, set fire to his house, for the purpose of defrauding insurers, as it was not the dwelling-house of another. See *Breene's case*, (2 *East, P. C.* 1026, *S. C. 1 Leach*, 220,) the burning of his own house by a lessee for years, was held not to be arson, because it was not the dwelling-house of another. In this case arson is said to be an offence against the possession. In *Pedley's case*, (2 *East*, 1026; *S. C. Cald.* 218; 1 *Leach*, 242, *A. D.* 1782,) it was held, that a house occupied under a lease for three months, was that of the lessee. In this case it is said also, that "arson is an offence against the possession of another." In *Gowan's case*, (2 *East, P. C.* 1027, *A. D.* 1786,) where a pauper burnt the house in which he was put by the parish-officers, for which he paid no rent and in which he had no right, it was held to be arson; that is, it was held to be the house of another: in other words, it was held that the parish were the occupants. In *Rickman's case*, (2 *East*, 1034, *A. D.* 1789,) in which the indictment did not allege whose house was burnt by the defendant, it was held to be a material omission. It was a house occupied by the overseers of the poor for the accommodation of paupers, by one of whom it was burnt, but it was not known in whom the legal estate was. It was held that it might have been alleged to be the house of the overseers of the poor, or of persons unknown. The doctrine as laid down by Mr. *East*, (*P. C. vol. 2, p. 1034*,) is, that the house must be alleged in the indictment to be that of the person "who may be said to occupy *suo jure*." This is precisely the doctrine as to burglary, in respect to which a dwelling-house is that of the occupant. In a case subsequent to those above cited, viz. (*Glanfield's case*, 2 *East, P. C.* 1034, *A. D.* 1791,) a dwelling-house belonged to the occupant of the house, and the out-buildings and farm also belonged to her, and she also occupied a part of the out-buildings with her son, who separately occupied other out-buildings with the farm, of which he took upon himself the sole management at his own risk of loss or profit. One of the out-buildings in use of both, and another in use of the son only, were burnt. It was held, that the indictment must allege one building to

But if the barn or out-house be not parcel of a dwelling-house, it is not felony, unless the barn have hay or corn in it, (g) and then, tho it be no parcel of a dwelling-house, it is felony, 4 *Co. Rep.* 20. *a. Barham's case*; but if the barn have only hay in it, and not corn, the offender shall have his clergy, but if it hath corn in it, he shall be excluded of clergy, tho not parcel of a dwelling-house. *Co. P. C.* p. 69.

[568] The burning of a frame of a house was no felony by the common law, but was made felony by the statute of 37 *H. 8. cap. 6.* but that stands repealed by 1 *E. 6. cap. 12.* and 1 *Mar. cap. 1.*

The burning of a stack of corn was no felony by the common law, but the attempting of it was made felony by the statute of 3 & 4 *E. 6. cap. 5.*, (h) but that is repealed by 1 *Mar. cap. 1.* (i)

But by the statute of 43 *Eliz. cap. 13.* the wilful and malicious burning of any barn, or stack of corn, or grain within the counties of *Northumberland, Cumberland, Westmortand, or Durham*, is made felony without benefit of clergy. (k)

II. What shall be said the house of *another*. [3]

(g) But by 22 & 23 *Car. 2. cap. 7.*, "It is felony maliciously to burn in the night-time any rick or stack of corn, hay or grain, barns or other out-houses, or buildings, or kilns whatsoever." So that now, tho the barn be empty, it is felony; and by 9 *Geo. I. cap. 22.* clergy is taken away from the offender.

(h) This statute does not make the attempt felony generally, but only where divers persons to the number of twelve are assembled for that purpose, and continue together for the space of an hour after proclamation to depart, or where any above the number of two, and under twelve, shall after proclamation, as aforesaid, in a forcible manner attempt the same.

(i) But it is made felony by 22 & 23 *Car. 2. cap. 7.* and by 9 *Geo. I. cap. 22.* it is felony without benefit of clergy to set fire to any house, barn, or out-house, or to any hovel, cock, mow, or stack of corn, straw, hay or wood.

(k) By 1 *Geo. I. cap. 48.* it is felony maliciously to set on fire any wood, underwood, or coppice. By this statute clergy is not taken away; but by 9 *Geo. I. cap. 22.* it is felony without benefit of clergy to cut down or destroy any trees planted in any avenue, orchard, garden, or plantation. See *Archb. Crim. Law, Tit. "Arson,"* p. 312, 10 *Lord. Ed.*

be the building of both, and the other to be that of the son. Here it was held, that the building was that of the occupant.

In *Margaret Wallis's case*, (*Moody, C. C.* 334, cited 2 *Deac.* 1496,) it was ruled, that in an indictment for arson, a dwelling-house may be described as in possession of the actual occupier, though his possession be wrongful. In *Holmes's case*, (*Cro. Car.* 376,) it was held, that possession is a sufficient title. So in *The People v. Van Blarcom*, 2 *Johns. R.* 105.

In the *English law* this question, as to whose a dwelling-house is in respect to arson, which, as Mr. East remarks, (2 *East, P. C.* 1034,) had been one of great nicety in *English jurisprudence*, is excluded by the statute of 7 & 8 *Geo. IV. c. 30, s. 1.*, by which it is enacted, that "if any person shall unlawfully and maliciously set fire to any house, whether the same shall then be in possession of the offender, or in possession of any other person, with the intent to injure or defraud any person, shall suffer death." This provision makes the crime the same, whether it be committed by day or night, and whether it be the dwelling-house of the offender or of another. The burning of other buildings is put upon the same footing in the same section. *Mass. Com. Rep. Tit. "Arson and Malicious Burning."*

[3] At common law, the offence could not be committed by a party in burning his own house; and a person seized in fee, or but possessed for years of a house standing by

A tenant for years of a house sets fire to his own house, thereby intending maliciously to fire the house of *B.* if he burn his own house, and also thereby burn the house of *B.* this is felony; but if he burn not the house of *B.* according to his design, but only burn his own house, this is not felony, but a great misdemeanor, for which he was set in the pillory, fined, and perpetually bound to the good behaviour, and yet it was of a house in the city of *London*, and laid that he did it *ex intentione* to burn the houses of others. *M. 10 Car. 1. B. R. Croke 377. Holme's case*, adjudged.

III. It must be a *burning* of a house of another, [4] therefore if *A.* sets fire to the house of *B.* maliciously to burn it, but either by some

itself, at a distance from all others, could not commit felony in burning the same. So a man so seized or possessed of a house in a town, who burned his own with intent to burn his neighbour's, but in the event burned his own only, was not guilty of felony: it was, however, certainly an offence highly punishable in regard to the malice thereof, and the great danger to the public which attended it, and the offender was liable to be severely fined and imprisoned during the Queen's pleasure, and set on the pillory, and bound to his good behaviour. 1 *Hawk. c. 29, s. 3; Breeme's case, 1 Leach, 220, 4th ed.; Holme's case, Cro. Car. 376. cited in the text supra.*

The frequent commission of the latter offence, and the very serious mischief that resulted from its being merely a misdemeanor, at last attracted the attention of the legislature; and the party who would occasion by burning his own possessions an injury to another, the extent of which in many cases cannot be calculated, is now guilty of a felony: formerly, by 43 *Geo. III. c. 58*, usually called *Lord Ellenborough's Act*, and now by 7 *Will. IV. & 1 Vict. c. 89, s. 3.*

The burning must be done unlawfully and maliciously to constitute the offence; for if it be done by mischance or negligence, it is no felony, (3 *Inst. 67.*) As if an unqualified person, in sporting, happen to set fire to the thatch of a house; or even if a man were shooting at the poultry of another, by which means the house is fired, that is, provided he did not mean to steal the poultry, but merely to commit a trespass, for otherwise the first intent being felonious, the party must abide all the consequences. 2 *East's P. C. 1019.*

[4] If a man, by wilfully setting fire to his own house, burn also the house of one of his neighbours, it will be felony. *Rex v. Robert, 2 East's P. C. 1031. Rex v. Isaac, Id.* The law in such case implies malice, particularly if the party's house were so situate that the probable consequence of its taking fire was that the fire would communicate to the houses in its neighbourhood. Per *Parke, J. in Sweetapple v. Jesse, 5 B. & Ad. 31. 2 Nev. & Man. 41. S. C. Ball's case, 3 City Hall Rec. 85.; sed vide Bliss v. Tobey, 2 R. & R. 325. Curtis v. Godley Hundred, 3 B. & Cr. 248.*

Neither a bare intention to burn a house, nor even an actual attempt to do it by putting fire to part of a house, will constitute the offence, if no part of it be burned; but if any part of the house, &c. be burned, the offence will be complete, notwithstanding the fire be afterwards put out, or go out of itself. 2 *East's P. C. 1020. The State v. Sandy, 3 Iredell, R. 570.*

Where it was proved that the floor near the hearth was scorched, and it was in fact charred in a trifling way, that it had been at a red heat, though not in a blaze, it was held that the offence was complete. *Reg. v. Parker, 9 Car. & P. 45.*

But in another case, where it appeared that a small fagot was set on fire on the boarded floor of a room, and that the fagot was nearly consumed, that the boards of the floor were scorched black, but not burnt, and that no part of the floor was consumed, it was held that the offence was not complete. *Rex v. Russ., 1 C. & Marsh, 541. Rex v. Taylor, 1 Leach, C. C. 49. Rex v. Judd, 2 T. R. 255.*

The cases lay down the doctrine generally that it is sufficient if the house be on fire. 3 *Inst. 66. 4 Bl. Com. 222, Chitty's note. 2 East's P. C. 21. s. 4. Rex v. Taylor, cited supra. The People v. Cotteral, 18 Johns. R. 115.* But in all the cases where this gene-

accident or timely prevention the fire takes not, this is no felony, tho it were a malicious attempt, for the words are *incendit and combussit*, but if he had burned part of the house, and the fire is quenched,

ral doctrine was laid down, there was an evident intent to burn down the house. *Sed quære*, whether this be not too broadly stated in point of principle.

The attempt to commit arson is a misdemeanor at common law, and as such may be punished severely. *Rex v. Inglaton*, 1 Wils. R. 139. *Burns' Just. vol. 1. tit. "Attempts."*

The burning must be with intent to injure some person who is not identified with the defendant. *Rex v. March*, R. & M. 182. *Rex v. Farrington*, R. & R. 207. *Rex v. Gibson*, *Id.* 138. *Jervis's Arch. Cr. Law*, 9 ed. 320.

As to the form of the Indictment.—In describing the building, it is sufficient to use the language used by the act calling it a house, &c. according to the fact. 2 *East's P. C.* 1033. *Rex v. North*, *Id.* *Rex v. Donnevan*, 2 Wm. Bl. 682. 2 *East's P. C.* 1020. 1 *Leach*, O. C. 69. S. C. *Rex v. Winter*, R. & R. 298.

The name of the owner of the house must be stated in the same manner as in burglary. *Rex v. Standfield*, 2 *East's P. C.* 1034. *The Com. v. Wade*, 17 Pick. R. 395. *The State v. Roe*, 12 Verm. R. 93. It is necessary, therefore, to determine the party to whom the premises belong. When any doubt is entertained on the subject, the difficulty may be obviated by the insertion of several counts to correspond with the evidence. 3 *Chit. Cr. L.* 1126.

If the premises be described as in the possession of A. B. proof that they are in the possession of the tenants of A. B. will support the indictment. *Rex v. Ball*, R. & M. O. C. 30. *The People v. Vanblarcum*, 2 Johns. R. 105.

So if the possession of a house be obtained wrongfully, it may be described as the house of the wrongful occupier. *Rex v. Wallis*, Mood. C. C. 334. *The People v. Gates*, 15 Wend. R. 159.

The parish in which the building is situated must be stated according to the fact; a variance will be fatal. *Rex v. Woodward*, Mood. C. C. 323.

A variance between the day stated in the indictment, as that on which the offence was committed, and the day proved will be immaterial. Where the indictment alleges the offence to have been committed in the night-time, and it was proved to have been committed in the day-time, the judges held the variance to be immaterial. *Rex v. Minton*, 2 *East*, P. C. 1021.

It is necessary to aver that the defendant "feloniously, unlawfully, and maliciously," set fire, &c. 2 *East's P. C.* 1021. *Rex v. Turner*, R. & M. C. C. 239. *Chapman v. Com.* 5 Whart. R. 427.

It was not necessary to aver in an indictment on the statute 9 Geo. I. c. 22. for setting fire to a hay-stack, that the stack "was thereby burnt." *Rex v. Salmon*, R. & R. C. C. 26. 2 Russ. Cr. & M. 294. S. C.

In an indictment on the same statute for the same offence, it is no answer to the charge, that the prisoner had no malice in spite to the owner of the stack; nor that the stack stood upon his ground, if it was not his property. *Id.*

An indictment for setting fire to a barge, the property of another, ought to contain an averment that it was done with an intent to injure the owner. *Rex v. Smith*, 4 Car. & P. 569.

An indictment on the statute of 7 & 8 Geo. IV. c. 30. §§ 2. 17. for setting fire to a barn and a stack of straw, charged the offences to have been committed "feloniously, voluntarily, and maliciously," instead of feloniously, unlawfully, and maliciously, held bad. The prisoners had set fire to a stack of stubble, (which in *Cambridgeshire* is called haulm;) they were indicted on a first indictment for setting fire to a "stack of straw:" Held, that this was not straw. And on their being again indicted for setting fire to "a stack of straw called haulm," the judge intimated that to convict them upon such a count would not be safe: and the verdict in consequence was taken upon other counts charging the setting fire to a barn and a wheat stack. *Rex v. Reader*, 4 Car. & P. 245. Ry. & M. C. C. 239. S. C.

An indictment on the same stat. § 17. charged a party with setting fire to a "stack of barley of the value of £100 of R. P. W.:" Held good, although the words of the statute creating the offence use "any stack of corn or grain:" Held also, that the words "R. P. W." sufficiently stated the property. *Rex v. Swatkins*, 4 Car. & P. 548.

or goes out before the whole house be burned, it is felony. *Co. P. C.* p. 66. *Dalt. cap.* 105. (l) [5]

It must be a *wilful and malicious* burning, otherwise it is not felony, but only a trespass.

And therefore if *A.* shoot unlawfully in a hand-gun, suppose it be at the cattle or poultry of *B.* and the fire thereof sets another's house on fire, this is not felony, for tho the act he was doing were unlawful, yet he had no intention to burn the house thereby, against the opinion of *Dalt. cap.* 105. p. 270. (m)

But if *A.* have a malicious intent to burn the house of *B.* and in setting fire to it burns the house of *B.* and *C.* or the house of *B.* escapes by some accident, and the fire takes in the house of *C.* and burneth it, tho *A.* did not intend to burn the house of *C.* yet in law it shall be said the malicious and wilful burning of the house of *C.* and he may be indicted for the malicious and wilful burning of the house of *C.* *Co. P. C.* p. 67. (n)

An infant of about fourteen years of age or under may be guilty of malicious burning of houses, if by circumstances it can appear he knew it to be evil. [6]

Before me at *Norfolk*, a boy about the age of fourteen years was arraigned upon two several indictments for malicious and wilful burning of two several houses, the first was his own father's, and it appeared, that when he had secretly carried fire into the barn and fired it, he falsely charged another with the fact, and upon the boy's accusation he was imprisoned, till it appeared clearly he was not the offender: this boy was afterwards together with his father and his other children entertained at a neighbour's house in charity, and the boy watching opportunity, when none were in the house but a child in the cradle, carried fire out of the kitchen into a room of furrzes, and set fire in it and went out, and thus burnt a second house, and the child in the cradle; for both these he was questioned, and at length confessed freely the whole circumstances of both facts; he was indicted, and upon his arraignment pleaded, and upon [570] his trial craftily insisted, that he was under fourteen years of age; but I directed the jury, that it appeared by the circumstances, that his malice supplied his age, for it appeared, that he understood the evil of the first offense when he did it so secretly, and yet charged another wrongfully; but if there had been any doubt of the first burning, yet he could not but be conscious that the second burning was a great crime, when he saw another formerly charged by him with the first burning committed as for felony; but yet for my farther satisfaction, and in respect the boy seemed very little, I took farther examination touching his age, and his father, being by, freely

(l) *New Edit.* p. 506.

(m) *Ibid.*

(n) See the case of *Coke and Woodburne*, *State Tr.* Vol. VI. p. 222.

[5] See ante note No. [2].

[6] See ante p. 26, note [2].

confessed and was content to swear, that he was above fourteen and near fifteen years of age, and he was convicted and executed.

IV. What felony this is.

And it seems unquestionable, that the burning of a dwelling-house, or any part thereof, or any out-house part thereof, was a felony at common law, and so was also the burning of a barn with hay or corn in it, tho not parcel of a dwelling-house, but standing at a distance. *Co. P. C. p. 67. 11 H. 7. 1. b.*[7]

V. But as to the point of the not allowance of clergy therein, there may be some matters to be examined: certain it is, that at this day clergy is not allowable to a party convicted of wilful and malicious burning of a dwelling-house, or of a barn with corn; *quod vide 11 Co. Rep. 34. Coulter's case adjudged per omnes Justic. Plow. Com. 475. Co. P. C. p. 67.* and the constant practice hath been to deny clergy to those convict of this crime; *quod vide* in the resolution of *Poulter's case*.

And the statute of 4 & 5 P. & M. cap. 4. takes away clergy from all accessaries before to the offenses of wilful burning any dwelling-house, or of any barn then having corn or grain in the same; and surely they took the law to be, that the principal was by law ousted of his clergy, or otherwise they would not have ousted the accessary of his clergy.

But then the question remains, what it was that ousted the principal of his clergy.

By the statute of 23 H. 8. cap. 1. clergy was ousted from [571] all persons found guilty of wilful burning of any dwelling-houses or barn, wherein any grain or corn should happen to be, and from all persons found guilty of abetting, aiding or counselling thereof, *viz.* accessaries before; except persons in order of subdeacon, or above.

The statute of 1 E. 6. cap. 12. as to divers offenses therein particularly mentiond, which are for the most part also included in the statute of 23 H. 8. carried the exclusion of clergy farther, *viz.* as to standing mute, or not directly answering, but mentions not at all wilful burning of houses, or barns with grain; and enacted, that in all other cases of felony persons indicted shall have their clergy, as they should have had before 1 H. 8.

So that by the act of 1 E. 6. clergy was restored to burning of houses and barns with corn, notwithstanding the statute of 23 H. 8. or any other statute made since the first year of Henry VIII. and if the ousting of the principal in arson from his clergy rested upon the statute of 23 H. 8. then the statute of 1 E. 6. had restored him to his clergy.

The solution therefore of this matter is upon two accounts.

[7] See *State v. Stewart*, 6 Conn. R. 47; *Simpson v. Com.* 5 W. & S. Rep. 385; *Com. v. Vanshaack*, 16 Mass. R. 105; *Com. v. Macomber*, 3 Id. 254; *Com. v. Squire*, 1 Metc. R. 258; *Com. v. Wade*, 17 Pick R. 395.

1. Some have thought that the wilful burning of houses was not within clergy by the common law, nor by the statute of 25 *E. 3. cap. 4.* because it was an hostile act,^(o) and therefore, as until the statute of 4 *H. 4. cap. 2. Insidiatores viarum & depopulatores agrorum* joined with another felony, and so found, were ousted of their clergy, because savouring of acts of hostility, so *incendiatores domorum* were even by the common law ousted of clergy before the statute of 23 *H. 8.* and so are not restored to clergy by the general clause of the statute of 1 *E. 6.* and this I remember was delivered as the reason of the exclusion of clergy from wilful burning by Mr. Attorney *Noy*, 8 *Car. 1.* in the king's bench, and seemed to be assented to by the court.

But I think this will hardly help the matter, 1. Because tho possibly clergy might not be allowed at common law to wilful burning, yet the statute of 25 *E. 3. cap. 4. pro* [572] *clero* extends clergy to all treasons and felonies touching other persons than the king himself, and his royal majesty. 2. Because then as well a burning of a barn with hay, as a barn with corn, would be excluded from clergy, for the one is as hostile as the other.

2. Others have thought that the statute of 4 & 5 *P. & M. cap. 4.* taking away clergy from the accessaries before, doth take away by necessary consequence the clergy from the principal, for it were not reason to think the accessary *before*, should be in a worse condition, than the principal offender, and therefore virtually and implicatively, and by necessary consequence it takes away clergy from the principal in all those cases, where it takes it from the accessary *before*; and besides, if the principal had his clergy, the accessary could not be arraigned, and this I think is true, tho this case needs not this help.

But I think, and so is the book of 11 *Co. Rep. 34, 35.* that the statute of 25 *H. 8. cap. 3.* which extends to take away clergy in all those cases which were within 23 *H. 8. cap. 1.* and particularly recites that of burning houses and barns with grain, and farther extends that exclusion to standing mute, not directly answering, challenging above twenty, I say that statute of 25 *H. 8.* was in great part repealed by the statute of 1 *E. 6.* and is entirely revived by the statute of 5 & 6 *E. 6. cap. 10.* not only as to the point of ousting clergy upon examination,^(p) but also as to the exclusion of clergy in those cases mentioned in the act of 25 *H. 8.* wherein burning of houses and barns with corn is expressly mentioned, so that consequently this statute of

(o) And so interpretatively a felony touching the person of the king himself, which by that statute was ousted of clergy,

(p) This relates to the second clause of the 25 *H. 8. cap. 3.* whereby it is provided that if any persons be indicted in one county for stealing goods in another, and stand mute, or challenge peremptorily above twenty, or will not directly answer, they shall be put from their clergy in like manner, as if they had been tried and found guilty in the same county, where the offense was committed, if it appear to the justices by the evidence or on examination, that it was such a felony, as if found guilty thereof in the county where committed, they would have lost their clergy by the 23 *H. 8. cap. 1.*

5 & 6 *E. 6.* reviving the statute of 25 *H. 8.* repeals the generality of that clause in 1 *E. 6.* whereby clergy was *let in*, in all cases there not enumerated.

[573] And consequently the periods of this case of clergy in wilful burning stand thus.

1. Before 23 *H. 8.* clergy was allowable therein by force of the statute of 25 *E. 3. pro clero.*

2. After 23 *H. 8.* until 25 *H. 8.* clergy was allowable for the accessory in all cases, and for the principal in all cases, but finding him guilty.

3. After 25 *H. 8.* until 1 *E. 6.* clergy was taken away from the principal as well where he stands mute, not directly answers or challenges above twenty, as where he is found guilty.

But the accessories as well before as after were to have clergy.

4. After 1 *E. 6.* till 5 & 6 *E. 6.* when the statute of 25 *H. 8.* was revived, both principal and accessories had their clergy in all cases of burning.

5. After 5 & 6 *E. 6.* till 4 & 5 *P. & M. cap. 4.* the principal was excluded in all cases, wherein he was excluded by the statute of 25 *H. 8.* as well where he stood mute, challenged above twenty, did not directly answer, as where found guilty. (*q*)

But the accessories *before*, as well as *after*, had their clergy.

6. By the statute of 4 & 5 *P. & M. cap. 4.* until this day, accessories *before* are excluded of clergy in all cases, but accessories *after* have their clergy.

But yet there still remain two doubts.

1. Whereas the statute of 4 & 5 *P. & M. cap. 4.* extends to oust clergy from the accessory, as well if he be attainted as convicted, and consequently if outlawed, he shall not have clergy, because it is an attainder; the statute of 25 *H. 8.* extends only to finding guilty, challenging above twenty, standing mute, or not directly answering, and it seems in attainder of the principal by outlawry he shall have his clergy; therefore *quære*, whether an attainder by outlawry ousts the principal of clergy upon the statute of 23 or 25 *H. 8.*

2. Whereas the statute of 4 & 5 *P. & M. cap. 4.* hath no [574] exception of persons in the order of sub-deacon; but accessories *before* are ousted of their clergy in all cases by that statute, tho in orders.

Yet by the statute of 25 *H. 8.* which is relative to the statute of 23 *H. 8.* principals in the order of sub-deacon, or above, have their clergy in the case of arson, for by the statute of 23 *H. 8.* clergy is saved to men in orders, where found guilty; and by the statute of 25 *H. 8.* in cases of standing mute, &c. they are ousted of their clergy as if found guilty, in which case men in orders had their clergy, and so the reviving of the statute of 25 *H. 8.* by that of 5 & 6 *E. 6.* *lets in* men in orders to their clergy in case of arson, which seems to make this absurdity, that the principal in arson shall have the bene-

(*q*) By 3 & 4 *W. & M.* clergy is taken away in case of outlawry also.

fit of clergy if in orders, but the accessaries *before*, tho in orders, are excluded by the general penning of the act of 4 & 5 *P. & M.*

And herein there will arise a difference as to men in orders, in relation to the benefit of clergy, between the case of being principal in wilful burning of houses, and the case of being principal in robbery in or near the highway, or robbing in a dwelling-house, putting the dweller in fear, or murder of malice prepense; for the act of 1 *E. 6. cap. 12.* excludeth them from their clergy generally without exception of men in orders, tho they were excepted by the statutes of 23 and 25 *H. 8.*

But this statute of 1 *E. 6.* making no mention of burning of houses, the exclusion of them from clergy, if resting upon the statute of 25 *H. 8.* revived by 5 & 6 *E. 6.* excepts them.[8]

[8] *The State v. Seaborn*, 4 *Dev. R.* 305; *Com. v. Posey*, 4 *Call's Rep.* 109. See *ante chap. 44*, p. 517, note [1.]

CHAPTER L.

[575]

CONCERNING FELONIES BY THE COMMON LAW,[1] RELATING TO THE BRINGING OF FELONS, TO JUSTICE, AND THE IMPEDIMENTS THEREOF, AS ESCAPE, BREACH OF PRISON, AND RESCUE; AND FIRST TOUCHING ARRESTS.[2]

I COME now, according to the method propounded, to consider those felonies that relate to the public justice of the kingdom in bringing malefactors to their due punishment, and the impediments thereof, and they are principally three, *viz.* I. By the party arresting or

[2] As to Arrests, see vol. 2, ch. 10, 11, 12, 13, and notes thereto.

[1] "Felonies in *England*, comprised originally every species of crime which occasioned the forfeiture of lands and goods. At common law, in addition to the crimes more strictly coming under the head of treason, the chief, if not the only felonies, were murder, manslaughter, arson, burglary, robbery, rape, sodomy, mayhem, and larceny. By statutes, however, running from the earliest period, new felonies were, from time to time, created; till finally not only almost every heinous offence against person or property was included within the class, but it was held that whenever judgment of life or member was affixed by statute, the offence to which it was attached, became felonious by implication, though the word felony was not used in the statute." In this country, with a few exceptions, the common law classification has obtained; the principal felonies being received as they originally existed, and their number being increased as the exigencies of society prompted. In *New York*, however, felony by the revised statutes is construed to mean an offence for which the offender, on conviction, shall be liable by law to be punished by death, or by imprisonment in a State prison. (*Rev. Stat. N. Y. Part IV. Chap. II. Title 7. s. 30.*) And in *Virginia* it comprehends all offences below treason which occasioned a forfeiture of property at common law, all so denominated by statutes, and all to which statutes have annexed capital punishment or confinement in the penitentiary, excepting those which, though subjected to the latter punishment, are

imprisoning, as voluntary escapes. 2. By the party arrested, and imprisoned, as breach of prison. 3. By a stranger, as rescue of felons.

And in this order I shall examine these offenses; but as a neces-

or may be declared misdemeanors by the statutes creating them." *Barker v. Com.* 2 *Virginia Cases*, 122; *Whart. Am. Crim. L.* 1, 2.

Felony is supposed to come from the Saxon *fel*, which signifieth fierce or cruel; of which the verb *fell* signifieth to throw down or demolish, and the substantive of that name is used to signify a mountain rough and uncultivated. But the same word, with a little variation, runneth through most of the European languages, and signifieth more generally, an offence at large; and the Saxon word *faellan*, signifieth to offend, and *fellnisee*, an offence or failure; and although *felony*, as it is now become a technical term, signifieth in a more restrained sense an offence of a high nature, yet it is not limited to capital offences only, but still retaineth somewhat of this larger acceptation; for petit larceny is felony, although it is not capital. *Burn's Just. Tit. "Felony," 29th Ed.*

According to Sir Henry Spelman's observation, it signifieth such an offence for which, during the feudal institution, a man should lose or forfeit his estate; which he derives of two northern words, *fee*, which signifieth the fief, feud, beneficiary, estate; and *lon*, which signifies price or value.

Upon the whole, the only adequate definition of felony seems to be this, viz. "an offence which occasions a total forfeiture of either lands or goods; or both, at the common law, and to which capital or other punishment may be superadded according to the degree of guilt." 4 *Bl. Com.* 94, 95.

The idea of felony is, however, so generally connected with that of capital punishment, that it seems hard to separate them, and to this usage the interpretations of law now conform. For if a statute makes any new offence *felony*, the law implies it shall be punished with death, (viz. by hanging,) as well as by forfeiture. See 1 *Hawk. c. 41. s. 4*; 2 *Id. c. 48*.

Where the statute declares that the offender shall, under the particular circumstances, be deemed to have *feloniously* committed any act, it makes the offence a *felony*, and imposes all the common and ordinary consequences attending a felony. *Rex v. Johnson*, 3 *M. & Sel.* 556. And though a statute make the doing of an act *felonious*, yet, if a subsequent act make it *penal* only, the latter is considered as a virtual repeal of the former. 1 *Hawk. c. 40. s. 5*.

All *felonies* are several, and cannot be joint, so that a pardon of one felon cannot discharge another; but the felony of one man may be dependent upon that of another, and the pardon of the one, by a necessary consequence, enure to the benefit of the other, as in cases of principal and accessory, &c.

The Massachusetts Commissioners, in their Report, enumerate as felonies within the provisions of their code, treason, murder, arson, rape, malicious burning, carnal abuse of a female child under ten years of age, burglary, robbery, larceny, kidnapping, child-stealing, and the offence of assault, or assault and battery in the first degree. And in a note they add that the meaning of *felony* as by them defined, is limited to the use of the word in their code, and is not to be confounded with the common law signification of the same term, "whatever that meaning may be, for it is a matter of no little difficulty to settle it." *Rep. tit. "Explanation of Terms."*

Where one is found guilty of acts which amount to a felony, though not charged to be done feloniously, he cannot be sentenced as for a misdemeanor. *Commonwealth v. Kingsbury*, 5 *Mass.* 106. *Commonwealth v. Roby*, 12 *Pick.* 496. *Commonwealth v. Macomber*, 3 *Mass.* 254.

If acts amounting only to a misdemeanor are charged to be done feloniously, the accused cannot be convicted of the misdemeanor. *Commonwealth v. Newell*, 7 *Mass.* 245. But see *Com. v. Squire*, 1 *Met.* 258. *The People v. Jackson*, 3 *Hill's N. Y. Rep.* 92. *The People v. White*, 22 *Wend.* 175.

Statutes are to be construed so as not to multiply felonies, unless such construction is supported by express words or necessary implication. *Commonwealth v. Macomber*, 3 *Mass.* 254, 257. *Commonwealth v. Barlow*, 4 *Mass. R.* 439. It would be such an implication if the statute provided for the punishment of accessories after the fact to the offence in question as distinct offenders. *Ib.*

A conviction, judgment and execution upon one indictment for a felony not capital, is

sary preliminary thereunto, I shall first consider of arrests and imprisonment for capital offenses, by whom it may be done, and where lawful.

Arrests of malefactors are of two kinds, 1. Either by persons thereunto by law deputed, or 2. By private persons.

And the former is again of two kinds. Either, 1. By process of law, or 2. *Virtute officii*.

The former again is of two kinds, 1. Either by process in the king's name, 2. Or by warrant in the name of a judge or justice thereunto authorized, and that either in writing or *ore tenus*.

I shall pursue this order, and

I. Shall begin with the first of these, namely, arresting by virtue of the king's writ.

Regularly no process issues in the king's name and by his writ to apprehend a felon or other malefactor, unless there be an indictment, or matter of record in the court upon which the [576] writ issues.

Antiently the process upon an appeal or an indictment of felony was only one *Capias*, and thereupon an *Exigent*. 22 *Assiz*. 81.

By the statute of 25 *E. 3. cap.* 14. there are to be a *Capias* and an *Alias* with a command to the sheriff to seize the goods of the felon, and then an *Exigent*.

But it should seem by the book of 8. *H.* 5, 6. that this statute extended not to felony of death, but that there should be only one *Capias*, and then an *Exigent*.

a bar in *Tennessee* to all other indictments for felonies not capital, committed previous to such conviction, judgment and execution. *Crenshaw v. The State*, *Mart. & Yerg.* 122.

Under an indictment for horse-stealing, it was held that to constitute a felony there must be a trespass in the original taking. *The State v. Braden*, 2 *Overton*, 68.

In *New York*, if a prisoner confined in the county prison, on a conviction of petit larceny, break prison, it is a felony for which he may be sentenced to imprisonment in the State prison for a period not exceeding fourteen years. *The People v. Duell*, 3 *Johns.* 449.

It is felony for a man who elopes with another's wife, to take his goods, though at the solicitation of the wife. *The People v. Schuyler*, 6 *Cow.* 572.

It is very much to be doubted whether a person ought ever to be convicted of a felony on the uncorroborated testimony of a prosecutor, who claims the property in question to which the defendant also claims title. Where the transaction was attended with none of the usual concomitants of larceny, as concealment, for example, the court, upon conviction, ordered a new trial. *The State v. Kane*, 1 *McCord*, 482.

In this country, where conviction of a felony does not work a forfeiture, a civil action is not merged in a felony. *Robinson v. Culp*, *Const. Rep.* 231.

It seems that one guilty of a felony should be proceeded against criminally before a civil action can be brought, because he should not be convicted of a felony except on a direct charge of a crime. *Ib.*

Wild bees remaining in the tree where they have lived, are not the subject of felony, though the tree is on the land of another who has confined them in it. *Wallis v. Mease*, 3 *Binney R.* 546.

A slave in *South Carolina* can commit a felony. *The State v. Wright*, 4 *McCord*, 358.

A mere solicitation to commit a felony is an offence, whether it is committed or not. *The People v. Bush*, 4 *Hill's N. Y. Rep.* 133.

It has been held in *New York* that petit larceny is not a felony. *Carpenter v. Nixon*, 5 *Hill R.* 260. *Ward v. The People*, 3 *Id.* 395.

But by the statute of 6 *H. 6. cap. 1.* if *A. de B. in comitatu S.* be indicted in the king's bench in *Middlesex*, there shall go out one *Capias* into *Middlesex*, another into *S.* and each shall have six weeks at least between the *Teste* and return, and upon *Non inventus* returned then an *Exigent*.

But if he be not named of another county, then it seems only one *Capias* shall issue, where the party is indicted, and upon *that an Exigent*: this statute was made during the king's pleasure; but by the proviso in the statute of 8 *H. 6. cap. 10.* it seems to be made perpetual.

By the statute of 8 *H. 6. cap. 10.* if *A. de B. in com. S.* be indicted or appealed *in com. W.* before justices assigned, there shall go out first a *Capias in Com. W.* and upon *Non inventus* returned a *Capias*, with proclamations *in com. S.* having three months at least between the *Teste* and return, or otherwise no *Exigent* to issue; but the process in the king's bench is excepted.

But this statute only extends, where the party is indicted in another county, than where conversant.

By the statute of 5 *E. 3. cap. 11.* justices of *oyer and terminer* may issue process against felons in a foreign county, and these processes ought, or at least may and are most fit to issue in the king's name under the *Teste* of the chief judge, for which purpose all clerks of assizes have a special seal, and issue their process in the king's name in case of felony, where they go to the outlawry, tho some other warrants are made in the name of the judge.

And in all cases the king's writs are directed to the [577] sheriff, and he executes the writ himself, or by his warrant under seal to the bailiffs.

And upon these writs the sheriff or his bailiff may break open doors to take the offenders, for they are for the king and preservation of the peace, and therefore include a *non omittas propter aliquam libertatem; quod vide 5 Co. Rep. 92. a.*

And in this case the sheriff or his bailiff may require any persons present to assist him in execution of the writ, and he that refuseth to assist him, is indictable and punishable by fine and imprisonment.

II. The second kind of arrest is by warrant under the seal of the justices thereunto authorized, as justices of *oyer and terminer*, or of gaol-delivery, or justices of peace.

And herein these things are considerable: 1. What are the essentials of such a warrant, without which it is void in law. 2. Who may grant a warrant to apprehend a felon. 3. To whom, and 4. In what order or method it is to be granted, or 5. Executed, and in what case.

1. As to the first of these,

It is necessary that such warrant express the name of the party to be taken: for a warrant granted with a blank and sealed, and after

filled up with the name of the party to be taken is void in law.

Dalt. cap. 117. p. 329. (a)

It must be under seal, tho some have thought it sufficient if it be in writing subscribed by the justice, *Dalt. cap. 117. p. 358. vide 2. Co. Instit. supra statutum de frangentibus prisonam, p. 591.* and the failing in these things will make the warrant void, and subject the officer to a false imprisonment; tho in some cases, the want of due formality may be blameable in him that makes the warrant, yet it will not therefore subject the officer to a false imprisonment, if the matter be within the jurisdiction of him that makes it; as for instance,

A warrant by a justice to apprehend *J. S.* to answer such matters as shall be objected against him, *ex parte domini regis*, without expressing the certainty of the crime, this is not regular, *Lambard's justice 95; 96. 2 Co. Instit. 591. 615.* tho Mr. *Dalt. cap.*

117. p. 329. gives instances of such warrants granted by [578] *Popham* chief justice.

And therefore, if before commitment a person so apprehended should be removed into the king's bench by *Habeas Corpus*, upon such a warrant, or should be committed upon such a general *Mittimus*, he should be discharged; or in case he should be rescued upon such an apprehension by such a warrant, or be voluntarily let go by him that apprehends him, (tho it may be the true cause of the warrant were felony,) yet it not being expressed in the warrant, such an escape or such a rescue would not be felony.

Yet it may excuse the officer in false imprisonment, if the true cause were felony, or any misdemeanor within the cognizance of him that makes the warrant, for it is but an erroneous, not a void warrant, and it is not reasonable to suppose the officer should be conusant of the formalities of law, or advise with counsel upon all occasions, whether the warrant were in strictness of law regular, especially in such a case where the error of this nature hath been seconded with common practice; but of this more hereafter.

2. As to the persons, that may grant a warrant for apprehending a felon.

The chief justice of the king's bench or any other judge of that court may issue a warrant in his own name, for the apprehending and bringing before him any person touching whom oath is made of a felony committed, or of suspicion of felony upon him, into any county of *England* and *Wales*, for they are intrusted with the conservation of the peace through all *England*, and are more than justices of peace or *oyer* and *terminer*; and this hath been usual in all ages.

But to avoid the trouble to the country in bringing up offenders they usually direct their warrants to apprehend the parties, and bring them before some justice of peace near adjoining, either to be examined or bound over to the sessions, and farther to be proceeded against according to law.

And thus their warrants ought to run in cases of surety of the peace or good behaviour against a person in another county, than where they are, by reason of the statute of 21 *Jac. cap. 8.*

Justices of *oyer and terminer* may also issue their warrants in the counties within their commission for apprehending felons or other malefactors, or, for surety of the peace within their limits; *quære*, whether they may not issue their warrants for any indicted of felony within their precincts, tho they are abroad in a foreign county, by the statute of 5 *E. 3.* before mentioned?

Justices of peace may also issue their warrants within the precincts of their commission for apprehending persons charged of crimes within the cognizance of the sessions of the peace, and bind them over to appear at the sessions, and this, tho the offender be not yet indicted.

And therefore the opinion of my lord *Coke*, 4 *Instit.* 177. is too strait-laced in this case, and, if it should be received, would obstruct the peace and good order of the kingdom; and the book of 14 *H. 8.* 16. upon which he grounded his opinion, was no solemn resolution, but a sudden and extrajudicial opinion, and the defendant had liberty to mend his plea as to the circumstance of time, to the end it might be judicially settled by demurrer, which was never done; and the constant practice hath obtained contrary to that opinion; *quod vide Dalt. cap. 117.(b)*

And whereas my lord *Coke*, *ubi supra*, saith also, that a justice of peace upon oath made by *A.* of a felony committed, and that *A.* suspects *B.* and shews his cause, cannot issue a warrant to bring *B.* before him for farther examination, and thereupon commit or bind him over to the assizes or sessions, because it must be the proper suspicion of *A.* himself, and *A.* may arrest him upon the score of his own suspicion, but not by warrant of the justice; I think the law is not so, and the constant practice in all places hath obtained against it, and it would be pernicious to the kingdom if it should be as he delivers it, for malefactors would escape unexamined and undiscovered; for a man may have a probable and strong presumption of the guilt of a person, whom yet he cannot positively swear to be guilty.

Therefore I think, that if *A.* makes oath before a justice of peace of a felony committed in fact, and that he suspects *B.* and [580] shews probable cause of suspicion the justice may grant his warrant to apprehend *B.* and to bring him before him, or some other justice of peace to be examined, and to be farther proceeded against, as to law shall appertain; and upon this warrant the constable, or he to whom the warrant is directed, may arrest him, and if occasion be may break doors to take him, if within a house, and will not upon demand render himself, as well as if it were an express and positive charge of felony sworn by *A.* against him, and so hath common practice obtained notwithstanding that opinion: *vide statute Westm. 1 cap. 15.(c)* 13 *E. 4. 9. a.*

(b) *New Edit.* p. 576.

(c) 2 *Co. Inst.* p. 185.

But a general warrant upon a complaint of a robbery to apprehend all persons suspected, and to bring them before, &c. was ruled void, and false imprisonment lies against him that takes a man upon such a warrant, *P. 24 Car. 1.* upon evidence in a case of justice *Swallow's* warrant before justice *Roll*.

If *A.* hath committed treason, tho the justices of the peace have no cognizance of it as treason, yet they have cognizance of it as a felony, and as a breach of the peace, and therefore a justice of peace upon information upon oath may issue his warrant to take him, and may take his examination, and commit him to prison.

A. commits a felony in the county of *B.* and then goes into the county of *C.* upon information given to a justice of peace of the county of *C.* he may issue his warrant to take him, may take his examination, and commit him to gaol in the county of *C.* from whence he may be removed by *Habeas Corpus* to the county of *B.* for his trial.

If *A.* commit a felony in the county of *B.* and upon a warrant issued against him by a justice of peace in the county of *B.* he is pursued and flies into the county of *C.* and there is taken, he must not by virtue of that warrant be carried to a justice of peace of the county of *B.* where he committed the felony, but to a justice of peace in the county of *C.* where he was taken.

But if *A.* were taken by the warrant in the county of *B.* and break away into the county of *C.* and be there taken upon fresh suit by them that first took him, he may be either brought [581] to a justice of the county of *C.* where he was last taken, or before the justice of the county of *B.* by whose warrant he was first taken; for in supposition of law he was always in custody: *vide dubitatur*, 13. *E. 4. 9. a.*

If *A.* be in commission of the peace in the county of *B.* and happen to be in the county of *C.* and there complaint is made to him of a felony in the county of *B.* where he is in commission, as he cannot issue a warrant out to apprehend the party, so neither can he imprison in the county of *C.* because an act of jurisdiction, but he may take an oath of a party robbed in pursuance of the statute of 27 *Eliz.* or he may take an examination, or information, or recognizance in a foreign county, but cannot compel them by imprisonment. *P. 7 Car. 1. Croke; n. 3 Helyar's case, (d) Dalt. cap. 6. and 117. (e)*

But if *A.* be a justice of peace in two adjacent counties, tho by several commissions, as the recorder of *London* is, nothing is more usual for him, that whilst he lives in one county to send his warrants to apprehend malefactors in another, and to send them to *Newgate*, which is the common gaol of both counties, *London* and *Middlesex*.

3. Touching the persons to whom a warrant may be directed.

The justice that issues the warrant, may direct it to a private person if he please, and it is good; but he is not compellable to execute it, unless he be a proper officer. 14 *H. 8. 16. Dalt. cap. 117. p. 332. (f)*

(d) *Cra. Car. 211.*

(e) *New Edit. p. 25 & 575.*

(f) *New Edit. p. 577.*

The warrant is ordinarily directed to the sheriff or constables, and they are indictable, and subject thereupon to a fine and imprisonment if they neglect or refuse it.

If directed to the sheriff, he may make a warrant to his bailiff to execute it.

If to a constable, tithing-man, &c. he must execute it himself, and may not substitute another; but he may call any persons to assist him, and they are bound to assist him, and are indictable if they neglect or refuse to assist: *vide Dalt. ubi supra*.

If directed to the constable of *D.* he is not bound to execute the warrant out of the precincts of his constablewick, [582] but if he doth it out of his constablewick, it is good; and so it was ruled in *Norfolk* in an action of trespass.

4. Touching the order in granting it.

1. It is convenient, tho not always necessary, to take an information upon oath of the person that desires the warrant, that a felony was committed, that he doth suspect or know *J. S.* to be the felon; and if suspected, then to set down the causes of his suspicion.

2. If the charge of the felony be positive and express, then it is fit to bind the party by recognizance to prosecute, before the warrant be issued.

But if it be only a charge of suspicion, and the business requires farther examination, then it is neither necessary nor fit to bind over the party to prosecute; for possibly upon the bringing in of the party accused, and farther examination of the fact, there may be cause to discharge him, and thus I think *Mr. Dalton* to be intended, *cap. 117. p. 334. (g)* the case before chief justice *Flemming*.

3. The warrant may issue to bring the party before the justice that granted the warrant specially, and then the officer is bound to bring him before the same justice; but if the warrant be to bring him before any justice, then it is in the election of the officer to bring him before what justice of the county he thinks fit, and not in the election of the prisoner. *5 Co. Rep. 59. b. Foster's case*.

5. Touching the demeanor of the officer in executing the warrant.

If it be a warrant for felony, or a warrant for the surety of the peace, the officer may break open the door, if he be sure the offender is there, if after acquainting them of the business, and demanding the prisoner, he refuses to open the door, tho the party be not indicted; and this is the constant practice against the opinion of my lord *Coke*, *4 Inst. 177. quod vide Dalt. cap. 117. p. 333. (h)*.

And so it is if the warrant be only upon suspicion of [583] felony, as hath been said before, for in both cases the process is for the king, and therefore a *Non omittas* is implied, and he that diligently considereth the statute of *West. 1. cap. 15. (i)* and the statute of *2 & 3 P. & M. cap. 10.* will find that an imprisonment may be made by the justice, as well for suspicion of felony, as for an absolute charge of felony, and that as well before indictment as after.

(g) *New Edit. cap. 169. p. 579.*

(h) *New Edit. p. 578.*

(i) *2 Co. Inst. 185.*

And by the book of 13 E. 4. 9. a. A man that arrests upon suspicion of felony, may break open doors, if the party refuses upon demand to open them, and much more may it be done by the justice's warrant.

If the officer be demanded he must show his warrant, but if he doth it *virtute officii* as a constable, &c. it is sufficient to notify that he is the constable, or that he arrests in the king's name. *Dalt. ubi supra*, 6 Co. Rep. 54. a. 9 Co. Rep. 69. a. *Mackally's case*.

Lastly, What is to be done after the warrant served, and when the person accused is brought before the justice thereupon.

If there be no cause to commit him found by the justice upon examination of the fact, he may discharge him.

If the case be bailable, he may bail them.

If he have no bail, or the case appears not to be bailable, he must commit him.

And being either bailed or committed, he is not to be discharged till he be convicted or acquitted, or delivered by proclamation. *Co. P. C. cap. 100. p. 209.*

And this leads me to the *Mittimus*, or the warrant to the gaoler to receive him; and this is the ground of the felony in case of a breach of prison.

My lord *Coke*, 2 *Inst.* 591. makes three essential parts of the *Mittimus*.

1. That it be in writing sealed by the justice that commits, and without this part the commitment is unlawful, the gaoler is liable to a false imprisonment, and the wilful escape by the gaoler, or breach of prison by the prisoner, makes no felony.

But this must not be intended of a commitment in a court of record, as the king's bench, gaol delivery, or sessions of [584] the peace, for there the record itself, or the memorial thereof, which may at any time be entered of record, are a sufficient warrant without any warrant under seal.

2. That it express the cause for which he is committed, namely felony, and what kind of felony.

This seems requisite to make the voluntary escape or breach of prison felony, and also it is necessary upon return of the *Habeas Corpus* out of the king's bench, because that is in nature of a writ of right or writ of error to determine, whether the imprisonment be good or erroneous.

But it seems not to make the commitment absolutely void, so as to subject the gaoler to a false imprisonment, but it lies in averment to excuse the gaoler or officer, that the matter was for felony.

And also upon such a general warrant without expressing any felony or treason, or surety of the peace, the constable cannot break open a door. *T. 9 Jac. B. R. 1 Bulstrode* 146. *Foster's case*.

3. That it have an apt conclusion, *viz. There to remain till deliverd by law.*

But if the conclusion be irregular, I think it makes not the warrant

void, but the law will reject that which is surplusage, and the rest shall stand.

And therefore if the cause be expressed, and the conclusion irregular, as *till farther order given by a justice*, yet a breach of prison under such a warrant will be felony, yea, if the party be removed by *Habeas Corpus*, tho the conclusion be irregular, yet if the matter appears to be such, for which he is to remain in custody, or be bailed, he shall be bailed or committed as the case requires, and not discharged; but the idle conclusion shall be rejected.

And therefore I do think that such a warrant is a good justification in a false imprisonment, tho the right conclusion be omitted, or tho the wrong conclusion be inserted, if the matter of the *Millimus* be otherwise sufficient to charge him in custody, and therefore it is a lawful warrant notwithstanding the omission or incongruity [585] of the conclusion, so as to make the voluntary permission of an escape or the breach of prison felony.

By the statute of 23 *H. 8. cap. 2.* the felons are to be sent to the common gaol:(i) and by the statute of 4 *E. 3. cap. 10.* the sheriffs and gaolers are bound to receive them; whether committed by justices, or attached *ex officio* by constables.

Previous to the commitment of felons, or such as are charged therewith, there are required three things, 1. The examination of the person accused, but without oath. 2. The farther information of accusers and witnesses upon oath. 3. The binding over of the prosecutor and witnesses unto the next assizes or sessions of the peace, as the case requires.

1. The examination of the person accused, which ought not to be upon oath, and these examinations ought to be put in writing, and returned or certified to the next gaol delivery or sessions of the peace, as the case shall require, by the statute of 2 & 3 *P. & M. cap. 10.* and being sworn by the justice or his clerk to be truly taken, may be given in evidence against the offender.(k)

And in order thereunto, if by some reasonable occasion the justice cannot at the return of the warrant take the examination, he may by word of mouth command the constable, or any other person, to detain in custody the prisoner till the next day, and then to bring him before the justice for further examination; and this detainer is justifiable by the constable, or any other person without showing the particular cause for which he was to be examined, or any war-

(i) *And not elsewhere*; so that it should seem that commitments to *New Prison* or the *Gate-house* are irregular; see 2 *Co. Inst.* 43. *Cro. Eliz.* 830. and of this opinion was chief justice *Holt*, in the case of *Kendal and Roe*, *State Tr. Vol. IV. p. 862.* See also 5 *H. 4. cap. 10.* which ordains, "That none be imprisoned by justices of the peace, save only in the common gaol." 9 *Co. Rep.* 119. b.

(k) Altho they be not evidence against any other person named in them; it was therefore very irregular in the chief justice to refuse reading the examinations of *Stern* and *Boroski* at their trial; see *State Tr. Vol. III. p. 470.* But *quære* by serjeant *Wilson*, if the chief justice was not right in such refusal? For by the opinion of some judges now living, the statute doth not extend to the examination of the party accused, unless he signed his examination, but only to the witnesses or persons accusing.

rant in scriptis. *T. 37 Eliz. Rot. 244. B. R. Broughton and Marshaw.*(*l*)

But the time of the detainer must be reasonable; therefore a justice cannot justify the detainer of such a person sixteen [586] or twenty days in order to such examination.(*m*)

2. He must take information of the prosecutor or witnesses in writing upon oath, and return or certify them at the next sessions or gaol-delivery, and these being upon the trial sworn to be truly taken by the justice or his clerk, &c. may be given in evidence against the prisoner, if the witnesses be dead or not able to travel.

3. Before he commit the prisoner, he is to take surety of the prosecutor to prefer his bill of indictment at the next gaol delivery or sessions, and likewise to give evidence; but if he be not the accuser, but an unconcerned party that can testify, the justice may bind him over to give evidence; and upon refusal in either case may commit the refuser to gaol. *Stamf. P. C. p. 163. a. Dalt. cap. 116. p. 326.*(*n*) 2 & 3 *P. & M. cap. 10. and Dalt. cap. 20. p. 55.*(*o*)

And thus far of arrests by warrant in writing.

Next come to be considered arrests by command *ore tenus*, or by order.

The chief justice, or other justice of the king's bench, may command *ore tenus* the marshal or any of his deputies, commonly called tipstaves, to arrest any person, and such command is a good justification in false imprisonment brought; altho 1. It be not in writing. 2. Altho no cause is expressed in the command, but only generally to answer such things as shall be objected against him *ex parte domini regis*. 3. And tho the command be *ita quod habeas corpus coram capitali justiciario, &c. quandocunque, &c.* for it shall be intended, when the party complains. 4. Altho the defendant declares not in his justification what he did with him in the mean time. *P. 11 Car. B. R. Throgmorton and Allen*, adjudged upon a demurrer.(*)

Altho, as hath been said, a justice cannot grant a warrant to apprehend all persons suspected, but must name their names, yet I have known in the king's bench upon a riot committed in the night by persons disguised, and whose names have not been [587] known, the court hath made an order to apprehend persons that the party, who was injured, suspects, and to bring them into the court to be examined, and such order of the court is a good warrant for the sheriff or constable to do it; but what is thus done in the highest court of ordinary justice, is not to be a pattern for particular justices or inferior jurisdictions.

I have now done with arrests by writs or warrants.

I come in the next place to arrests, *ex officio*, without any warrant.

(*l*) This case is reported in *Moore*, 408. by the name of *Broughton and Mulshoe*.

(*m*) See the case of *Scavage and Tateham*, *Cra. Eliz.* 829. where it was adjudged, that the time of detainer must not exceed three days.

(*n*) *New Edit. cap. 168. p. 572.*

(*o*) *New Edit. cap. 40. p. 106.*

(*) 2 *R. A. p. 558.*

If an affray be made in the presence of a justice of peace, or if a felon be in his presence, he may arrest him, and detain him *ex officio* till he can make a warrant to send him to gaol, but then the warrant must be in writing to the gaoler, *P. 23. Car. B. R. Sandford's case*, and so he may by word command any present to arrest. *Dalt. cap. 117. p. 328.(p)*

A constable may *ex officio* arrest a breaker of the peace in his view, and keep him in his house, or in the stocks, till he can bring him before a justice of peace.

So if *A.* be dangerously hurt, and the common voice is, that *B.* hurt him, or if *C.* thereupon comes to the constable, and tells him that *B.* hurt him, the constable may imprison him till he knows whether *A.* dies or lives, *T. 43 Eliz. B. R. Dumbleton's case*, or can bring him before a justice.

So if a felony be committed, and *A.* acquaint him that *B.* did it, the constable may take him and imprison him, at least till he can bring him before some justice of peace.

But if there be only an affray, and not in view of the constable, it hath been held he cannot arrest him without a warrant from the justice; but it seems he may to bring the offender before a justice, tho not compellible.

Lastly, I come to the authority of every private person in relation to arrests of felons.

If *A.* commit a felony, *B.* who is a private person, may arrest him for that felony without any warrant; nay farther, if *A.* will [588] not suffer himself to be taken, but either resists or flies, so that he cannot be taken, unless he be slain, if *B.* or any in assistance in that case of necessity kill him, it is no felony; *de quo antea*, p. 481.

If *A.* commit a felony in the sight of *B.* and *B.* uses not his best endeavours to apprehend him, or to raise hue and cry upon him, it is punishable by fine and imprisonment. *Co. P. C. p. 53.*

If *A.* strike *B.* dangerously in the presence of *C.* *C.* may justify the imprisoning of *A.* till he can bring him before a justice, or deliver him to the constable, tho it be not felony till death.

If a hue and cry be levied upon a felony, and come to the town, *B.* the constable, and those of the town are bound to apprehend the felon if in the town, or if not in the town, then to follow the hue and cry, otherwise they are punishable upon an indictment. *Co. P. C. cap. 52.*

If the constable in pursuit of a felon require the aid of *J. S.* he is bound by law to assist him, and is finable for his neglect. *(q)*

If a felony be committed in fact, and *A.* suspects *B.* did it, and hath probable cause of suspicion, *A.* may arrest *B.* for it, and justify it in an action of false imprisonment. *2 E. 4. 8. b.*

The causes of suspicion are many, as common fame finding goods upon him, and many more, *de quibus vide Dalt. cap. 118.(r)*

(p) New Edit. cap. 169. p. 574.

(q) 13 H. 7. 10. b.

(r) New Edit. cap. 170.

If a felony be committed, and *A.* suspects *B.* and *B.* being in his house refuse to open the doors, or render himself, it seems *A.* may break open the doors to take him; and so may the constable, if *A.* acquaint him therewith, especially if *A.* be present, 13 *E.* 4. 9. *a.* tho (as hath been said) my lord *Coke*, 4 *Inst.* 177. be to the contrary; yet the common practice and opinion hath obtained in that case against my lord *Coke*, *Dalt. cap.* 98. *p.* 249., (s) *cap.* 78. *p.* 204., (t) 7 *E.* 3. 16. *b.*

There are special cases where a constable having received information of the misdemeanors following, or any private person without a warrant may arrest and break open doors to arrest [589] if they within refuse to open them upon demand, or to deliver up the party.

1. Where a felony or treason is committed, and the offender is within the house.

2. Where a felony or treason is committed, and a man suspects *J. S.* who is in the house, and hath probable cause of such suspicion, tho the party be not indicted. 7 *E.* 3. 16. *b.* 13. *E.* 4. 9. *a.*

3. Where *A.* hath dangerously wounded *B.* and then *A.* flies into the house, whether it were done in the presence of the constable, or him that arrests, or not. 7 *E.* 3. 16. *b.* *Crompt.* 171. *a.*

4. Where there is an affray made in a house, and the doors are shut, and are refused to be opened, during such affray the constable or any other may break open the doors to preserve the peace, and prevent blood shed; but after the affray, it cannot be done without a warrant, unless a man be dangerously wounded or killed in the affray.

Yet to avoid question in these cases, it is best to obtain the warrant of a justice, if the time and necessity will permit.

When a private person hath arrested a felon, or one suspected of felony, he may detain him in custody till he can reasonably dismiss himself of him; but with as much speed as conveniently he can, he may do either of these things.

1. He may carry him to the common gaol, 20 *E.* 4. 6. *b.* but that is now rarely done.

2. He may deliver him to the constable of the vill, who may either carry him to the common gaol, *vide* 4. *E.* 3. *cap.* 10. or to a justice of peace to be examined, and farther proceeded against as case shall require. 10 *E.* 4. (u) 17 *b.*

3. Or he may carry him immediately to any justice of peace of the county where he is taken, who upon examination may discharge, bail, or commit him, as the case shall require.

And the bringing the offender either by the constable or [590] private person to a justice of peace is most usual and safe, because a gaoler will expect a *Mittimus* for his warrant of detaining.

And thus far of arrests.

(s) *New Edit.* p. 482.

(t) *New Edit.* p. 426.

(u) This is the same year with 49, *H.* 6, and is so printed in the year-book.

CHAPTER LI

OF FELONY BY VOLUNTARY ESCAPES, AND TOUCHING FELONY BY ESCAPES OF FELONS.

HAVING in a former chapter said somewhat of arrests, it remains that somewhat be said touching those felonies that relate to the escape of persons arrested or imprisoned.

And these escapes are of three kinds, 1. By the person that hath the felon in his custody, and this is properly an escape; and 2. When the escape is caused by a stranger, and this is ordinarily called a rescue of a felon. 3. By the party himself, which is of two kinds, *viz.* 1. Without any act of force, and this is a simple escape. 2. With an act of force, *viz.* by breach of prison.

As to the *first*, touching an escape separate by the person that hath a felon in custody, which is properly an escape; and this is of two kinds, voluntary and negligent.

And *first* concerning the *voluntary escape*.

A voluntary escape is when any person having a felon lawfully in his custody voluntarily permits him to escape from it; or go at large, and this is felony in case the person be imprisoned for felony, and treason in case the person be imprisoned for treason; for the [591] latter enough hath been said before; touching the former in this place.

And altho Mr. *Stamford*, *Lib. I. cap. 26, 27, 28, 29, 30, 31.* hath collected almost all that can be well said in this case, yet I shall proceed distinctly herein.

And therein I shall as near as I can, observe this order.

1. I shall consider who shall be said a felon, whose escape makes a felony in him that voluntarily suffers it. 2. What shall be said a having of such a felon in his custody. 3. Who shall be said a person lawfully having such a felon in his custody. 4. What shall be said a voluntary escape of such a felon out of his custody. 5. Who shall be said voluntarily to suffer such a felon to escape. 6. What is the offense of such a voluntary permission of an escape, and where, and how punishable.

And tho I apply these particulars to a voluntary escape, yet many of them are applicable unto, and useful for the learning of a negligent escape.

I. Who shall be said a felon, whose voluntary escape is felony in him that so permits it.

If *A.* gives *B.* a mortal wound, and before *B.* dies the constable takes *A.* into custody, either with or without a justice's warrant, and then lets him voluntarily escape before *B.* is dead, and then *B.* dies tho as between *A.* and *B.* or *A.* and the king, this is a felony from the stroke given, and the attainder of *A.* as to the forfeiture of his lands relates to the stroke; yet this is no felony in the constable, but

only a misdemeanor punishable by fine and imprisonment. 11 *H.* 4. 12 *b. Plowd. Com.* 258. *b.*

If *A.* be indicted for felony, and taken by *Capias*, or by the warrant of a justice, or by the constable &c. and committed to prison, and the gaoler suffers *A.* to escape voluntarily, this is the escape of a felon, tho *A.* be not attainted at the time of the escape, but the gaoler shall not be arraigned thereupon till after the attainder of *A. de quo infra.*

If a felony be in fact committed, and the constable takes *A.* upon suspicion of felony, and after voluntarily suffers him to go at large, tho *A.* be not then indicted, yet this is a felonious [592] escape in the constable, tho 42 *Assiz.* 5. be otherwise, (a) yet 44 *Assiz.* 12 *Dy.* 99. *a.* 43 *E.* 3. 36. *a. accord.* (b)

And altho the constable be well assured after the arrest by him made, that *A.* was not the person that did it, yet he may not by the law discharge him, but must bring him before a justice, who may upon due circumstances discharge, bail, or commit him, as he sees cause; but the constable, if he discharges him, is finable.

But if the constable after the arrest finds certainly, that there was no felony committed, it is held he may discharge him both without danger of felony, (which is true,) and without any danger of fine and imprisonment, 13 *H.* 7. *Kelw.* 34. *a. b.* but then it is at his peril, if in truth there were a felony committed, and the party be guilty; *sed de his vide infra, Dall. cap.* 106. *p.* 271. *accords.* (c)

If *A.* be committed for petit larceny, and so it appears by the charge of his *Mittimus*, and the gaoler lets him at large, this is a contempt, for which he shall be fined, but not felony in the gaoler; so if he were convicted of petit larceny before the escape. *Stamf. P. C. Lib.* I. *cap.* 27. *p.* 33. *b.* 8. *E.* 2. *Coron.* 430.

So if a man be originally committed for manslaughter *per infortunium* or *se defendendo*, or were convict only *se defendendo* or *per infortunium*, and afterwards the gaoler suffers him voluntarily to escape, it is no felony; but if the commitment or indictment were for manslaughter, tho in truth it were but *se defendendo*, yet *prima facie* a voluntary escape is indictable as felony, tho *in eventu* it may fall out otherwise; *de quo infra.*

If *A.* be indicted of murder for the death of *B.* and pardoned or acquitted within the year, but left in jail till the [593] year be elapsed, upon the statute of 3 *H.* 7. *cap.* 1. that the wife may bring her appeal if she pleases, and after that acquittal, and within the year, the gaoler suffers him voluntarily to escape, it is

(a) That was the case of a negligent (not a voluntary) escape, and for that reason could not be felony, tho it is there given as a reason, why it should not be adjudged an escape, because the thief was not taken with the *mainouvre*, nor at the suit of the party, nor indicted of felony.

(b) This case is plainly the same with 44 *Assiz.* 12. and seems to be the case of a voluntary escape; it does not report any resolution of the court, but only says, that the bailiffs who let the thief go, altho he were not indicted, were charged with an escape; and a *quære* is added at the end of the case: and as to the case in *Dyer*, that was not the case of the person arresting letting the thief go, but of a third person's rescuing him, and that is said to be felony, altho he was not indicted. See 1 *E.* 316. *b.*

(c) *New Edit.* *p.* 511.

felony *prima facie*, and the gaoler may be indicted for it as felony; but if the wife brings not her appeal within the year, or bringing her appeal *A.* is acquitted, the gaoler ought to be acquitted: *vide infra, Plowd. Com. 476. b.*

If *A.* commits felony, and being convicted prays his clergy and the court take time to advise upon it till another sessions, and in the mean time he is left in gaol, as he ought to be, and the gaoler voluntarily suffer him to make his escape, this is felony in the gaoler, for such a prisoner stands yet under a conviction of felony, and therefore is not by lawailable; but if the felon be retaken, and hath his clergy, the felony in the escape is purged, and the gaoler is not indictable after, or if indicted before the clergy allowed, he is to be acquitted.

If *A.* be indicted of felony, and hath his clergy, but is continued for six months in custody for his farther correction, according to the power given by the statute of 18 *Eliz. cap. 7.* and the gaoler suffer him to escape voluntarily, it is a misdemeanor punishable by fine and imprisonment, but no felony.

If a man be delivered to the ordinary as a clerk convict upon his own confession, or as a clerk attain, in which cases he ought not to be admitted to purgation, and the ordinary notwithstanding admit him to his purgation, and set him at large, this, at common law, had been a misdemeanor fineable; but it seems it had not been felony in the ordinary; for in those times there was a pretension, that a clerk was not within the temporal jurisdiction; but the law concerning purgation is altered since by the statute of 18 *Eliz. cap. 7.* and other statutes; *de quo infra, 21 Assiz. 12. 9 E. 4. 28.*

Thus far what shall be said à felony.

II. What shall be said to be a having in custody.

Every man is bound by law to pursue and take a felon; and if he makes not pursuit, he is fineable.

But if *A.* commits a felony in the presence of *B.* and *B.* [594] never takes him, nor attempts it, this is not felony in *B.* for *B.* had him not in his custody.

So it is if *A.* commits a felony, and *B.* receives him knowing him to be a felon, and then *B.* voluntarily suffers him to depart, tho the receipt makes him accessory after, yet it is no escape by *B.* because he never arrested him, and so had him not in custody. 9 *H. 4. 1. (d)*

If *A.* being acquit of felony, judgment is given, that he shall go free paying his fees, tho the gaoler lets him go before fees paid, it is not felony, for by that judgment he is no longer in custody as a felon. 21 *H. 7. 17.*

If the constable arrest a man for felony, and bring him to the gaol, and the gaoler refuse to receive him, yet in law he is in the custody of the constable, and if he lets him go, he is chargeable in an escape. 10 *H. 4. 7. a. Escape 8.*

If *A.* have a franchise to have the custody of felons in his gaol [for

three days,](e) and then to deliver over to the sheriff or county-gaol, and after the three days he offers him to the county-gaol, and the gaoler do not receive him, he yet remains a prisoner to *A.* and if he suffers a voluntary escape, it is felony, 27 *Assiz.* 27. yet in both these cases the gaoler is punishable for not receiving the felon by 4 *E. 3. cap.* 10.

If *A.* arrest *B.* of felony, and deliver him to the constable or to the vill, and they receive him, *A.* is discharged of the custody, and the escape after is chargeable upon the constable or vill, and if the constable or vill deliver him to the sheriff or his gaoler, and he receive him, the constable and vill are discharged of the custody, and the sheriff or gaoler is chargeable with the escape after. 3 *E. 3. Coron.* 328. 337.

As touching escapes without arrests, they belong not to this title of voluntary escapes; *sed hæc vide infra & supra.*

If *A.* the sheriff of *B.* hath a felon in gaol, and then *C.* is made sheriff, till the prisoner be turned over by indenture to the new sheriff, the custody of him remains in *A.* and he or his gaoler is chargeable for a negligent escape, and his gaoler chargeable. [595] for a voluntary escape.

If the bailiff of a franchise, that hath a gaol, hath the custody of a felon, he is chargeable for his escape, and not the sheriff or his gaoler.

III. Who shall be said a person lawfully having the custody of a felon: this hath been touched in the former section, but now shall be farther prosecuted.

If *A.* a meer private man knows *B.* to have committed a felony, he may thereupon arrest him of felony, and he is lawfully in the custody of *A.* till he be discharged of him by delivering him to the constable or common gaol; and therefore if he voluntarily suffers him to escape out of his custody, tho he were no officer, nor *B.* indicted, it is felony in *A.*

So it is, if a felony be in fact committed, and *A.* hath a probable cause to suspect *B.* and accordingly suspects and arrests him, *B.* is lawfully in the custody of *A.* for suspicion of felony; and if he voluntarily lets him escape, it is felony in *A.* *in eventu, viz.* if *B.* proves really guilty of the felony.

And accordingly if *A.* deliver the party so arrested to the constable's custody, he is lawfully in his custody, and if he suffer the escape voluntarily, it is felony *in eventu.* 44 *Assiz.* 12.

If a justice of peace make a *Mittimus* to the gaoler for felony with an unapt conclusion, as *till the justice give order for his delivery*, whereas it should be *till he be delivered by due course of law*, tho this warrant be not formal, yet the felon is lawfully in his custody, and if he let him voluntarily escape, it is felony, for he is sufficiently ascertained of the crime with which he is charged.

(e) These words are not in the original MS. but yet are plainly supposed in the argument, and are mentioned in the case here quoted by our author, *viz.* 27 *Assiz.* 27.

And it seems to me, if the *Mittimus* be general and contain no certain cause, tho the gaoler is not bound to receive him upon such a *Mittimus*, yet if he be acquainted what the crime is for which he is committed, if he suffer him voluntarily to escape, it is felony.

For if a private person or a constable arrests a man for felony, and carry him to the common gaol, (as he may do by law, 13 *E.* 4. 9. and the gaoler is bound to receive him by the statute(*f*) of [596] 4 *E.* 3. *cap.* 10. if the constable or person that delivers him, acquaints the gaoler it is for felony, it is at the peril of the gaoler if he lets him escape, and yet there is no *Mittimus* in that case, but a notice *ore tenus*.

The stocks is the prison of the constable, and so long as he is in the stocks he is in the constable's custody, and therefore if the constable wilfully let a felon escape out of the stocks, and go at large, it is felony in the constable, unless it be to bring him to a justice, or to a safer or more convenient custody.

IV. What shall be said a voluntary escape of a felon in custody, for it must be *voluntary* escape to make felony,

If the prisoner be rescued, or rescue himself against the will of him that hath him in custody, this is no voluntary escape, nor is the gaoler, &c. punishable for the same.

If the prison be fired, and the gaoler lets out the prisoners, there being no other means to save their lives, and uses the best means he can by his officers and irons to keep them safe, and this without fraud, or if enemies force him to open the prison doors, and he doth it to save his life, it excuseth from felony.

And if it be done by rebels, tho this excuse not the gaoler or sheriff in civil actions, but he is liable to an action of debt, or upon the case for the escape, because the sheriff hath his remedy over, yet it excuseth the gaoler from felony, and also from a fine, if it be *vis major, quam cui resisti potest*.

If a justice of peace bail a person notailable by law, it excuseth the gaoler, and it is not felony in the justice, but a negligent escape, for which he is fineable at common law, 25 *E.* 3. 39.,(*g*) and by the justices of gaol-delivery by the statute of 1 & 2 *P. & M.* *cap.* 13.

And the like in case of a sheriff, under-sheriff, constable, bailiff of a liberty bailing one that is not by lawailable, it is not a voluntary escape, at least unless done by design to deliver the prisoner for ever, but it is a negligent escape punishable at common [597] law, or according to the statute of 3 *E.* 1. *cap.* 15. by loss of office, fine, and three years imprisonment.

And therefore I think, that if a justice of peace bail a person, that confesseth a felony before him, it is no voluntary escape, but fineable

(*f*) This statute obliges the gaoler to receive felons by the delivery of the constables or townships, but says nothing as to the delivery by private persons.

(*g*) In the last edition of the year-books, which is in this place mispaged, it is 25 *E.* 3. 82. *a.*

as above, for it is *error scientiæ*, 2 R. 3. 10. contrary to the opinion of *Crompt.* 39. a. *Dalt.* p. 276.(h)

If a gaoler voluntarily licence a felon to wander out of the bounds of the prison and to return again, if the prisoner returns again to the gaol before the gaoler be indicted, so as he be in custody, it is held by some this will not excuse a voluntary escape as to the point of felony, but certain it is that it is punishable as a misdemeanor, and if he had never returned, it had been such an escape, as would have been felony, tho perchance the licence were special to go out and come in at night. 22 E. 3. *Coron.* 242. 8 E. 2. *Coron.* 431. because he cannot apportion his own wrong and breach of duty.

V. In whom the voluntary escape shall be.

In all civil causes the sheriff is to be responsible, or the gaoler at election, as if the gaoler, or bailiff of a sheriff suffer either voluntarily or negligently an escape of a person imprisoned for debt, the sheriff is chargeable with an action upon the escape, for the gaoler or bailiff is the sheriff's officer or minister, and gives him security. 14 E. 3. cap. 10. 19 H. 7. cap. 10.

But if the gaoler being placed there by the sheriff voluntarily suffer a felon in his custody to escape, this, in as much as it reacheth to life, is felony only in the gaoler that was immediately trusted with the custody; not in the sheriff.

But whether the escape was voluntary or negligent, yet the sheriff may be indicted for it so as to subject him to a great fine and imprisonment for the offense of his gaoler, tho not to make him guilty of felony. *Dalt.* cap. 106. p. 273.(i) *Doctor* and *Student* 42.(k)

For the escape must be voluntarily permitted in him that permitted it, which could not be in the high sheriff; tho it were such in the gaoler, for he was not privy to it, and therefore could not do it *felonice*, but it was a negligent escape in him in trusting [598] such a person with the custody of his prisoners, that would be false to his trust, and therefore the sheriff shall pay, but not corporally suffer, for the miscarriage of his gaoler.

But if the gaoler were a gaoler in fee, as antiently constables of castles were, the sheriff should not answer in any kind for the default of such gaoler or constable: but now by the statutes of 14 E. 3. cap. 10. and 19 H. 7. cap. 10. gaols of counties are rejoined to the counties.

But for escapes committed by gaolers of gaols in particular franchises, as the *Gale-house* at *Westminster* belonging to the dean and chapter of *Westminster*, escapes there permitted concern not the sheriff, but the particular gaoler and lord of the franchise.

VI. How and in what manner, and before whom felonious escapes shall be determined, tried and adjudged.

It is to be known, that I may say it once for all, altho the felony for breaking of prison may be heard, tried and determined before the felony, for which he was committed, as shall be said; yet in case of a felony for the wilful escape or rescue of a person committed to

(h) *New Edit.* p. 512.

(i) *New Edit.* p. 509.

(k) *Dialog.* 2. cap. 42.

prison for felony, tho the party that voluntarily permits such escape, or rescues the prisoner, may be indicted for these offenses as felonies before the principal felony in him that escapes or is rescued be tried, yet he shall not be arraigned or put upon his trial, till the principal be convicted or attainted; and the reason is, because possibly the person escaping may be found not guilty, or if guilty, yet of such a fact as is not capital; as of petit larciny, *se defendendo*, *per infortunium*, in which case the rescuer or officer ought to be discharged: nay, if the principal person be only convict and not attaint, but hath his clergy, I think the gaoler or rescuer shall never be put to answer to the escape or rescue, but be discharged, as the accessory, where the principal hath his clergy, shall be discharged thereby; for the rescuer and officer, that permits the escape, are a kind of accessories.[1]

But in these cases the gaoler or rescuer may be fined and [599] imprisoned for their misdemeanor, but shall not be charged with felony, where the principal is discharged. 2 Co. Instit. p. 592.

Again, it is to be remembered, that there is a voluntary escape before indictment, and a voluntary escape of a party indicted of felony.

1. If the party that escapes were not indicted at the time of the escape voluntarily permitted, the indictment of the gaoler (and so in case of a rescue) ought to surmise, that *de facto* a felony was committed, and that the person escaping was imprisoned for that felony or suspicion of it.

And I need not say this must be proved upon the evidence against the gaoler, for, as I said before, the gaoler cannot be arraigned till the principal be attainted by verdict, confession, or outlawry, and the record of such attainder must be shewed or proved.

2. But if the party that escaped were indicted, and so taken by *Capias*, and then escape, tho, as I said before, the gaoler or rescuer cannot be arraigned and tried till the principal be attainted, yet the indictment for the escape or rescue need not surmise a felony done, but only recite the substance of the indictment against him that escapes. 1 E. 3. 16. b. 2 E. 3. Coron. 158.

And the like law is in case of felony for breach of prison. 2 Co. Instit. p. 590.

Again it is to be known, that as to the voluntary suffering of an escape or rescuing of a felon, tho the felony be not within clergy, yet the escape or rescue are within clergy, and tho the prisoner were indicted or attainted of several felonies, yet the escape or rescue of such a prisoner makes but one felony, and he shall be indicted but of one escape; but if *A.* and *B.* be indicted of one felony, and the gaoler voluntarily suffer both to escape, the gaoler may be indicted severally for both.

The means of bringing an officer to judgment cannot be barely by the calling of the record of the prisoners over, as is usually done in

[1] See note, post p. 605.

the king's bench, because tho this may be a sufficient cause to convict of a negligent escape, yet it cannot appear thereby that it is voluntary; the marshal or gaoler may be fined upon a record thereof made, but he cannot be convict of a felony, 39 *H. 6.* [600] 33. but there must be an indictment or presentment of the felonious and voluntary escape.

And tho by the statute of *Westm. 1. cap. 3. (l)*, amercements upon the country for the escapes of felons cannot be set but by the justices in *Eyre*, or by the king's bench, 21 *Assiz. 12. 27 Assiz. 27*, or, as it seems, by justices of general *oyer and terminer*; yet the hearing and determining of escapes is at this day within the jurisdiction of justices of peace, or any other justices, by the statutes of 1 *R. 3. cap. 3. 31 E. 3. cap. 14.*

And thus far concerning voluntary escapes of felons, where it is felony and where not.

In the next chapter I shall say something concerning negligent escapes, tho this hath been before, *cap. 50.* in part handled.

CHAPTER LII.

TOUCHING NEGLIGENT ESCAPES.

NEGLIGENT escapes of felons are not felony, but punishable by fine upon the parties that suffer them.

These negligent escapes are of two kinds, 1. By an officer or some particular person or persons, that hath a felon in custody, 2, Or by vills or townships, whether the felon be taken and in custody, or not taken.

I. First as to negligent escapes by officers or particular persons these things are considerable.

1. What shall be said a negligent escape. 2. What the conviction of such negligent escape. 3. What the punishment of it, and by whom.

As to the first of these, what shall be said a negligent escape hath been partly before described, only some things [601] I shall add.

If a prisoner for felony break the gaol, this seems to be a negligent escape, because there wanted either that due strength in the gaol that should have secured him, or that due vigilance in the gaoler or his officers to have prevented it, and therefore it is by law lawful for the gaoler to hamper them with irons to prevent their escape, (a) and if

(l) 2 *Co. Inst.* 165.

• (a) And therefore this liberty can only be intended, where the officer has just reason to fear an escape, as where the prisoner is unruly or makes any attempt to that purpose; but otherwise, notwithstanding the common practice of gaolers, it seems altogether unwarrantable, and contrary to the mildness and humanity of the laws of *England*, by which gaolers are forbid to put their prisoners to any pain or torment; see *Co. P. C.*

this should not be construed a negligent escape, gaolers would be careless either to secure their prisoners, or to retake them that escape, if he should in such a case be exempt from pecuniary punishment; and we see by daily experience in civil cases of men in execution or arrested for debt, if they break prison the sheriff is chargeable.

But if a private person arrest a felon, and he escapes by force from him without any default in him, tho the township shall be amerced, as shall be said, yet it seems it excuseth the party, for he being a private person cannot raise power to take or detain a felon.

But if a sheriff, bailiff, constable, or other officer hath the custody of a prisoner bringing him to the gaol, it seems that a simple escape by the rescue of the prisoner himself doth not excuse him *a toto*, though it may *a tanto*, because he may take sufficient strength to his assistance; but if he be rescued before he be brought to gaol, *quare*, whether it be not an excuse of an escape, as in case where a man is arrested upon a mesne process, and in carrying to gaol be rescued, the return of the rescue excuseth the sheriff, 39 *Eliz. C. B. Croke, n. 22.*

Conyer's case; but it is no excuse if he be taken in execution [602] and rescued, for there the sheriff shall be answerable notwithstanding the rescue, but it seems the rescue is no excuse in case of felony. 3 *E. 3. Coron. 328. 337.(b)*

And upon the same reason it is, that if a felon be attaint and be carried to execution, and be rescued from the sheriff, the sheriff is punishable notwithstanding the rescue, for there is judgment given, and the sheriff should have taken sufficient power with him, and therefore in that case the township is not fineable: *vide 27 Assiz. 54.*

If a prisoner for felony be in gaol and escape, and the gaoler pursue after him, he may take him seven years after, tho he were out of his view, 13 *E. 4. 9. a. 14 H. 7. 1. a.* but that will not excuse the gaoler from a negligent escape, tho it may excuse *a tanto*; for if the gaoler hath once lost the view of his prisoner, tho he take him after, it is an escape, but if he retake him upon a fresh pursuit, and hath still the view of him, it is no escape, nor punishable. 8 *E. 2. Coron. 400. 22 E. 3. Coron. 236. M. 28. E. 3. Rot. 32. Rex Hertf. Casus Abbatis Sancti Albani. M. 45. E. 3. Rot. 17. in dors. Rex Essex.*

But if a man be arrested for felony, and in bringing to gaol by the sheriff's bailiff or constable he makes his escape, and they follow him and keep the view of him, but cannot take him without killing him, whereby he is kild in the pursuit, yet the sheriff or constable, or township, that let him escape, shall be fined for the escape, because tho the party be kild in the fresh pursuit, he cannot now be brought to

p. 34 & 35. *Custodes gaolarum penam sibi commissis non augeant, nec eos torquant vel redimant, sed omni sævitia remotæ pietateque adhibitâ judicia debite exequantur, Flet. Lib. I. cap. 26.* and the *Mirror of Justices*, cap. 5. § 1. n. 54. says, *It is an abuse that prisoners should be charged with irons, or put to any pain before they be attainted of felony; and lord Coke in his comment on the statute of Westm. 2. cap. 11. is express, that by the common law it might not be done. 2 Instil. 381.*

(b) These cases, as also *Conyer's case* here mentiond, prove nothing particularly as to a rescue, but only in general, that a sheriff shall be liable in case of an escape.

judgment, and yet by his flight, if presented by the coroner, he forfeits his goods. 3 *E. 3. Coron.* 328 and 346.

If a felon escape out of the gaol by negligence, tho the gaoler be fined for it, he may retake the felon at any time after, for the felon shall not take the advantage of his own wrong, or the gaoler's punishment, but his retaking shall not discharge the gaoler's fine, and so is the book to be intended, 13 *E. 4. 9. a.*

2. Touching the conviction of a negligent escape.

The proper way of conviction is by presentment and trial [603] thereupon.

Yet where the prisoners be of record in a court, if the gaoler being called cannot give an account where a prisoner is, this is a conviction of an escape, but seems not to be presently a conviction of a *voluntary* escape, unless the gaoler confess it: *vide* 27 *H. 6. 7. 39 H. 6. 33.* so in some cases the coroner's roll is a conviction of an escape, *vide* 3 *E. 3. Coron.* 352. so if the dozers present a felon taken and delivered to the sheriff by the vill, but shew not what sheriff. 3 *E. 3. Coron.* 345.(c)

Where an officer is to be charged either with a voluntary or negligent escape, the bare presentment of the escape by the grand inquest or the dozers in *Eyre*, or upon a commission of *Oyer and Terminer*, or in the king's bench, is not alone sufficient to convict the officer, because upon his conviction, tho but of a negligent escape, he is to be fined.

But if the dozers in *Eyre* or in the king's bench present the escape of a felon, whereby the vill is to be amerced, because this is but an amercement, and the justices may [not in this case(d)] set a fine but an amercement, *de minimis non curat lex*, and therefore the presentment is not traversable: *vide* 3 *E. 3. Coron.* 291. & *ibidem* 3 *E. 3. Coron.* 328. 346. *Stamf. P. C. Lib. I. cap. 33. fol. 35. b.*

An escape is presentable in a leet, but they cannot set a common fine or amercement there, but it ought to be sent to the next *Eyre*, &c. or may be removed into the king's bench by *Certiorari*, and there the common fine or amercement set; and this by the statute of *Westm. 1. cap. 3.*

3. As to the punishment of a negligent escape by an officer or other that hath the felon in custody, it is by fine and imprisonment.

If the felon be attainted, it is said that the fine is to be an [604] hundred pounds, and if he be only indicted, then an hundred shillings, *Stamf. P. C. p. 35.* but the fine in truth is more or less according to the quality of the offense, and sometimes of the

(c) The words of the book are, "When the dozen present, that a felon is taken for felony and delivered to the sheriff, they adjudge it for an escape in *Eyre*, if they do not say to what sheriff by name, for a man may inquire his rolls to see whence the prisoner comes, &c. and if they do not find in the sheriff's roll, that he was charged with him, or if they do not find how he got out of his custody according to the law of the land, it shall be adjudged an escape in the sheriff."

(d) These words are wanting in the MS. but the sense of the place seems plainly to require them.

offender: *vide* 3 *E. 3. Coron.* 370. a bishop fined one hundred pounds for an escape.

Communia Scaccario, M. 36 E. 3. n. 5. The constable of a castle under the duke of *Lancaster* permitted a negligent escape: It was ruled, 1. That in default of the constable the duke of *Lancaster*, that put him in, should be fined. 2. That tho the duke were dead, yet his executors should be fined, (e) and they were fined five pounds for negligent escape.

II. I come to those fines, that are for escapes of felons either before or sometimes after arrest.

And this is that which is set upon vills, towns, cities, and sometimes upon hundreds and counties, and is usually called *escapium*, and those that have franchises to be quit *de murther, latrocinio, escapiis*, are intended of those common fines set upon vills or hundreds for those offenses, and then he that hath such a liberty granted by the king to be quit *de escapiis*, hath a discharge for the rate or portion of such a common fine or amercement that comes to his share; and this franchise or liberty generally granted to be quit *de escapiis* extends not to voluntary escapes by officers or others, but as I said to the rate or portion chargeable upon them by such common fine or amercement for negligent escapes.

If a murder, manslaughter, or killing of a man *se defendendo* be committed in a vill not inclosed in the day-time, and the murderer, &c. be not taken, the vill shall be amerced, altho it be done after sun-set, before day-light be gone. 22 *E. 3. Coron.* 238. 3 *E. 3. Coron.* 293, 302. 3 *H. 7. cap.* 1.

And if the murder be committed in a town inclosed in the day or night, and the murderer or manslayer escape, the town shall be amerced, because by the statute of *Winchester*, they ought to keep their gates shut from sun-set to sun-rising. 3 *E. 3. Coron.* 299. 3 *H. 7. cap.* 1.

If a felony be committed in a vill, and they take the [605] felon, and commit him to four men to carry him to gaol, and they suffer him to escape, the vill shall be amerced. 3 *E. 3. Coron.* 346.

If a felony be committed in a vill, and the felon taken by them of the vill, and he escape from them to the church of the same vill, and from thence before abjuration he escapes again, the vill shall be amerced for two escapes at common law, for they should have kept him in the church till abjuration, &c. 8 *E. 2. Coron.* 422.

But if a person attain, as they are carrying him to execution, escape to a church, and from thence make an escape, the vill were not amerceable, because he could not abjure being attain, and therefore the vill were not bound to watch him, 27 *Assiz.* 54. *vide Rot. Parl.* 45 *E. 3. n.* 25. 50 *E. 3. n.* 183. But now abjuration and sanctuary are ousted, (f) and with it much of this old learning of escapes is antiquated.

(e) See 2 *Co. Instit.* 382.

(f) By 21 *Jac. cap.* 28. §. 7.

If a prisoner for suspicion of felony be brought to the hundred court, and the court grant him liberty to seek his voucher or warrant, and he escape, the hundred shall be amerced. 3 *E. 3. Coron.* 316. and so it is if a manslaughter be committed out of any vill. *Stamf. P. C.* 34. a.

If the vill answers not the amercement for an escape, the hundred shall be distrained, and if the hundred answer not, the county shall be charged therewith and distrained. *Stamf. P. C.* p. 34. b.

And thus far touching escapes both voluntary and negligent.[1]

[1] An escape is, where one that is arrested gaineth his liberty before he is delivered by the course of law. *Terms de la Ley.*

Escapes are of three kinds. 1. By a person who has the offender in his custody; this is properly called an escape. 2. Caused by a stranger; this is commonly called a rescue. 3. By the party himself; either without force, which is simply an escape, or with force, which is prison-breaking.

Escape by the party himself.—As all persons are bound to submit themselves to the judgment of the law, and to be ready to be justified by it, whoever in any case refuses to undergo that imprisonment which the law thinks fit to put upon him, and frees himself from it by any artifice before such time as he is delivered by due course of law, is guilty of a high contempt, punishable with fine and imprisonment. 2 *Hawk. c.* 17. s. 5. 4 *Blac. Com.* 129.

Escape suffered by a private person.—It seems to be a good general rule, that wherever any person hath another lawfully in his custody, whether upon an arrest made by himself or another, he is guilty of an escape, if he suffer him to go at large before he hath discharged himself of him, by delivering over to some other who by law ought to have the custody of him. 2 *Hawk. c.* 20. s. 1.

And the law is generally the same, in relation to escapes suffered by private persons, as by officers. *Id.*

Escape suffered by an officer.—Whenever an officer, having a party lawfully in his custody on a charge of felony, voluntarily permits him to escape, the officer is involved in the legal guilt of the crime charged on his prisoner. 2 *Hawk. c.* 19. s. 40.

Where he negligently permits a prisoner to escape, he is guilty of a misdemeanor, and he is guilty in this degree if a prisoner in his charge commits suicide. *Dalt. J. c.* 159.

It is laid down, that whoever, *de facto*, occupies the office of a gaoler, is liable to answer for a negligent escape, and that it is no way material whether his title to the office be legal or not. 2 *Hawk. c.* 19. s. 28.

It appears to have been holden, that it is an escape in the constable to discharge a person committed to his custody by a watchman, as a loose and disorderly woman, and a street-walker, although no positive charge was made. *Rex v. Bootie*, 2 *Burr.* 864.

What is an escape, and what a negligent or voluntary one.—In order to make an escape there must be an actual arrest; and therefore if an officer, having a warrant to arrest a man, see him shut up in a house, and challenge him as his prisoner, but never actually have him in his custody, and the party get free, the officer cannot be charged with an escape. 2 *Hawk. c.* 19. s. 1.

The arrest must be also justifiable; for, if it be either for a supposed crime, where no such crime was committed, and the party neither indicted nor appealed, or for such a slight suspicion of an actual crime, and by such an irregular *mittimus* as will neither justify the arrest nor imprisonment, the officer is not guilty of an escape, by suffering the prisoner to go at large. 2 *Hawk. c.* 19. s. 2.

And as the imprisonment must be justifiable, so it must be also for a criminal offence. *Id. s.* 3.

The imprisonment must also be continuing at the time of the escape; and its continuance must be grounded on that satisfaction which the public justice demands for the crime committed. So that if a prisoner be acquitted, and detained only for his fees, it will not be criminal to suffer him to escape, though the judgment were that he be dis-

charged paying his fees; he being detained, not as a criminal, but only as a debtor: but if a person convicted of a crime be condemned to imprisonment for a certain time, and also "until he pays his fees," and he escape after such time has elapsed, without paying them, perhaps such escape may be criminal, for it was part of the punishment that the imprisonment be continued till the fees should be paid. 2 *Hawk. c. 19. s. 4.* 1 *Russ. C. & M. 531.*

Also, it is an escape in some cases to suffer a prisoner to have greater liberty than by the law he ought to have; as to admit a person to bail who by law ought not to be bailed, but be kept in close custody. 2 *Hawk. c. 19. s. 5.*

So if a gaoler or other officer shall license his prisoner to go abroad for a time, and to come again, this is an escape, even though the prisoner return again. *Dalt. c. 159.*

If the gaoler so closely pursue the prisoner who flies from him, that he retakes him without losing sight of him, the law looks on the prisoner so far in his power all the time, as not to adjudge such a flight to amount at all to an escape: but if the gaoler once lose sight of the prisoner, and afterwards retake him, he seems in strictness to be guilty of an escape. 2 *Hawk. c. 19. s. 6.* But it must be by a known officer of the law.

T. Hill, a yeoman warden of the tower, and *Dod*, the gentleman gaoler there, were indicted for the negligent escape of Colonel *Parker*, committed to the tower for high treason. Lord *Lucas*, the constable of the tower, had committed the Colonel to the care of the defendants, to be kept in the house of the defendant, *Hill*. The judges present, (*O. B. January, 1694.*) were of opinion, that the defendants were not such officers as the law took notice of, and therefore could not be guilty of a negligent escape. It was merely a breach of trust to Lord *Lucas*, their master.

Upon the same principle, *S. Stick*, a warden of the tower, who was indicted at the same session for the negligent escape of Lord *Clancarty*, was acquitted. Wherever an officer, who hath the custody of a prisoner, charged with and guilty of a capital offence, doth knowingly give him his liberty, with an intent to save him from his trial or execution, this is a voluntary escape. 2 *Hawk. c. 19. s. 10.* A negligent escape is, when the party arrested or imprisoned doth escape against the will of him that arrested or imprisoned him, and is not freshly pursued and taken again before he hath lost sight of him. *Dalt. c. 159.* If a constable or other officer shall voluntarily suffer a thief, being in his custody, to go into water to drown himself, this escape is felony in the constable, and drowning is felony in the thief; otherwise if the thief shall suddenly, without the assent of the constable, kill, hang, or drown himself, this is but a negligent escape in the constable. *Id.*

If an officer hath arrested a man by virtue of a warrant, and then taketh his promise that he will come again, and so letteth him go, the officer cannot, after arrest, take him again by force of his former warrant, for that this was by consent of the officer. But if he return, and put himself again under the custody of the officer, it seems that it may be properly argued that the officer may lawfully detain him, and bring him before the justice, in pursuance of the warrant. *Dalt. c. 169; 2 Hawk. c. 13. s. 9.*

But if the party arrested had escaped in his own wrong, without the consent of the officer, now, upon fresh suit, the officer may take him again and again so often as he escapeth, although he were out of view, or that he shall fly into another town or county, and bring him before the justice upon whose warrant he was first arrested. *Dalt. c. 169. p. 405.* And it is said, generally, in some books, that an officer who hath negligently suffered a prisoner to escape, may retake him wherever he finds him, without mentioning any fresh pursuit; and indeed since the liberty gained by the prisoner is wholly owing to his own wrong, there seems to be no reason he should take any manner of advantage from it. 2 *Hawk. c. 19. s. 12.*

And wherever a person is lawfully arrested for any cause, and afterwards escapes, and shelters himself in a house, the doors may be broken open to take him, on a refusal of admittance. 2 *Hawk. c. 14. s. 9.* It is perhaps the better opinion, that wherever a prisoner, by the negligence of his keeper, gets so far out of his power that the keeper loses sight of him, the keeper is punishable for the escape, notwithstanding he took him immediately after; and it is clear that he cannot excuse himself from an escape by killing a prisoner in the pursuit, though he could not possibly retake him; but must in such case be content to submit to such punishment as his negligence shall appear to deserve. 2 *Hawk. c. 19. s. 13.*

In the case of *Ryland v. Lavender*, 2 *Bing. 65; 9 Moore, 71. S. C.* the defendant, as gaoler, covenanted with the sheriff, among other things, to attend the quarter sessions, and to remove prisoners, under writs of habeas corpus, without permitting them to escape. The defendant being engaged at the quarter sessions, the sheriff, upon a writ

of habeas corpus for the removal of a prisoner, directed his warrant to the defendant, and "W. W. by me (the sheriff) for this time only thereto specially appointed." W. W., who was the defendant's turnkey, proceeded with the prisoner towards the place of destination. The prisoner having escaped, the court of C. P. held that the sheriff having specially directed the warrant to W. W., the defendant was not liable upon his covenant.

Indictment for an Escape.—The indictment for an escape, whether negligent or voluntary, must show that the party was actually in the defendant's custody for some crime, or upon some commitment on suspicion; and it is not sufficient to say that he was in the defendant's custody, and charged with such crime; for that is no allegation that he was in custody upon that charge. 2 Hawk. P. C. c. 97, s. 4. It should show that the prisoner went at large, and the time when the offence was committed for which the party was in custody; not only that it may appear that it was prior to the escape, but also that it was subsequent to the last general pardon. An indictment for a voluntary escape, must allege that the defendant feloniously and voluntarily permitted the prisoner to go at large, and must also show the species of crime for which the party was imprisoned; for it will not be sufficient to say in general that he was in custody for felony, &c. It is questionable, however, whether such certainty, as to the nature of the crime, be necessary in an indictment for a negligent escape, as it is not, in such a case, material whether the person who escaped were guilty or not. 1 Russ. 374; Chitt. Coll. Stat. tit. Escape.

Evidence, Trial, and Conviction for an Escape.—It seems to be clear, that a keeper who voluntarily suffers another to escape who was in his custody for felony, cannot be arraigned for such escape as for felony, until the principal be attainted, for that the felony of the prisoner shall not be tried between the king and the keeper, because the prisoner is a stranger thereunto; yet he may be indicted and tried for it as a misprision before the attainder of the principal offender. 2 Hawk. c. 19, s. 26; 2 Inst. 591, 592.

By the 4 Geo. IV. c. 64, s. 44. "And, to the intent that prosecutions for escapes, breaches of prison, and rescues, may be carried on with as little trouble and expense as is possible, be it enacted, That any offender escaping, breaking prison, or being rescued therefrom, may be tried either in the jurisdiction where the offence was committed, or in that where he or she shall be apprehended and retaken; and in case of any prosecution for any such escape, attempt to escape, breach of prison, or rescue, either against the offender escaping, or attempting to escape, or having broken prison, or having been rescued, or against any other person or persons concerned therein, or aiding, abetting; or assisting the same, a certificate given by the clerk of assize, or other clerk of the court in which such offender shall have been convicted, shall, together with due proof of the identity of the person, be sufficient evidence to the court and jury of the nature and fact of the conviction, and of the species and period of confinement to which such person was sentenced." The certificate, to make it evident under this enactment, must set forth the effect and substance of the conviction. Rex v. Watson, R. & R. 468.

Punishment of an Escape.—If a felon escape before arrest, it is not punishable as a felony; but for the flight he forfeits his goods when presented. Hale's Sum. 111.

Wherever a person is found guilty upon an indictment or presentment of a negligent escape of a criminal actually in his custody, he is punishable by fine and imprisonment, according to the quality of the offence. 2 Hawk. c. 19, s. 31; c. 20, s. 6.

And it seems to be the better opinion, that the sheriff is as much liable to answer for a negligent escape suffered by his bailiff as if he had actually suffered it himself, and that the court may charge either the sheriff or the bailiff for such an escape; and if a deputy gaoler be not sufficient to answer a negligent escape, his principal must answer for him. 2 Hawk. c. 19, s. 29; Rex v. Fell, 1 Ld. Raym. 424.

It seems to be generally agreed, that a voluntary escape suffered by an officer amounts to the same kind of crime, and is punishable in the same degree, as the offence of which the party was guilty, and for which he was in custody; whether it be treason, felony, or trespass, (2 Hawk. c. 19, s. 22.) if the cause be expressed in the commitment. 2 Inst. 52.

But yet a voluntary escape is no felony, if the act done were not felony at the time of the escape made, as in case of a mortal wound given, and the party not dying till after the escape; but the officer may be fined to the value of his goods. Dalt. c. 159.

Also a voluntary escape suffered by one who wrongfully takes upon him the keeping of a gaol, seems to be punishable in the same manner as if he was never so rightfully

entitled to such custody; for that the crime is in both cases of the same ill consequences to the public: and there seems to be no reason that a wrongful officer should have greater favour than a rightful, and that for no other reason but because he is a wrongful one. 2 Hawk. c. 19, s. 23.

But it seemeth to be clear that no one is punishable as for felony for the voluntary escape of a felon, but the person only who is actually guilty of it; and therefore that the principal gaoler is only finable for a voluntary escape suffered by his deputy; for that no one shall suffer capitally for the crime of another. *Id.* s. 27.

The Mutiny Act in general enacts, That if any offender, under sentence of death by court martial, shall obtain a conditional pardon, (viz. on transportation,) all the laws in force touching the escape of felons under sentence of death shall apply to such offender, and to all persons aiding, abetting, or assisting in any escape, or intended escape of any such offender, or contriving any such escape, from the time when an order (for his transportation) shall be made by a justice or baron, and during all the proceedings had for the purposes mentioned in the act.

The 52 Geo. III. c. 156, provides against the aiding of the escape of prisoners of war. The offence of aiding a prisoner of war to escape is not complete, if such prisoner is acting in concert with those under whose charge he is merely to detect the defendant, who was supposed to have assisted in the escape of other prisoners, and such prisoner having no intention to escape. *Rex v. Martin, Russ. & R. C. C.* 196.

Aiding in attempting to Escape.—The mere aiding an attempt of persons confined to make an escape, though no escape should ensue, is made highly penal by stat. 16 Geo. II. c. 31, s. 1, which enacts, "that if any person shall assist any prisoner to attempt his escape from any gaol, though no escape be actually made, if such prisoner were then attainted or convicted of treason, or felony, (except petty larceny,) or lawfully committed to or detained in any gaol for treason, or felony, (except petty larceny,) expressed in the warrant of commitment or detainer, he shall be guilty of felony, and be transported for seven years: and if such prisoner were then convicted of, committed to, or detained in a gaol for petty larceny, or any other crime, not being treason or felony, expressed in the warrant of commitment or detainer, or was then in gaol upon any process for debt, damages, costs, or sum of money, amounting to 100*l.* he shall be guilty of a misdemeanor, and be liable to fine and imprisonment."

Sect. 3. "If any person shall assist any prisoner to attempt to escape from any constable, or other officer or person who shall have the lawful charge of him in order to carry him to gaol, by virtue of a warrant of commitment for treason or felony, (except petty larceny,) expressed on such warrant; or if any person shall assist any felon to attempt his escape from on-board any boat, ship, or vessel, carrying felons for transportation, or from the contractor for the transportation of such felons, or his agents, or any other person to whom such felon shall have been lawfully delivered in order for transportation, he shall be guilty of felony, and be transported for seven years." All prosecutions on this act to be commenced within a year after the offence committed.

The stat. 16 Geo. II. c. 31, does not extend to cases where an *actual escape* is made, but must be confined to cases of an *attempt*, without effecting the escape itself. Mr. J. Buller, in delivering the opinion of the judges, (*O. B. June, 1726*,) observed, "The statute purports to be made for the further punishing of those persons who shall aid and assist persons attempting to escape, and makes the offence felony; it creates a new felony; but the offence of assisting a felon in making an actual escape was felony before, and therefore does not seem to fall within the view or intention of the legislature when they made this statute." *Rex v. Tilley and others, O. B. April Sess. 1795*; 2 Leach, 662; see also *Rex v. Burridge, 3 P. Wms. 439*; *Rex v. Young and Chissell, Winchester Lent Ass. 1801, coram Le Blanc, J.*

It is a misdemeanor, indictable at common law, to aid a person to escape from custody, though he be confined under the remand of the commissioners for the relief of insolvent debtors, and not on any criminal charge. *Reg. v. Allan, 5 Jar. 296.*

Delivering instruments is within the act, though the prisoner has been pardoned of the offences of which he has been convicted, on condition of transportation. *Rex v. Shaw, R. & R. C. C.* 526.

The stat. 4 Geo. IV. c. 64, s. 43, enacts, that "if any person shall convey or cause to be conveyed into any prison to which this act shall extend, any mask, vizor, or other disguise, or any instrument or arms proper to facilitate the escape of any prisoners, and the same shall deliver, or cause to be delivered, to any prisoner in such prison, or to any other person there, for the use of any such prisoner, without the consent or privity of

the keeper of such prison; every such person shall be deemed to have delivered such vizer or disguise, instrument or arms, with intent to aid and assist such prisoner to escape or attempt to escape; and if any person shall, by any means whatever, aid and assist any prisoner to escape, or in attempting to escape from any prison, every person so offending, whether an escape be actually made or not, shall be guilty of felony, and being convicted thereof, shall be transported beyond the seas, for a term not exceeding fourteen years." See *Burn's Just. Tit. 'Escape,' 29 Lond. Ed. 1845.*

In the several States of the *United States*, with but a few partial exceptions, severe penalties are prescribed against both keeper and prisoner, in case of escape. At common law it is held that every liberty given to a prisoner not authorized by law is an escape. *Cotby v. Sampson, 5 Mass. 310. 312.*

It is not necessary to prove negligence in the defendant: the law implies it, (see post, 600,) but if the escape were not in fact negligent, if the defendant by force rescued himself, or were rescued by others, and the defendant made fresh pursuit after him, but without effect; all this must be shown upon the part of the defendant. It is enough also to prove that the warrant on which the prisoner was convicted was legal, it is not requisite for the prosecutor to prove that he actually committed the offence with which he was charged. *2 Hawk. c. 28. s. 16.*

On a charge against the prisoner for breach of prison the same principle obtains, though if he can prove that no such offence was ever actually committed, or that he was arrested and detained without any reasonable cause of suspicion against him, (see post, 610, 611,) or if he have been subsequently indicted for the offence and acquitted, this will be a sufficient defence to the indictment for breach of prison.

A person confined in a jail, who attempts to escape by breaking of the prison, in consequence of which a fellow prisoner, confined for felony, escapes, is guilty of an offence within the *New York* act, and may be punished by imprisonment in the State prison. *The People v. Rose, 12 Johnson, R. 339.*

Aiding and assisting to escape from jail a person committed on suspicion of having been accessory to the breaking the house of *S.* with intent to commit felony, is not indictable under a repealed statute of *New York*. *Sess. 24, c. 58. s. 12, 13. 1 N. Y. Rev. Laws, 411.* because the prisoner was not committed on any distinct and certain charge of felony. *The People v. Washburn, 10 Johns. R. 160.*

Lying in wait near a jail, by agreement with the prisoner, and carrying him away, is not an offence against the same statute, but it is a misdemeanor at common law. *The People v. Tompkins, 9 Johnson, R. 70. Whart. Am. Crim. L. 551.*

CHAPTER LIII.

[606]

CONCERNING RESCUES OF PRISONERS IN CUSTODY FOR FELONY.

RESCUE of a person imprisoned for felony is also felony by the common law.

To make a rescue a felony, 1. It is necessary that the felon be *in custody, or under arrest* for felony, and therefore if *A.* hinder an arrest, whereby the felon escapes, the township shall be amerced for the escape, and *A.* shall be fined for the hindrance of his taking; but it is not felony in *A.* because the felon was not taken. *3 E. 3. Coron. 333. Stamf. P. C. p. 31. a.*

2. Again, to make a rescue felony, the party rescued must be under custody *for felony or suspicion of felony*, and it is all one, whether he be in custody for that account by a private person, or by an officer or warrant of a justice, for where the arrest of a felon is lawful, the rescue of him is a felony.

It seems that it is necessary that he should have knowledge that

the person is under arrest for felony, if he be in the custody of a private person.

But if he be in the custody of an officer, as constable or sheriff, there at his peril he is to take notice of it; and so it is if there be felons in a prison; and *A.* not knowing of it, breaks the prison, and lets out the prisoners, tho he knew not that there were felons there, it is felony, and if traitors were there, it is treason. *P. 16 Car. 1. Croke p. 583. Benstead's case per omnes justiciarios.*

A return of a rescue of a felon by the sheriff against *A.* is not sufficient to put him to answer for it as a felony, without indictment or presentment, by the statute of 25 *E. 3. cap. 4. 1 H. 7. 6. a. per curiam, 2 E. 3. 1 Coron. 149.*

As in case of an escape, so in case of a rescue, if the party [607] rescued be imprisoned for felony, and be rescued before indictment, the indictment must surmise a felony done as well as an imprisonment for felony or suspicion thereof; but if the party be indicted and taken by a *Capias* and rescued, then there needs only a recital that he was indicted *prout*, and taken and rescued.

But tho the rescuer may be indicted before the principal be convicted and attainted, yet he shall not be arraigned or tried before the principal be attaint for the reason given, *cap. 51.*

The rescuer of a prisoner for felony, tho not within clergy, yet shall have his clergy.

Vide plus capite proximo, for many things there said are applicable to the case of a rescue.[1]

[1] Rescue is the forcibly and knowingly freeing another from an arrest or imprisonment; and it is generally the same offence in the stranger so rescuing as it would have been in a gaoler to have voluntarily permitted an escape. A rescue, therefore, of one apprehended for felony, is felony; for treason, treason; and for a misdemeanor, a misdemeanor also. But here likewise, as upon voluntary escapes, the principal must first be attainted or receive judgment before the rescuer can be punished: *The State v. Cuthbert, Charl. R. 13; 4 Steph. Com. 256;* and for the same reasons; because, perhaps in fact it may turn out that there has been no offence committed. See 4 *Blac. Com. 131.*

Rescous is an ancient French word, coming from *rescouter*, that is *recuperare*, to recover; and signifies a forcible setting at liberty, against law, a person arrested by the process or course of law. 1 *Inst. 160.*

Rescue is a common law felony, if the party rescued be a felon. *Rex v. Haswell, R. & R. 458.* It is a misdemeanor if the party rescued be guilty of a misdemeanor. See a case of *Rex v. Stokes, 5 C. & P. 148; 1 Russ. C. & M., by Greaves, 435.* If the party rescued be guilty of high treason, the rescuer would be guilty of high treason. 2 *Hawk. c. 21. s. 7.*

It is said that the rescue of a prisoner in any of the superior courts committed by the justices, is a great misprison, for which the party and the prisoner, if assenting, will be liable to be punished even by imprisonment for life, and forfeiture of goods and chattels; though no stroke or blow were given. 1 *East, P. C. c. 8. s. 3; Bac. Ab. Rescue, (E).*

A hindrance of a person to be arrested, that has committed felony, is a misdemeanor, but no felony. *Hale's Sum. 116; 2 Hawk. c. 21. s. 7; R. & R. 458.*

Although a prison breaker may be arraigned for that offence, before he be arraigned for the crime for which he was imprisoned, yet he who rescues one imprisoned for felony, cannot, according to the better opinion, be arraigned for such offence, as for a felony, till the principal offender be attainted; but he may be immediately proceeded against for a misprison, if the queen pleases. 2 *Hawk. c. 21. s. 7.* Therefore, if the principal die before the attainder, he shall be fined and imprisoned. *Hale's Sum. 116.*

An indictment of *rescous* must set forth the nature and cause of the imprisonment,

and the special circumstances of the fact in question. 2 *Hewk.* c. 21. s. 5. The word *recessit*, or something equivalent to it, to show that the rescue was forcible, and against the will of the officer. *Rex v. Burridge*, 3 *P. Wms.* 483; 5 *Burns' Just.* p. 727. tit. "Rescue."

By 1 & 2 *Geo. IV.* c. 88, entitled, "An Act to amend the Law of Rescue," sect. I. rescuing persons charged with felony, is punishable with seven years transportation, or imprisonment for not less than one year, and not more than three years. And by sect. II. assaulting any lawful officer to prevent the apprehension or detainer of persons charged with felony, is punishable with two years imprisonment in addition to other pains and penalties incurred. See 5 *Geo. IV.* c. 84. s. 22. This section is, however, repealed by 9 *Geo. IV.* c. 31. as to punishment.

An indictment for a rescue, must show that the person rescued was lawfully in custody, and set out the writ and warrant. 1 *Stark. Cr. Pl.* 156; *Archb. Crim. Pl.* 550. 10 *Lond. Ed.*

An indictment for a rescue from a constable, must state the charge made before the magistrate, the warrant and its delivery to the constable, and that the party was in custody under the warrant. *Archb. Cr. Pl.* 309, 551; *Rex v. Osmer*, 5 *East's Rep.* 304.

By 9 *Geo. IV.* c. 4. § 13. entitled the Mutiny Act, persons under sentence of death by court martial, having obtained a conditional pardon, escaping out of custody, and all parties aiding such escape, are punishable as felons. *Rex v. Stanley*, R. & R. C. C. 432; see *Ryland's note*, 4 *Bl. Com.* 131. 21 *Lond. Ed.*

CHAPTER LIV.

CONCERNING ESCAPES AND BREACH OF PRISON, BY THE PARTY HIMSELF THAT IS IMPRISONED FOR FELONY.

AT common law it was held, that if any imprisoned for a misdemeanor, tho not felony, had broke the prison and escaped, it had been felony. *Bract. Lib.* II.(a) *Stamf. P. C.* p. 30. b. 2 *Co. Instit.* p. 589.(b)

But by the statute of 1 *E. 2. de frangentibus prisonam* the severity of the common law is moderated, viz. Nullus [608] de cætero, qui prisonam fregerit, subeat iudicium vitæ vel membrorum pro fractione prisonæ tantum, nisi causa, pro quâ captus & imprisonatus fuerit, tale iudicium requirit, si de illâ secundum legem & consuetudinem terræ fuerit convictus, licet temporibus præteritis aliter fieri consuevit.[1]

(a) This should be *Lib. III. Tract. 2. de Cordua, cap. 9. f. 124. a.* In this place *Bracton* carries the matter very far; for he says, tho the party were innocent, and had only conspired to escape, he was *ultimo supplicio puniendus*.

(b) But this severity is complained of as an abuse, *Mirror, cap. 5. § 1.* and it was the opinion of *Billing*, chief justice, and the rest of the judges, 1 *H. 7. 6. a.* that a rescue of a felon was felony at common law, but not in the person himself, till the statute of 1 *E. 2.* This lord *Coke* says must be intended, where others break the prison without his privity. 2 *Inst.* 589.

[1] Breach of prison by the offender himself, when committed for any cause, was felony at the common law, *ante p. 588*, or even conspiring to break it. But this severity is mitigated by the stat. *de frangentibus prisonam*, 1 *Ed. II.* cited by *Hale supra*, which enacts, that no person shall have judgment of life or member for breaking prison, unless committed for some capital offence. So that to break prison and escape, when lawfully

Upon this statute, therefore, to make a felony by breach of prison these things must concur: 1. The party must be in prison. 2. He must be in prison for felony. 3. He must break that prison. Many of these things have been discussed before. I shall resume and add what shall be necessary for the explication of this felony.

I. What is a prison, and who shall be said a person in prison.

If a man be imprisoned for felony in the prison of a franchise, and breaks and escapes, this is a breaker of prison, and it is as to this purpose the king's prison, (c) tho the franchise or profit be the lord's. 2 E. 3. 1 Coron. 149. *Stamf. P. C.* 31. a. 2 *Co. Instit.* 589.

So at common law when sanctuary was in use, if a felon had escaped to a church, and there had been watched by the vill where the church is, and he had broken the church and escaped, this had been a felony within this statute. *Stamf. P. C.* p. 30. b. 3 E. 3. Coron. 290.

Whether the breach of the prison of the ordinary by a clerk convict or attaint before purgation had been felony, *vide Stamf. P. C.* p. 31, 32. but that learning is now antiquated, because by the statute of 18 Eliz. cap. 7. the prisoner is not now delivered to the ordinary; and therefore I shall not farther examine it.

(c) *Stamford* in the place here mentioned thinks it is not the king's prison, and therefore at common law the breaking of it would not be felony; but by the statute of 1 E. 2. it matters not whether it be the king's prison or no, for it speaks *de prisonis* generally, and not *de prisonis nostris*; however, as it must be intended a legal prison, which cannot be without a grant from the crown, our author's construction is very reasonable, that all such prisons should be taken as to this purpose to be the king's prisons.

committed for any treason or felony, remains still felony as at common law; and to break prison, whether it be the county gaol, the stocks, or other usual place of security, when lawfully confined upon any other inferior charge, is still punishable as a high misdemeanor by fine and imprisonment. 4 *Blac. Com.* 130.

An actual breaking is the gist of this offence, and must be stated in the indictment. It must also appear that the party was lawfully in prison, and for a crime involving judgment of life or member; it is not enough to allege that he feloniously broke prison. 2 *Inst.* 591. 1 *Russ. C. & M.* 381.

If lawfully committed, the party breaking prison is within the statute, although he may be innocent; as if committed by a magistrate upon strong suspicion. 2 *Inst.* 590. 1 *Russ. C. & M.* 378.

A person confined in a gaol by virtue of a void warrant, may lawfully liberate himself by breaking the prison, using no more force than is necessary to accomplish this object; nor is it a crime or misdemeanor in such person, that while his sole object was to liberate himself, other persons lawfully confined for atrocious crimes in the same room with him, in consequence of such prison breach, made their escape. *The State v. Leach*, 7 *Conn. R.* 752.

To constitute a felonious prison breach the party must be committed for a crime which is capital at the time of the breaking. 1 *Russ. C. & M.* 370. *Cole's case*, *Plowd.* 401. A constructive breaking is not sufficient, therefore, if a person goes out of prison without obstruction, it is only a misdemeanor: *post* p. 611.

An actual intent to break is not necessary. The statute extends to a prison in law as well as to a prison in fact. 2 *Inst.* 589.

Prison breach, or rescue, is a common law felony, if the prisoner breaking prison or rescued is a convicted felon; and it is punishable at common law by imprisonment, and under 19 Geo. III. c. 74, s. 4, by three times whipping.

Throwing down loose bricks at the top of a prison-wall, placed there to impede escape and give alarm, is prison breach, though they were thrown down by accident. *Rex v. Haswell*, R. & R. C. C. 458.

If a person be taken for felony, and put in the stocks and break it, this is a breaking of prison, and felony within the law. *Dy. 99. a. 2 Co. Inst. 589. Stamf. P. C. p. 30. b.*

So it is if the constable or any other secure a felon in the house of him that makes the arrest, or in the house of any other, and he break it and escape, it is felony.

Yet farther, if *A.* arrest *B.* for felony or suspicion of felony, there being *de facto* a felony committed, and being in the hands of *A.* he violently rescueth himself and escapeth, this is a breach of prison and a felony, for so are the words of my lord *Coke, 2 Instit. 589. "Nota, He that is in the stocks, or under lawful arrest, is said to be in prison, tho he be not infra carceris parietes."* And *Stamford ubi supra p. 30. b. Et nota* quant a ceo que chescun que est sous arrest pour felony est prisoner auxy bien hors de gaol come deins, issint que sil soit lorsque in cippes in le haut street ou hors de cippes in le possession d'ascun, que lui aver arrest, & faite escape ceo est debrusement de prison in le prisoner, which must be intended, as it seems, of a violent escape, viz. rescuing himself out of custody.

II. What shall be said a being in prison for such a cause, as requires *judicium vitæ vel membrorum*.

It seems it is intended only of capital offenses, as felony, and therefore if a man be committed for petit larciny, or homicide *se defendendo*, or *per infortunium*, and breaks prison, this is not felony, for the principal offense *non requirit tale judicium. 2 Co. Instit. 590.*

But if the commitment expresses larciny above value or manslaughter, tho *de facto* it were but petit larciny, or *per infortunium* or *se defendendo*, and possibly would appear so upon the evidence, yet this escape will be felony.

Touching my lord *Coke's* opinion of the form of the *Mittimus*, that it must particularly express the nature of the felony, and must have an apt conclusion, I have said enough before; I think it is sufficient if it be generally for felony, although it want that regular conclusion (*till he be delivered by due course of common law*); yet these defaults will not excuse the breach of prison from felony: but possibly if it express no cause, the case may be otherwise, because the substance of the *Mittimus* must be recited in the indictment. [610]

For it is very plain, that antiently there were more felons committed to the common gaol without *Mittimus* in writing than were with it; such were all the commitments by constables, watchmen, and private persons arresting for felony and bringing to the common gaol; and *Mittimus's* were not of so antient a date as justices of peace, and they were not before 1 *E. 3.(d)* and yet breach of prison by felons was felony even from 2 *E. 1.* and not only from 1 *E. 2.*

It is therefore enough if the gaoler have a sufficient notification of the nature of the offense, for which he was committed, and the prisoner of the offense whereof he was arrested, and commonly they know their own guilt, if they are guilty, without much notification.

And again, by what hath been said, breach of prison is not only where the felon is formally committed to gaol by a *Mittimus*, but if he be put in the stocks, kept in the constable's house, nay, under the custody of him that makes the arrest, and he break prison, it is a felony, tho in these cases there neither are nor can be *Mittimus*'s.

If *A.* arrest *B.* for suspicion of felony, and carry him to the common gaol, and there deliver him, as he may do, 13 *E.* 4. 9. a. 4 *E.* 3. cap. 10. and he break prison, if he be indicted upon it there must be an averment in the indictment, that there was a felony committed, and *A.* having probable cause did suspect *B.* and arrested him and committed him, and that he broke the prison, and this must be all proved upon the evidence.

But if *B.* be indicted or appealed and taken by *Capias*, and committed, and break prison, there needs no averment or proof that a felony was done, but only that there was an indictment or appeal, and a *Capias* thereupon, because all appears by matter of record. 2 *Co. Instit.* 590.

But a lawful commitment may be for suspicion of felony, and this is within this statute; yet no person can be indicted barely [611] of suspicion of felony, but of the felony itself. 43 *E.* 3. *Coron.* 454. 44 *Assiz.* 12. 2 *Co. Instit.* 592.

If a felony be made by act of parliament subsequent to 1 *E.* 2. and a person be committed for such a felony and break prison, yet this is felony. 2 *Co. Instit.* 592.

III. What shall be said a breaking of prison by a person committed for felony to make a felony.

If the prison be fired by accident, and there be a necessity to break prison to save his life, this excuseth the felony; but if the prison were fired by the prisoner himself, or by his procurement, the breaking to save his life is nevertheless felony, for it was a necessity of his own creating. 2 *Co. Instit.* 590.

If the gaoler set open the prison doors, and the felon escape, this may be a felony in the gaoler, but is no breach of prison to make felony in the prisoner.

If *A.* be arrested or imprisoned for felony, and *B.* and others without the consent of *A.* rescue *A.* this is felony in the rescuers, but not felony in *A.* But if *A.* were of confederacy with *B.* to do it, then it is felony in *B.* as a rescue, and in *A.* as a breach of prison.

And so it is if *B.* had broke the prison doors, and they being open, *A.* had gone away, this had been felony in *B.* but not felony in *A.* unless it were done by his confederacy, or procurement, for *A.* did not actually break prison. 2 *Co. Instit.* 589. 1 *H.* 7. 6. a.

IV. Touching the proceeding for felony by breach of prison.

A. is committed for felony, or suspicion thereof, and breaks prison, he may be indicted, arraigned, convicted, and have judgment for the escape, altho the principal felony be not tried, and he may be not

guilty of the felony; and so it differs from the case of a rescue or escape before, and the reason is, because here it is the same person, there they are divers, and therefore in the latter case the principal felony shall be first tried. 2 *Co. Instit.* 592.

And yet I hold, that if *A.* be indicted of felony and committed, and then breaks prison; and then be arraigned of the principal felony and found not guilty, now *A.* shall never be [612] indicted for the breach of prison; or if indicted for it before the acquittal, and then he is acquitted of the principal felony, he may plead *that* acquittal of the principal felony in bar to the indictment for the felony for breach of prison.

And so it was pleaded by myself in the case of one Mrs. *Samford*, who was severely prosecuted by the earl of *Leicester*, upon a suspicion that she had stolen his jewels; for tho while the principal felony stood untried, it stood indifferent whether she were guilty of the principal felony, or rather the breach of prison was a presumption of the guilt of the principal offense; yet now it be cleared, that she was not guilty of the felony, she is now in law as a person never committed for felony; and so her breach of prison is no felony.

The felony of breach of prison is a felony within clergy, tho the principal felony for which the party was convicted were out of clergy, as robbery or murder.

CHAPTER LV.

OF PRINCIPALS AND ACCESSARIES IN FELONY, AND FIRST OF ACCESSARIES BEFORE THE FACT.

HAVING gone through the considerations of the offenses of treasons; and also of felonies at the common law, it will be seasonable in this place to consider of those different relations of principals and accessaries, whereof tho much hath occasionally been mentioned, yet I shall now proceed to the discussion of this matter distinctly and apart, and shall put together all the learning that occurs to me concerning this matter.

In the highest capital offense, namely, high treason, there are no accessaries neither *before* nor *after*, for all consenters, [613] aiders, abettors, and knowing receivers and comforters of traitors, are all principals, as hath been said, 3 *H.* 7. 10. *a. Stamf. P. C.* p. 40. *a. Co. P. C.* p. 20.

But yet as to the course of proceeding, it hath been and indeed ought to be the course, that those who did actually commit the very fact of treason, should be first tried before those that are principals in the second degree, because otherwise this inconvenience might follow, *viz.* that the principals in the second degree might be convicted, and yet the principals in the first degree may be acquitted,

which would be absurd: *vide Somervill's case*(a) before, *cap. 22. p. 238.*[1]

In cases that are criminal, but not capital, as in trespass, mayhem, or *præmunire*, there are no accessaries, for all the accessaries *before*, are in the same degree as principals, *Stamf. Lib. I. cap. 48. & libros ibi*; and accessaries *after*, by receiving the offenders, cannot be in law under any penalties as accessaries, unless the acts of parliament that induce those penalties, do expressly extend to receivers or comforters, as some do.[2]

Note the word *maintainers* in the statute of 27 *E. 3. cap. 1.* and 16 *R. 2. cap. 5.* denotes the maintainers of the offense, and not (as it seems) of the parties.

It remains, therefore, that the business of this title of principal and accessory refers only to felonies, whether by the common law, or by act of parliament.

As to felonies by act of parliament, regularly if an act of parliament enact an offense to be felony, tho it mentions nothing of accessaries *before* or *after*, yet virtually, and consequentially those that counsel or command the offense are accessaries *before*, and those that knowingly receive the offender are accessaries *after*, as in the case of rape made felony by the statute of *Westminst. 2. cap. 34.(b) Stamf. P.*

C. Lib. I. cap. 47. 11 H. 4. 14. in case of multiplication, *Co. [614] P. C. cap. 20.* tho *Dy. 88.* makes it a *quære*.

But if the act of parliament that makes the felony, in express terms comprehend accessaries *before*, and make no mention of accessaries *after*, namely, receivers or comforters, there it seems there can be no accessaries *after*, for the expression of procurers, counselors, abettors, all which import accessaries *before*, make it evident, that the law makers did not intend to include accessaries *after*, which is an offense of a lower degree than accessaries *before*, as the statute of 8 *H. 6 cap. 12.* for stealing of records, the statute of 33 *H. 8. cap. 8.* for witchcraft, &c. *Stamford's P. C. ubi supra.*

It is true my lord *Coke, P. C. cap. 19. p. 72, 73.* denies the opinion of *Stamford*, and affirms, that tho the statute of 8 *H. 6. cap. 12.*

(a) 1 *And. 109.* But it was ruled in that case, that upon that branch of treason, which relates to the compassing the death of the king, there is no need that the principal in the first degree, (*viz.* he who undertook to do the act) should be first tried, for the movers or procurers are guilty of compassing the death of the king, altho he that was procured should never assent thereto.

(b) 2 *Co. Instit. 434.*

[1] A person is not constructively present at an overt act of treason, unless he be aiding and abetting at the fact, or ready to do so if necessary. *U. States v. Burr, 4 Cranch, 492.*

[2] See *Foster, 341; Hawk. P. C. b. 2. c. 290; 3 Inst. 21; Dalton, c. 161; Commonwealth v. Gillespie, 7 S. & R. 469; U. S. v. Morrow, 4 Wash. C. C. R. 733; U. S. v. Mills, 7 Peters, 38; Ward v. The State, 6 Hill, 144; Commonwealth v. Macomber, 3 Mass. 356; Whitaker v. English, 1 Bay. 15; Commonwealth v. Barlow, 4 Mass. 440; State v. Arden, 1 Bay. 488; Comm. v. Knapp, 9 Pick. 497; Chanet v. Parker, 1 Rep. Con. Ct. 333.* The crime of an accessory before the fact to murder is murder. *People v. Mather, 4 Wendell, 229; State v. Arden, 1 Bay, 488; State v. Westfield, 1 Bailey, 132.*

mention only accessaries *before*, yet virtually and consequentially accessaries *after* are included, as well as in felonies at common law; but he neither allegeth any reason or authority for that opinion, and therefore the authorities being equal, the greater reason seems to be with *Stamford's* opinion, *Expressum facit cessare tacitum*, and no weight can be laid upon the statute of 3 *H. 7. cap. 2.* for that in express terms makes accessaries *before* and *after* to stand as principals.

And upon the same reason it is, that many of these acts of parliament mentioned before, *cap. 22. p. 236.* that make certain offenses, their counsellors, abettors, and procurers, to be treason, do not extend to make receivers guilty of treason, tho if the act had been general that such an offense shall be treason, it had consequentially made knowing receivers as well as abettors guilty of treason: *vide Co. P. C. cap. 64. p. 138.*

Tho generally an act of parliament creating a felony renders consequentially accessaries *before* and *after* within the same penalty, yet the special penning of the act of parliament in such cases sometimes varies the case.

The statute of 3 *H. 7. cap. 2.* for taking away maidens, &c. makes the offender, and the procuring and abetting, yea, and wittingly receiving also, to be all equally principal felonies, and excluded of clergy.

Again, the statute of 27 *Eliz. cap. 2.* makes the coming in of a jesuit treason, the receiving or relieving of him felony, [615] the contributing of money to his relief a *præmunire*, so that acts of parliament may diversify the offenses of accessory or principal according to the various penning thereof, and so have done in many cases.

And thus much as to accessaries to felonies made by act of parliament, which being general directions may be applicable almost to all cases.

I come to consider of principals and accessaries in felony, and their differences among themselves, and with relation to felonies at common law.

By what hath been formerly delivered, principals are in two kinds, principals in the first degree, which actually commit the offense, principals in the second degree, which are present, aiding, and abetting of the fact to be done.[3]

[3] The *presence* need not be an actual standing within sight or hearing of the act; an *active co-operation* in the crime at the time of its commission completes the felony. As if several persons set out together or in small parties upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each taketh the part assigned him, some to commit the fact, others to watch at proper distances and stations to prevent a surprise, or to favour, if need be, the escape of those who are more immediately engaged. They are all, provided the fact be committed, in the eye of the law, *present* at it; for it was a common cause with them, each man operated in his station at one and the same instant towards the same common end, and the part each man took tended to give countenance, encouragement, and protection to the whole gang, and to insure the success of their common enterprise. *Foster, 350.*

In case of stealing in a shop, if several are acting in concert, some in the shop and some out; and the property is stolen by one of those in the shop, those who are on the outside are equally guilty as principals in the offence of stealing in a shop. *Rex v. Gaggerley, Russ. & R. C. C. 349;* and see *Rex v. Owen, 1 Ry. & M. C. C. 96;* *Rex v. Borth-*

So that regularly no man can be a principal in felony, unless he be present, unless it can be in case of wilful poisoning, wherein he that layeth or infuseth poison with intent to poison any person, and the person intended, or any other take it in the absence of him that so

wick, 1 Dougl. 207. So if one keeps guard while others commit the act, he is constructively present, and liable as a principal. *State v. Town, Wright's Ohio R.* 75. If several act in concert to steal a man's goods, and he is induced by fraud to trust one of them in presence of the others, with the possession of such goods, and another of them entices him away, that the man who has the goods may carry them off, all are guilty of felony as principals. *Rex v. Standley, Russ. & R. C. C.* 305. See *State v. Coleman, 5 Porter*, 32. All persons aiding and abetting the personating a seaman are principals; the offence is not confined to the person only who personates the seaman. *Rex v. Potts, Russ. & R. C. C.* 353. So in simony, all are principals. *Baker v. Rogers, Cro. Eliz.* 789.

If one encourages another to commit suicide, and is present abetting him while he does so, such person is guilty of murder as a principal, and if two encourage each other to murder themselves and one does so, the other being present, but the latter fail in the attempt upon himself, he is a principal in the murder of the first; but if it be uncertain whether the deceased really killed himself, or whether he came to his death by accident before the moment when he meant to destroy himself, it will not be murder in either. *Rex v. Dyson, Russ. & R. C. C.* 523; and see *Rex v. Russell, Moody, C. C.* 356; *Reg. v. Alison, 9 C. & P.* 418. See *Com. v. Bowen, 13 Mass.* 359.

All those who assemble themselves together with an intent even to commit a trespass, the execution whereof causes a felony to be committed; and continue together abetting one another, till they have actually put their design into execution: and also all those who are present when a felony is committed, and abet the doing of it, are principals. And where persons combine to stand by one another in a breach of the peace, with a general resolution to resist all opposers; and in the execution of their design, a murder is committed, all the company are equally principals in the murder, though at the time of the fact, some of them were at such a distance as to be out of view. *Reg. v. Howell, 9 Car. & P.* 437. See also *Com. v. Daily, 4 Penn. L. J.* 156. *Com. v. Here, 4 Penn. L. J.* 259.

To constitute the offender a principal, it is not necessary that he should be present during the whole of the transaction, it is sufficient to show that he originally assented to the felony, and was present aiding and abetting when the offence was consummated, although he was not at the inception. As where the servants of A. feloniously removed goods in A.'s warehouse, from one part of it to another, and B. several hours afterwards assisted in removing the goods from the warehouse, he was held a principal, since it was a continuing transaction. *Rex v. Atwell, 2 East, P. C.* 768.

If several combine to forge an instrument, and each executes by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are nevertheless all guilty as principals. *Rex v. Bingley, Russ. & R. C. C.* 446; see *vide Rex v. Kelly, Russ. & R. C. C.* 421; and *id.* 332. *infra*. As if A. counsel B. to make the paper, C. to engrave the plate, and D. to fill up the names of a forged note, and they do so, each without knowing that the others are employed for that purpose. B. C. and D. may be indicted for the forgery, and A. as an accessory. *Rex v. Dale, Moody, C. C.* 307. For if several make distinct parts of a forged instrument, each is a principal, though he do not know by whom the other parts are executed, and though it is finished by one alone in the absence of the others. *Rex v. Kirkwood, Moody, C. C.* 304.

Persons not sufficiently near to give assistance, are not principals. Thus where Brighton uttered a forged note at Portsmouth, the plan was concerted between him and two others, to whom he was to return when he had passed the note, and divide the produce. The three had before been concerned in uttering another forged note, but at the time this note was uttering in Portsmouth, the other two stayed at Gosport. The jury found all three guilty; but on a case reserved the judges were clear that as the other two were not present, nor sufficiently near to assist, they could not be deemed principals, and therefore they were recommended for a pardon. *Rex v. Seares, Atkinson and Bughton, 2 East, P. C.* 974; *Russ. & R. C. C.* 25. S. C. and see *R. v. Stewart and others, Russ. & R. C. C.* 363; *Rex v. Badcock, and others, Russ. & R. C. C.* 249; *Rex v. Manners, 7 C. & P.* 801.

Going towards a place where a felony is to be committed in order to assist in carrying off the property, and assisting accordingly, will not make a man a principal if he were

at such a distance at the time of the felonious taking as to be unable to assist in it. *Rex v. Kelly, Russ. & R. C. C.* 421.

Where *H.* and *S.* broke open a warehouse, and stole thereout thirteen firkins of butter, &c. which they carried along the street thirty yards, and then fetched the prisoner, who was apprized of the robbery, and he assisted in carrying the property away, he was held not a principal, the felony being complete before he interfered. *Rex v. King, Russ. & R. C. C.* 332. *Rex v. McMakin, ib.* 333. note.

If a wife, by her husband's order, but in his absence, knowingly utter a forged order and certificate for prize money, the presumption of coercion at the time of uttering does not arise, as the husband was absent, and the wife may be convicted. *Rex v. Morris, Russ. & R. C. C.* 270. It is not sufficient to make a person a principal in uttering a forged note, that he came with the utterer to the town where it was uttered, went out with him from the inn at which they had put up a little while before he uttered it, joined him again in the street a short time after the uttering, and at some little distance from the place of uttering, and ran away when the utterer was apprehended. *Rex v. Davis, Russ. & R. C. C.* 113; and see *Rex v. Else, id.* 142.

If the principal were insane when the act was committed, no one could be convicted as aider or abettor. *Reg. v. Taylor, 8 Car. & P.* 616.

The offender must also be participating in the felonious design, or at least the offence must be within the compass of the original intention. *Rex v. Plumer, Kel.* 109. 117. The act must also be the result of the confederacy, and if several are out for the purpose of committing a felony, and upon an alarm run different ways, and one of them main a pursuer to avoid being taken, the others are not to be considered principals in such act. *Rex v. White, Russ. & R. C. C.* 99. And in order to render persons liable as principals in the second degree, the killing or other act must be in pursuance of some unlawful purpose not collateral to it. 1 *East, P. C.* 258. *Fost.* 354, 355.

Thus where a number of persons combine to seize with force and violence a vessel, and run away with her, and, if necessary, to kill any person who should oppose them in the design, and murder ensues, all concerned are principals in such murder. 1 *Gallison, C. C. R.* 624. And where there is combined resistance to officers, or a combined effort to cause tumults and affrays, or to commit felony, and death takes place, all are principals. *Commonwealth v. Daily, 4 Penn. Law J.* 156. *Commonwealth v. Hare, 4 Penn. Law J.* 259.

If *A.* is charged with the offence, and *B.* is charged with aiding and abetting him, it is essential to make out the charge as to *B.* that *B.* should have been aware of *A.*'s intention to commit murder. *Reg. v. Cruise, 8 C. & P.* 541.

But all persons present at a prize-fight, having gone thither for the purpose of seeing the prize-fighters strike each other, were principals on the breach of the peace. *Rex v. Perkins, 4 Car. & P.* 537. *Rex v. Murphy, 6 C. & P.* 10. *Rex v. Young, 8 C. & P.* 645.

The indictment against principals in the second degree may in general charge all the parties as principals in the first degree, or as being present aiding and abetting. *Fost.* 251. 2 *Hawk. c.* 23. s. 76. *Rex v. Young, 3 T. R.* 105. *Rex v. Toole, Russ. & R.* 314. *Reg. v. Crisbam, 1 C. & Mar.* 187. But there are exceptions to this rule as to the structure of indictments under particular statutes which make the punishment different, and it is best not to charge all the parties as principals in the first degree, but to charge the principals in the second degree specially as aiders and abettors when there is any doubt as to the evidence to prove them all equally guilty; for if one were altogether innocent, having repented of his purpose, and left the others before the felony, and it is uncertain which is guilty, both must be acquitted. 1 *Leach, 387.*

Where a prisoner was convicted upon an indictment which charged him with a rape as a principal in the first count, and as an aider and abettor in the second, it was holden that the conviction upon the first count was good. *Rex v. Folkes, Moody, C. C.* 354.

A. B. and *C.* were indicted for murder in the first count as principals in the first degree, in the second count *A.* was indicted as principal, and *B.* and *C.* as principals in the second degree; the first count was ignored as to *B.* and *C.* and a true bill found on the second count against all, and it was held that *B.* and *C.* might be convicted on the second count, though *A.* was acquitted. *Reg. v. Phelps, 1 C. & Mar.* 180.

All who are present aiding and abetting him who inflicts the mortal blow, in cases of murder, are principals and criminals in the highest degree; but it is not every intermeddling in a quarrel or affray from which death ensues, that constitutes an aiding and abetting to the murder. If, for instance, two men fight on a former grudge, and of settled malice, and with intent to kill, of which the spectators are ignorant, and they, of a sudden, take sides with the combatants and encourage them by words, and death ensue, it will not be murder in such persons. When there is a combination to resist all opposition in the commission of an unlawful act, in the execution of which death ensues, all are

layeth it, yet he is a principal, and he that counsellet or abetteth him so to do, is accessory *before*. *Co. P. C. cap. 64. p. 138 [4]*.

Who shall be said present, aiding, and abetting in case of felony, hath been sufficiently declared in *cap. 34.* in case of murder, in *cap. 48.* in case of burglary, in *cap. 46.* in case of robbery, and need not again be repeated.

Accessaries again are of two kinds, accessaries *before* the fact committed, and accessaries *after*.

An accessory *before*, is he, that being absent at the time of the felony committed, doth yet procure, counsel, command,[5] or abet another to commit a felony; and it is an offense greater than the accessory *after*; and therefore in many cases clergy is taken away from accessaries *before*, which yet is not taken away from accessaries *after*, as in petit treason, murder, robbery, and wilful burning, by 4 & 5 *P. & M. cap. 4.[6]*

guilty of murder. The fact, however, must appear to have been committed strictly in prosecution of the purpose for which the party was assembled, and if one of the party of his own head, turn aside to commit a felony, foreign to the original design, his companions do not participate in his guilt. *State v. King et al. 2 Rice's S. C. Dig. 106.* The distinction between principals in the first and second degree, is a distinction without a difference, and therefore it need not be made in the indictment. The words "then and there," in the concluding part of a charge against one present abetting a murder, may be rejected as surplusage, or referred to the act done, which caused the death, and not to the time and place of the death. *State v. Fley and Robhill, 2 Rice, S. C. Dig. 104.* In an indictment for murder, if several be charged as principals; one as principal perpetrator, and the others as aiding and abetting, it is not material which of them be charged as principals in the first degree, as having given the mortal blow; for the mortal injury given by any one of those present, is in contemplation of law, the injury of each and every of them. If the actual perpetrator of a murder should escape by flight or die, those present abetting the commission of the crime, may be indicted as principals, and though the indictment should state the mortal injury was committed by him who is absent or dead; yet, if it be substantially alleged that those who were indicted were present at the perpetration of the crime, and did kill and murder the deceased, by the mortal injury so done, by the actual perpetrator, it shall be sufficient. *State v. Fley and Robhill, 2 Rice, S. C. Dig. 104.* If some of the persons engaged in accomplishing a lawful purpose commit a felony in presence of others of the party, but without their participation, the latter are neither principals nor accessaries. *U. States v. Jones, 3 Wash. C. C. 223.*

[4] 4 *Bl. Com. 34.* *Rex v. Giles, Ry. & M. R. 166.* *Rex v. Palmer, 1 T. R. 96.* *Rex 1 Stewart, R. & R. 363.* *Foster, 349.* *R. v. Harley, 4 C. & P. 369.* *Rex v. Gordon, 1 Leach, 15.* 1 *East, P. C. 352.*

[5] *State v. Mann, 1 Haywood, N. C. Rep. 4.*—meaning of the word "command" as here used.

[6] Lord Coke and Mr. Justice Foster considered the word *command* as comprehending all those who incite, procure, set on, or stir up any other to do the fact. 2 *East's P. C. 641.* But there are some diversities: As—1. When the principal doth not accomplish the fact altogether in the same sort as it was beforehand agreed between him and the accessory; and, therefore, if one commands another to lay hold upon a third person, and he lays hold upon him and robs him, the person commanding is not accessory to the robbery, for his command might have been performed without any robbery. *Dalt. c. 161, p. 369;* and see 1 *Ch. C. L. 262.*

But if the command had been to beat him, and the party commanded doth kill him, or beat him so that he dieth thereof, the person commanding shall be accessory to the murder; for it is a hazard in beating a man that he may die thereof. *Id.* *Sed query,* if this does not mean where the command was to beat the other violently? 1 *East, P. C. 257.*

2. He that commandeth or counsellet any evil or unlawful act to be done shall be adjudged accessory to all that shall ensue upon the same evil act, but not to any other distinct thing. As if one command another to steal a horse, and he stealeth an ox; or to

Those offenses, which in the construction of law are sudden and unpremeditated, cannot have any accessaries before, as killing a man *per infortunium, se defendendo*, or manslaughter. And therefore if *A.* be indicted of murder, and *B.* as accessary *before*, if the jury find *A.* guilty only of manslaughter, there shall be no inquiry of *B.* but

rob a man by the highway of his money, and he robs him in his house of his plate; or to burn such an one's house, and he burns the house of another; these are other acts and felonies than he commanded to be done, and therefore he shall not be adjudged accessary to them. *Id.*

3. But if a person commit the same felony which another did command or counsel to be done, though he doth it another time, or in another place, or in another sort than was commanded or counselled, yet here such person commanding or counselling shall be accessary. As if he doth counsel to kill a man by poison, and he kills him with a dagger; or to kill him by the highway, and he kills him in his house; or to kill him one day, and he kills him on another day; in these and the like cases he shall be accessary to the murder, (*Id.*) for the means used are immaterial, so that the criminal object be effected.

4. Those offences which in the construction of law are sudden and unpremeditated, cannot have any accessaries before. As killing a man by misadventure in his own defence, or manslaughter, for in such case there can be no procuring, counselling, commanding or abetting. *Ante* 450, *post* 616.

5. It seems to be generally agreed, that he who barely conceals a felony which he knows to be intended, is guilty only of a misprision of felony, and shall not be adjudged an accessary, for this is not procuring, counselling, or abetting. *2 Hawk. c. 29, s. 23.* Thus, words that seem to imply mere permission, as if one informs another that he is about to commit a felony, and the latter replies: "You may do your pleasure for me," this does not implicate him as an accessary, but it only fixes him with the guilt of a misprision. *Post* 616; *2 Hawk. c. 29, s. 23-28.*

6. Also, if a man counsel or command another to kill a person, and before he hath killed him, he who counselled or commanded it, repents and countermands it, charging him not to kill him, and yet after he doth kill him, here such person countermanding shall not be adjudged accessary to the murder, for, generally, the law adjudges no man accessary to a felony before the fact, but such as continue in that mind at the time that the felony is done and executed. *Dalt. c. 161, p. 369.*

7. But if a person advise a woman to kill her child as soon as it shall be born, and she kill it in pursuance of such advice; he is an accessary to the murder, though at the time of the advice, the child not being born, no murder could be committed of it, for the influence of the felonious advice continuing till the child was born, makes the adviser as much a felon as if he had given his advice after the birth. *2 Hawk. c. 29, s. 18.*

8. If the crime solicited to be committed be not perpetrated, then the adviser may still be indicted for a misdemeanor in having made such solicitation. *Rex v. Higgins, 2 East, 5.*

Accessaries before the fact are in general punishable in the same manner as principals, for they are frequently more deeply criminal than the principal. See *Dalt. c. 161.* But there are several legislative provisions pointing out the punishment in different offences. Thus, accessaries before the fact to murder, are punishable with death. *9 Geo. IV. c. 31. s. 3.* So are accessaries to administering poison, and attempts to drown, suffocate, or strangle, and to maliciously shooting and stabbing with intent to murder or maim, &c. *9 Geo. IV. c. 31. s. 11, 12.* So are accessaries to administering poison to a woman to procure abortion, with intent, &c. *9 Geo. IV. c. 31, s. 13,* and *7 Will. IV. and 1 Vict. c. 85. s. 6. ante, 11. 13.* Accessaries to administering poison to a woman not quick with child, with intent, &c. are punishable as principals. (*Id.*) So are accessaries to the forcible abduction of women for lucre. *9 Geo. IV. c. 31. s. 19.* So are accessaries to child-stealing. *9 Geo. IV. c. 31. s. 21.* So are accessaries to bigamy. *9 Geo. IV. c. 31. s. 22.* And accessaries to any felony punishable under stat. *9 Geo. IV. c. 31,* for whom no punishment is otherwise provided, may be transported for not more than fourteen nor less than seven years, or imprisoned with or without hard labor not exceeding three years. *9 Geo. IV. c. 31. s. 31.* See *Arch. C. L. by Jervis, 9 ed. 689.*

Accessaries before the fact to felonies within the statutes *7 & 8 Geo. IV. c. 29. s. 30. 11 Geo. IV. & 1 Will. IV. c. 68; 2 Will. IV. c. 34; 7 Will. IV. & 1 Vict. c. 85. s. 7; c. 86. s. 6; c. 87. s. 9; c. 88. s. 4; c. 89. s. 11; and also c. 36. s. 35.* as to offences against the post office, and *4 & 5 Vict. c. 56. s. 2.* respectively, are punishable with death or otherwise in the same manner as principals in the first degree.

he shall be forthwith discharged, because bare homicide is always sudden: for if it were premeditated, it had been murder, and not barely homicide, *Bibith's case*, (c) but there may be an accessory *after*.

Again, the exility of the offense, tho it be felony, yet because it is not capital, excludeth accessories *before* or *after*, and therefore in petit larciny there can be no accessory, *Anne Lassington's case*, P. 42 Eliz. B. R. (d) and this is also the reason why there can be no accessory neither *before* nor *after* in manslaughter *per infortunium* or *se defendendo*, because there is no judgment of death in that case.

That which makes an accessory *before* is *command*, counsel, abetment, or procurement by one to another to commit a felony, when the commander or counsellor is absent at the time of the felony committed, for if he be present he is principal.

And therefore words that sound in bare permission, make not an accessory, as if *A.* says he will kill *J. S.* and *B.* says you may do your pleasure for me, this makes not *B.* accessory. 21 H. 7. 36, 37 *Crompt.* 41. b. [7]

If *A.* hire *B.* to mingle or lay poison for *C.* *B.* doth it accordingly, and *C.* is poisoned, *B.* tho absent, is principal, *A.* is accessory; but if *A.* were present at the mingling or laying of the poison, tho both were absent at the taking of it, yet both are principals, for they are both equally acting in the poisoning.

But if *A.* buy the materials of the poison, knowing and consenting to the design, and deliver them to *B.* to mingle and apply it, or lay it in the absence of *A.* here it seems *A.* is only accessory before: *quod vide Co. P. C. cap. 7. p. 50. Franklin's case.* (e)

If *A.* command or counsel *B.* to commit felony of one kind, and *B.* commits a felony of another kind, *A.* is not accessory, as [617] if *A.* command *B.* to steal a plate, and *B.* commits burglary to steal the plate, *A.* is accessory to the theft, but not to the burglary. *Co. P. C. cap. 7. p. 51.*

If *A.* commands *B.* to take *C.* and *B.* takes *C.* and robs him, *A.* is not accessory to the robbery.

But if *A.* commands *B.* to beat *C.* and *B.* beats *C.* so that he dies, *A.* is accessory, because it may be a probable consequence of his beating, 3 E. 3. Coron. 314. *Stamf. P. C. Lib. I. cap. 45. fol. 41. a.* the like it is if he command *B.* to rob him, and in robbing him *B.* kills him, *A.* is accessory to the murder. *Plowd. Com. 475. Crompt. 43. b.* [8]

A. commands *B.* to burn the house of *C.* *B.* kills, robs, or steals from *C.* *A.* is not accessory, for it is an offense of another kind; so if *A.* commands *B.* to steal the horse of *C.* and he steals his cow, *A.* is not accessory. *Plowd. Com. 475. Saunder's case.*

(c) 4 Co. Rep. 43 b.

(d) Cro. Eliz. 750.

(e) State Tr. Vol. I. p. 329.

[7] The procurement need not be direct, it is sufficient if it be through the agency of another; and it may be by approbation or consent to an expressed felonious design. *Foster*, 127. *R. v. Somerset*, 19 State Trials, 804. *R. v. Cooper*, 5 C. & P. 535. 2 Hawk. c. 29, s. 11. *People v. Norton*, 8 Cowen, 127. But bare concealment of an intention on the part of another to commit a felony, will not make the person so concealing an accessory. 2 Hawk. c. 29, s. 23.

[8] 4 Bl. Com. 37. *R. v. Saunders*, *Plowden*, 475.

But if *A.* command *B.* to steal generally from *C.* then he is accessory to any kind of theft from *C.* tho it were done by robbery, for that varies the offense only in degree.

A. commands *B.* to poison *C.* *B.* kills him with a sword, yet *A.* is accessory, for the substance of the thing commanded was the death of *C.* and the differing in the manner of its execution from the command doth not excuse *A.* from being accessory.[9]

But if *A.* command *B.* to kill *C.* and *B.* by mistake kills *D.* or else in striking at *C.* kills *D.* but misseeth *C.* *A.* is not accessory to the murder of *D.* because it differs in the person. *Qb. P. C. cap. 7. p. 51. Plowd. Com. 475. Saunder's case.*

A. gets *B.* with child, and before the birth counsels *B.* to kill it, the child is born, *B.* murders it, *A.* is accessory to the murder, yet at the time of the counsel given the child was not *in rerum natura*. *2 Eliz. Dy. 186. a.*

A. lets out a wild beast, or employs a madman to kill others, whereby any is killed, *A.* is principal in this case, tho absent, because the instrument cannot be a principal. *Dalt. cap. 108.(f)*

A. commands *B.* to kill *C.* but before the execution thereof *A.* repents, and countermands *B.* and yet *B.* proceeds in [618] the execution thereof, *A.* is not accessory, for his consent continues not, and he gave timely countermand to *B.* *Co. P. C. cap. 7. p. 51. Plowd. Com. 474. Saunder's case;* but if *A.* had repented, yet if *B.* had not been actually countermanded before the fact committed, *A.* had been accessory.[10]

(f) *New Edit. p. 529.*

[9] *Foster, 369, 370. R. v. Cooper, 5 C. & P. 535.*

[10] Among the statutory enactments on this subject in the United States, are the following: collected in *Whartan's American Criminal Law, 24-27.*

UNITED STATES.—Every person who shall, either upon the land or the seas, knowingly and wittingly aid and assist, procure, command, counsel or advise, any person or persons, to do or commit any murder or robbery, or other piracy aforesaid, upon the seas, which shall affect the life of such person, and such person or persons shall thereupon do or commit such piracy or robbery, then all and every such person so as aforesaid aiding, assisting, procuring, commanding, counselling or advising the same, either upon the land or the sea, shall be, and they are hereby declared, deemed and adjudged to be, accessory to such piracies before the fact, and every such person, being thereof convicted, shall suffer death. *Act of April 30, 1790. s. 10.*

That after any murder, felony, robbery, or other piracy whatsoever aforesaid, is or shall be committed by any pirate or robber, every person who, knowing that such pirate or robber has done or committed any such piracy or robbery, shall, on the land or at sea, receive, entertain or conceal, any such pirate or robber, or receive or take into his custody any ship, vessel, goods or chattels, which have been, by any such pirate or robber, piratically and feloniously taken, shall be, and are hereby declared, deemed and adjudged, to be accessory to such piracy or robbery, after the fact; and on conviction thereof, shall be imprisoned not exceeding three years, and fined not exceeding five hundred dollars. *Ibid. sect. 11.*

MASSACHUSETTS.—Every person, who shall be aiding in the commission of any offence, which shall be a felony, either at common law, or by any statute now made, or which shall hereafter be made, or who shall be accessory thereto before the fact, by counselling, hiring or otherwise procuring such felony to be committed, shall be punished in the same manner, which is or which shall be prescribed for the punishment of the principal felon. *Rev. Stat. chap. 133. sect. 1.*

Every person, who shall counsel, hire, or otherwise procure any offence to be commit-

ted, which shall be a felony, either at common law, or by any statute now made, or which shall hereafter be made, may be indicted and convicted as an accessory before the fact, either with the principal felon, or after the conviction of the principal felon, or he may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been convicted, or shall or shall not be amenable to justice, and in the last mentioned case, may be punished in the same manner as if convicted of being an accessory before the fact. *Ibid. sect. 2.*

It was said by the Supreme Court that *stat. 1784, c. 65*, (from which the above section was drawn,) providing that if any person shall aid, assist, &c. any person to commit murder, he shall be considered as an accessory before the fact, refers to a person not present, aiding, &c. If the party be in such a situation as to be able to afford assistance to the principal, although not literally present, he will be a principal. *Com. v. Knapp, 9 Pick. 496.*

Any person, charged with the offence mentioned in the preceding section, may be indicted, tried and punished in the same court and the same county, where the principal felon might be indicted and tried, although the offence of counselling, hiring, or procuring the commission of such felony may have been committed on the high seas, or on land, either within or without the limits of this state. *Rev. Stat. chap. 133. sect. 3.*

Every person, not standing in the relation of husband or wife, parent or grand-parent, child or grand-child, brother or sister, by consanguinity or affinity, to the offender, who, after the commission of any felony, shall harbour, conceal, maintain, or assist any principal felon, or accessory before the fact, or shall give such offender any other aid, knowing that he had committed a felony, or had been accessory thereto before the fact, with intent that he shall avoid or escape from detection, arrest, trial or punishment, shall be deemed accessory after the fact, and shall be punished by imprisonment in the state prison, not more than seven years, or in the county jail, not more than three years, or by fine not exceeding one thousand dollars. *Ibid. sect. 4.*

Every person, who shall become an accessory after the fact, to any felony either at common law, or by any statute now made, or which shall hereafter be made, may be indicted, convicted, and punished, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, by any court having jurisdiction to try the principal felon, and either in the county where such person shall have become an accessory, or in the county where such principal felony shall have been committed. *Ibid. sect. 5.*

NEW YORK.—Every person, who shall be a principal in the second degree, in the commission of any felony, or who shall be an accessory to a murder, before the fact, and every person who shall be an accessory to any felony, before the fact, shall, upon conviction, be punished in the same manner herein prescribed, with respect to principals in the first degree. *2 R. Stat. 698, sect. 6, 1st Edition.*

Every person, who shall be convicted of having concealed any offender after the commission of any felony, or of having given such offender any other aid, knowing that he has committed a felony, with intent and in order that he may avoid, or escape from, arrest or trial, or conviction, or punishment, and no others, shall be deemed an accessory after the fact, and upon conviction shall be punished by imprisonment in a state prison, not exceeding five years, or in a county jail not exceeding one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment. *Ibid. sect. 7.*

An indictment against an accessory to any felony may be found in the county where the offence of such accessory shall have been committed, notwithstanding the principal offence was committed in another county; and the like proceedings shall be had thereon in all respects as if the principal offence had been committed in the same county. *Ibid. 727, sect. 48.*

An accessory, before or after the fact, may be indicted, tried, convicted and punished, notwithstanding the principal felon may have been pardoned, or otherwise discharged, after his conviction. *Ibid. sect. 49.*

Every person who shall be convicted of having been an accessory after the fact to any kidnapping or confinement, herein before prohibited, shall be punished by imprisonment in a state prison, not exceeding six years, or in a county jail not exceeding one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment. *Ibid. 665, sect. 31.*

PENNSYLVANIA.—Where any murder or felony hath been, or hereafter shall be committed in one county of this province, and one or more persons shall be accessory or

accessaries to any such murder or felony in another county, then an indictment found or taken against such accessory or accessaries, upon the circumstances of such matter, before justices of the peace, or other justices or commissioners, to inquire of felonies in the county where such offences of accessory or accessaries, in any manner, have been or shall be committed or done, shall be as good and effectual in law as if the said principal offence had been committed or done within the same county, where the indictment against such accessory hath been or shall be found. *Act of 31st May, 1718, sect. 22; 1 Smith, 405; 7th ed. Purdon, 935.*

The justices of the said Supreme Court, or two of them, upon suit to them made, shall write to the keepers of the records, where such principal is or shall hereafter be attainted or convicted, to certify them whether such principal be attainted, convicted or otherwise discharged of such principal felony; who, upon such writing to them or any of them directed, shall make sufficient certificate in writing, under their seal or seals, to the said justices, whether such principal be attainted, convicted, or otherwise discharged or not. And after they who so have the custody of records, do certify that such principal is attainted, convicted or otherwise discharged of such offence by the law, then the justices of gaol delivery or of oyer and terminer shall proceed upon every such accessory in the county where he or they became accessory, in such manner and form as if both the said principal offences and accessory had been committed and done in the same county, where the offence or accessory was or shall be committed or done. And every such accessory and other offenders as above expressed, shall answer upon their arraignments, and receive such trial, judgment, order and execution, and suffer such forfeiture, pains and penalties, as is used in other cases of felony, and as the statute made in the second and third years of the reign of king *Edward the Sixth*, (chap. 24,) entitled, "An act for the trial of murders and felonies committed in several counties," doth direct in such cases; which statute shall be observed in this province, any law or usage to the contrary notwithstanding. *Ibid. sect. 23.*

Every person convicted of bigamy, or being an accessory after the fact, in any felony, or of receiving stolen goods, knowing them to have been stolen, or of any other offence not capital, for which, by the laws in force, before the act, entitled, "An act to amend the penal laws of this state," burning in the hand, cutting off the ears, nailing the ear or ears to the pillory, placing in and upon the pillory, whipping or imprisonment for life, is or may be inflicted, shall, instead of such parts of the punishment, be fined and sentenced to undergo in the like manner, and be confined, kept to hard labour, fed and clothed as is hereinafter directed, for any term not exceeding two years, which the court before whom such conviction shall be, may and shall, in their discretion, think adapted to the nature and heinousness of the offence. *Act 5th April, 1790; 2 Dallas, 801; 2 Smith, 531; 7th ed. Pur. 938, sect. 4.*

VIRGINIA.—An accessory to a murder or a felony committed, shall be examined by the court of that county or corporation, and tried by the court in that district where he became accessory, and shall answer upon his arraignment, and receive such judgments, order, execution, pains and penalties as are used in other cases of murder and felony. *R. L. vol. i. 104.*

If any be accused of an act done as principal, they that be accused as accessory shall be attached also, and safely kept in custody until the principal be attainted or delivered. *R. L. vol. i. 126.*

Persons knowingly harbouring horse-stealers, or receiving from them stolen horses, are to be deemed and punished as accessaries. And if the principal felon cannot be taken so as to be prosecuted and convicted of such offence, nevertheless the accessory may be punished as for a misdemeanor, although the principal felon be not before convicted of the felony, which shall exempt the offender from being punished as accessory, if the principal offender shall afterwards be taken and convicted. *R. L. vol. i. 179.*

If any principal offenders shall be convicted of any felony, or shall stand mute, or shall peremptorily challenge above twenty persons returned to be of the jury, it shall be lawful to proceed against any accessory either before or after the fact, in the same manner as if the principal felon had been attainted thereof, notwithstanding such principal shall be admitted to the benefit of his clergy, pardoned or otherwise delivered before his attainder; such accessory to suffer the same punishment as the principal, if he had been attainted. *R. L. vol. i. p. 206.*

CHAPTER LVI.

OF ACCESSARIES AFTER THE FACT.

THIS kind of accessory after the fact is, where a person knowing the felony to be committed by another, receives, relieves, comforts, or assists the felon.[1]

This, as hath been said, holds place only in felonies, and in those felonies, where by the law judgment of death regularly ought to ensue, and therefore there is no accessory in petit larciny, homicide *per infortunium*, or homicide *se defendendo*. 15 E. 3. Coron. 116.

I shall consider, 1. What shall not be a receiving or relieving to make an accessory *after*; and 2. What shall be such a receiving or relieving to make an accessory *after*.

If *A.* knows that *B.* hath committed a felony, but doth not discover it, this doth not make *A.* an accessory *after*, but it is misprision of felony, for which *A.* may be indicted, and upon his conviction fined and imprisoned.

If *A.* sees *B.* commit a felony, but consents not, nor yet takes care to apprehend him, or to levy hue and cry after him; or upon hue and cry levied doth not pursue him, this is a neglect punishable by fine and imprisonment, but it doth not make *A.* an accessory *after*. 8 E.

2. Coron. 395. 3 E. 3. Coron. 293. *Stamf. P. C. Lib. 1.* [619] *cap. 45. f. 40. b. 14. H. 7. 31. b.* and the contrary opinion of some old books in this case is therefore rejected.

If *B.* commit a felony, and come to the house of *A.* before he be arrested, and *A.* suffer him to escape without arrest, knowing him to have committed a felony, this doth not make *A.* accessory; but if he takes money of *B.* to suffer him to escape, this makes him accessory, 9 H. 4. 1. and so it is if *A.* shut the fore door of his house, whereby the pursuers are deceived, and the felon hath opportunity

[1] Generally any assistance whatsoever given to one known to be a felon, in order to hinder his being apprehended or tried, or suffering the punishment to which he is condemned, is sufficient to bring a man within this description, and makes him accessory to the felony: as where one assists him with a horse to ride away with, or with money or victuals to support him in his escape. 2 Hawk. c. 29. s. 26. Also, it seems to be settled that whosoever rescues a felon from an arrest for the felony, or voluntarily suffers him to escape, is an accessory to the felony. 2 Hawk. c. 29. s. 27. It seems agreed, says *Hawkins*, that the law hath such a regard to that duty, love and tenderness which a wife owes to her husband, as not to make her an accessory to felony by any receipt given to her husband. Yet, if she be any way guilty of procuring her husband to commit it, it seems to make her an accessory before the fact, in the same manner as if she had been sole. Also, it seems agreed that no other relation besides that of a wife to her husband, will exempt the receiver of a felon from being an accessory to the felony; from whence it follows, that if a master receive a servant, or a servant a master, or a brother a brother, or even a husband a wife, they are accessories in the same manner as if they had been mere strangers to one another. 2 Hawk. c. 29. s. 34.

Where goods are feloniously taken by a servant in his master's absence, and the master afterwards assists in secreting them, he is an accessory only, though he directed the original taking. *Norton v. People*, 8 Cow. 137.

to escape, this makes *A.* accessory; for here is not a bare omission, but an act done by *A.* to accommodate his escape, 8 *E. 2. Coron.* 427.

A. hath his goods stolen by *B.* if *A.* receives his goods again simply without any contract to favour him in his prosecution, or to forbear prosecution, this is lawful; but if he receives them upon agreement not to prosecute, or to prosecute faintly, this is theft-bote, punishable by imprisonment and ransom, (a) but yet it makes not *A.* an accessory, 42 *Assiz.* 5. b. 3 *E. 3. Coron.* 353. *Stamf. P. C. f.* 40. a. but if he take money of *B.* to favour him, whereby he escapes, this makes him accessory. *Dalt.* 263. (b) *Crompt.* 41. b.

A. hath his goods stolen by *B.* who sells them to *C.* upon a just value, tho *C.* know them to be stolen, this makes not *C.* accessory, unless he receive the felon. *Dalt. cap.* 108. p. 288. (c)

But by some opinions, if he buy them at an under value, it makes him accessory, per *Crompt.* 43. b. and Sir *Nich. Hyde, Dalt. ubi supra*; but it seems this makes not an accessory, for if there be any odds, he that gives more, benefits the felon more than him that gives less than the value, but it may be a misdemeanor punishable by fine and imprisonment, and the buying at an under value is a presumptive evidence, that he knew they were stole, but makes him not accessory.

If *A.* hath his goods stolen by *B.* and *C.* knowing they were stolen, receives them, this simply of itself makes not an accessory, and therefore it hath been often ruled, (d) that to say, *J. S. hath received stolen goods knowing them to be stolen*, is not actionable, because it imports not felony, but only a trespass [620] or misdemeanor, punishable by fine and imprisonment, (e) for the indictment of an accessory *after*, is that he received and maintained *the thief*, not *the goods*. (f) [2]

(a) *Vide antea, p.* 546. & *notas ibid.*

(b) *New Edit. p.* 331.

(c) *New Edit. ibid.*

(d) *Dawson's case, Yelv.* 4.

(e) By 3 & 4 *W. & M. cap.* 9. "Receivers of stolen goods, knowing them to be stolen, are to be deemed accessories after the fact, and suffer as such;" but because these receivers often concealed the principal felons, and thereby escaped being punished as accessories; therefore by 1 *Ann. cap.* 9. "Whosoever shall buy or receive stolen goods knowing them to be stolen, may be prosecuted for a misdemeanor, and punished by fine and imprisonment, though the principal felon be not convicted;" and this shall exempt them from being punished as accessories, if the principal shall afterwards be convicted.

(f) But by 5 *Ann. cap.* 31. "If any person shall receive or buy knowingly any stolen goods, or knowingly harbour or conceal any felon, he shall be taken as accessory to the felon, and shall suffer as a felon:" this statute does not take away the benefit of clergy; but by 4 *Geo. I. cap.* 11. such person may be transported for fourteen years.

[2] The 7 & 8 *Geo. IV. c.* 29. is now the only statute in force, affecting receivers of stolen goods in general. All the statutes prior to that statute are repealed, and the only other acts in force on this offence are the 2 *Geo. III. c.* 28. relating to receiving stolen goods, &c. on the river *Thames*, and the 1 & 2 *Geo. IV. c.* 75. relating to anchors, cables, shipping, &c.

Where two receivers are charged in the same indictment with separate and distinct acts of receiving, it is too late after verdict, to object that they should have been indicted separately. *Reg. v. Hays, 2 M. & Rob.* 156. Where a person knowing goods to have been stolen, directs his servant to receive them, and the servant also knowing them to be stolen, does so, they are jointly indictable. *Reg. v. Parr, 2 M. & Rob.* 346. Three persons were charged with a larceny, and two others as accessories, in separately receiving portions of the stolen goods. The indictment also contained two other counts, one of

But yet it seems to me, that if *B.* had come himself to *C.* and delivered him the goods to keep for him, *C.* knowing that they were stolen, and that *B.* stole them, or if *C.* receives the goods to facilitate the escape of *B.* or if *C.* knowingly receives them upon agreement to furnish *B.* with supplies out of them, and accordingly supplies him, this makes *C.* accessory; ^(g) and with this seems to agree the preamble of the statute of 2 & 3 *E. 6. cap. 24. Crompt. 41. b.* for it is relieving and comforting.

But the bare receiving of stolen goods, knowing them to be stolen, makes not an accessory; for he may receive them to keep for the true owner, or till they are recovered or restored by law; and so it seems are the books to be intended of 27 *Assiz. 69. 25 E. 3. 39., (h)* 9 *H. 4. 1. a.*

If a felon be in prison, he that relieves him with necessary meat, drink, or clothes for the sustentation of life, is not accessory.

So if he be bailed out till the next sessions, &c. it is law-
[621] ful to relieve and maintain him, for he is *quodammodo* in custody, and is under a certainty of coming to his trial. *Crompt. 42. b. Dalt. p. 286. (i)*

And therefore it is not treason thus to relieve a traitor, while he is in custody or under bail, and therefore the statute of 27 *Eliz. cap. 2.* that makes it felony to relieve a Jesuit, hath yet this qualification, *being at liberty and out of hold.*

But if a felon be in-gaol, for a man to convey instruments to him

^(g) But because this was difficult to prove, the confederates of such thieves frequently disposing of such goods to the owners for a reward, under the notion of helping them again to their stolen goods, it is provided by 4 *Geo. I. cap. 11.* "That whosoever shall take a reward under the pretence of helping any one to stolen goods, shall suffer as a felon, as if he himself had stolen the said goods, unless he cause such felon to be apprehended and brought to trial, and give evidence against him;" upon this clause the famous *Jonathan Wild* was convicted and executed. 10 *Geo. I.*—See statute 6 *Geo. I. ch. 23.* for pretending to help one to stolen goods. Receivers of linen goods stolen from the bleaching grounds, are by the statute 18 *Geo. II.* declared felons, without benefit of clergy.

^(h) In the last edition of the year-books, which is in this place mispaged, it is 25 *E. 3. 82. b.*

⁽ⁱ⁾ *New Edit. p. 530.*

them charging each of the receivers separately with a substantive felony, in separately receiving a portion of the stolen goods. The principals were acquitted, but the receivers were convicted on the last two counts of the indictment. *Reg. v. Pulham, 9 Car. & P. 280.* A lad stole a brass weight from his master, and after it had been taken from him in his master's presence, it was restored to him again with his master's consent, in order that he might sell it to a man, to whom he had been in the habit of selling similar articles, which he had stolen before. The lad did sell it to the man, and the man being indicted for receiving it of an evil disposed person, well knowing it to have been stolen, was convicted, and sentenced to be transported for seven years. *Reg. v. Lyons, 1 C. & Mar, 217.* Where six £100 notes were stolen, and the party was indicted for receiving them, it appeared that the notes had been changed by the thief for £20 notes, which latter notes had been received by the accused; it was held, that he could not be convicted on the indictment, as he did not receive the notes which were stolen. *Rex v. Walkeley, 4 C. & P. 132.*

A person may be indicted for receiving stolen property, if it remain the same in substance, though the name be changed, and therefore a principal may be indicted for stealing a live sheep, and the accessory with receiving twenty pounds of mutton. *Rex v. Cowell, 2 East, P. C. 781; and see R. v. Puckering, R. & M. C. C. 242.*

to break prison to make an escape, or to bribe the gaoler to let him escape makes the party an accessory, for the common humanity allows every man to afford them necessary relief, yet common justice prohibits all men unlawful attempts to cause their escapes.

If *A.* speak or write in favour of a prisoner for his favour and deliverance, this makes him not an accessory. 26 *Assiz.* 47.[3]

To instruct a felon to read thereby to save him by his clergy makes not an accessory. *M. 7 R. 2., (k) Co. P. C. cap. 64. p. 139.*

If *A.* be committed for felony, and *B.* an attorney advise the friends of *A.* to write to the witnesses not to appear against him, who writes accordingly, this makes neither *B.* nor the friends accessory, but is a misdemeanor punishable by fine and imprisonment. *Co. P. C. ubi supra.*

A feme covert cannot be an accessory for the receipt of her husband, for she ought not to discover him.

But the husband may be an accessory for the receipt of his wife. *Stamf. P. C. Lib. I. cap. 19. fol. 26. a.*

If the wife alone, her husband being ignorant, do knowingly receive *B.* a felon, the wife is accessory and not the husband. 15 *E. 2. Coron.* 383.

But if the husband and wife both receive a felon knowingly, it shall be judged only the act of the husband, and the wife acquitted. *M. 37 E. 3. Rot. 34. in dors. Rex Coram Rege. (l)*

To make an accessory to felony there must be a felony [622] committed by him, to whom he is accessory.

A. gives *B.* a mortal stroke, *C.* receives or relieves *A.* or helps him to escape, and then *B.* dies, *C.* shall not be an accessory to the felony, because when he received him no felony was done.[4]

(k) *Rot. 30. Rex Cant.*

(l) This was the case of *Richard Day* and *Margery* his wife, (*vide supra p. 47.*) who had been indicted before the sheriff of *Lincoln pro receptamento felonum*; the indictment was sent *coram rege*; *Richard* surrendered himself and alleged, that he had been tried and acquitted on the said indictment before the justices of gaol-delivery at *Lincoln*, and was admitted to bail; after which the judge of gaol-delivery sent the record of *Richard's* acquittal; *Margery* the wife pleaded, that she also had been tried and acquitted, and was also bailed, but afterwards she not appearing, a *Capias* was awarded against her and her bail: upon this her husband and one *John Hode* two of her bail came into court, *Et petunt ipsos admitti ad finem cum domino rege occasione prædictâ faciendum, & admittuntur*; sometime afterwards the said *John Hode* came into court and alleged, that he had been unjustly fined, "Quia prædictum indictamentum super prædictam *Margeriam* factum minus sufficiens est, eo quod prædicta *Margeria* tempore, quo ipsa dictos felones receptasse seu eis consentire debuisset, fuit cooperta prædicto *Ricardo* viro suo, & adhuc est & omnino sub potestate sua [ejus], cui ipsa in nullo contradicere potuit, and ex quo non inseritur in indictamento prædicto, quod ipsa aliquod malum fecit, nec eis consentivit, seu ipsos felones receptavit ignorante viro suo, petit judicium, si ipsa vivente viro suo de aliquo receptamento in præsentia viri sui occasionari possit." The court took time to consider of this plea, and in *Michaelmas* term, anno 4to gave the following judgment. "Viso & diligenter examinato indictamento prædicto super præfatam *Margeriam* facto videtur curiæ, quod indictamentum illud minus sufficiens est ad ipsam inde ponere responsuram. Ideo cessit processus versus eam omnino. See *Co. P. C. p. 108.*

[3] But advising witnesses not to appear, though it does not make an accessory, is a misdemeanor. *Hale's Sum.* 219.

[4] 2 *Hawk. c. 29, s. 35, 4 Bl. Com.* 38.

But a man may be accessory to an accessory by the receiving of him knowing him to be an accessory to felony. *Stamf. P. C. cap. 46. f. 43. b. 22 Assiz. 52.*[5]

There can be no accessory in receipt of a felon, unless he know him to have committed a felony: *vide Stamford's P. C. 41. b.*

But yet it hath been held, that if the party be attaint of felony by outlawry or otherwise in the county of *A.* if any one of that county receive him, he is accessory, whether he had notice or not, because he is a felon by matter of record, whereof all in the same county ought to take notice. 12 *E. 2. Coron. 377. Stamf. P. C. cap. 46. fol. 41. b.*

But it seems to me necessary to make an accessory after, that there be notice, altho the felon were attaint in the same county, for presumption shall not make men criminal, where the punishment is capital.[6]

See *antes*, 612. ch. 55.

[5] 3 *P. Wms.* 475; 2 *Hawk. c. 29, s. 1.*

[6] But some particular evidence is necessary. *Com. Dig. Justices, t. 2 Hawk. c. 29, s. 33, c. 25, s. 67; R. v. Thompson, 2 Lev. 308; 3 P. Wms. 496.*

The punishment of accessories after the fact is at common law trivial, they being in most cases allowed the benefit of clergy. *Post. 372.* There are several legislative provisions pointing out the punishment in different offences. "Thus, in *abduction, bigamy, assaults, child stealing, rape, and unnatural crimes*, the 9 *Geo. IV. c. 31. s. 31.* provides, "that every accessory after the fact to any felony punishable under this act, (except murder) shall be liable to be imprisoned with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years; and every person who shall counsel, aid, or abet the commission of any misdemeanor punishable under this act, shall be liable to be indicted and punished as a principal offender."

In murder, 9 *Geo. IV. c. 31. s. 3.* "every accessory after the fact to murder, shall be liable at the discretion of the court, to be transported beyond the seas for life, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding four years."

Accessories after the fact to offences within the 7 & 8 *Geo. IV. c. 29. c. 30*; 11 *Geo. IV. & 1 Will. IV. c. 66*; 2 *Will. IV. c. 34*; 7 *Will. IV. & 1 Vict. c. 36; c. 85; c. 86; c. 87; c. 88, and c. 89*, respectively, may be imprisoned not exceeding two years, with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year. Where accessories after the fact are punishable as for a felony, but no specific punishment is provided by the particular statute, they may be transported for seven years, or imprisoned, with or without hard labour, for the whole or any part of the imprisonment, and with or without solitary confinement; (7 & 8 *Geo. IV. c. 28. s. 9.*) such confinement not exceeding one month at any one time, nor three months in any one year; (7 *Will. IV. & 1 Vict. c. 90. s. 5.*) and if a male, may be once, twice, or thrice publicly or privately whipped, in addition to the imprisonment, if the court shall think fit. 7 & 8 *Geo. IV. c. 28. s. 8.*

CHAPTER LVII.

CONCERNING THE ORDER OF PROCEEDING AGAINST ACCESSARIES.[1]

THE accessory may be indicted in the same indictment with the principal, and that is the best and most usual way; but he may be indicted in another indictment, but then such indictment must contain the certainty and kind of the principal felony.

If a man were accessory before or after in another county, than where the principal felony was committed, at common law it was dispunishable, but now by the statute of 2 & 3 E. 6. cap. 24. the accessory is indictable in that county, where he was accessory, and shall be tried there, as if the felony had been committed in the same county; and the justices, before whom the accessory is, shall write to the justices, &c. before whom the principal is attainted, for the record of the attainder.

This writing is to be by writ in the king's name under the *teste* of the justice so sending it. *Dy. 253. b.*

If the accessory be indicted either alone or together with the principal, process of outlawry shall not go against the accessory till the principal be attainted or outlawed, neither shall he be put to plead till the principal appear, but shall be bailed till the principal appear; *vide Westm. 1. cap. 14.(a)[2]*

(a) 2 Co. Instit. 183. This is now altered by 1 Ann. cap. 9.

[1] See statutes 7 & 8 Geo. IV. c. 64, s. 9. On the construction of this statute, see *Rex v. Russell*, Mood. C. C. 356; *Reg. v. Leddington*, 9 Car. & P. 79. This provision in this statute with respect to attainder, is substituted for that of 1 Ann. St. 2. c. 9, s. 1, which is repealed.

[2] *Ry. v. Ashmell*, 9 C. & P. 236; *Whitehead v. The State*, 4 Humphreys, 278. By the common law an accessory cannot be put upon trial against his consent until the principal is convicted. Hence if the principal be dead before conviction the accessory cannot be tried. *Commonwealth v. Phillips*, 16 Mass. 423. The guilt of the principal must be established before the accessory can be tried, 2 Burr's Trial, 440. An accessory to a felony committed by several, may be tried as accessory to those who have been convicted; but if tried as accessory to all, and some have not been proceeded against, it is error. *Stoops v. Commonwealth*, 7 S. & R. 491. After conviction of an accessory, it is not ground for arresting judgment that the indictment does not allege that the principal had been convicted. *Harty v. The State*, 3 Blackf. 386.

By statute a receiver of stolen goods may be tried, though the principal is not convicted. *State v. S. L. 2 Tyler*, 249; *Commonwealth v. Andrews*, 2 Mass. 14; *Commonwealth v. Frye*, 1 Virg. Cases, 18; *Butler v. State*, 3 McCord, 384.

But in North Carolina he cannot be tried before the principal, except "when the latter escapes and eludes the process of law." *State v. Groes*, 1 Murph. 270; *State v. Goode*, 1 Hawks, 463.

But conviction of a principal without judgment warrants the trial of the accessory. *Commonwealth v. Williamson*, 2 Virg. Cases, 211.

A verdict that the defendant indicted as accessory to a murder is guilty, without

The accessory shall not be constrained to answer to his indictment, till the principal be tried, 9 *E. 4.* 48. *a.* but if he will wave that benefit, and put himself upon his trial before the principal be tried he may, and his acquittal or conviction upon such trial is good. *Stamf. P. C. Lib. I. cap. 49. f. 46. b.*

But it seems necessary in such case to respite judgment till the principal be convicted and attaint, for if the principal be after acquitted, that conviction of the accessory is annulled, and no [624] judgment ought to be given against him; but if he be acquitted of the accessory, that acquittal is good, and he shall be discharged. 8 *H. 5.* 6. *b.* *Coron.* 463.

If *A. B.* and *C.* be indicted as principals, and *D.* is indicted as accessory to them all, *D.* shall not be arraigned till all the principals be attaint or outlawed, for if *A.* and *B.* be tried, and acquit or attaint, yet *D.* may be accessory to *C.* and not to *A.* nor *B.* but if *A. B.* and *C.* be indicted as principals, and *D.* indicted as accessory to *A.* only, there if *A.* be attaint, tho *B.* and *C.* be not, yet *D.* shall be arraigned. 40 *Assiz.* 25. *Coron.* 216. 7 *H. 4.* 36. *b.* *Stamf. ubi supra.*

stating whether accessory to the murder in the first or second degree, is erroneous. *Ib.*

If *A.* is charged in the indictment as principal, and *B.* as accessory, and the jury find *B.* to be the principal and *A.* the accessory, the indictment is sustained. *State v. Mairs, Cox,* 453.

The court may, in its discretion, permit an accessory to be tried separately from the principal. *State v. Yancey, 1 Const. Rep.* 241.

If the principal in murder has absconded, and process of outlawry is seasonably commenced, but there is not time to finish it at the second term, the accessory, who has refused to be tried without the principal, although he has been two terms under indictment, is not entitled to be discharged on *habeas corpus*. *Commonwealth v. Sheriff,* 16 *S. & R.* 304.

Whatever constitutes one as an accessory in a capital offence, makes him liable as principal in a misdemeanor. *State v. Westfield, 1 Baily,* 132.

The record of the conviction of a slave as principal in a felony, is evidence against a free man as accessory before the fact; so of the slave's confession of his own guilt as principal. *State v. Sims, 2 Baily,* 29; *State v. Crank, ib.* 66.

The records of the principal's conviction must be produced on trial of the accessory, unless they are tried together, or the latter has consented to be tried before the former, or the former is dead or has been pardoned before trial. But if the indictment charge the accessory with being present, aiding and abetting, the principal's guilt may be proved by parol evidence, though the principal has been convicted. *State v. Crank, 2 Baily,* 66.

Where the principal and accessory are joined in an indictment and tried separately, the records of the principal's conviction is *prima facie* evidence of his guilt upon the trial of the accessory, and as the burden of proof is on the accessory, he must show clearly that the principal ought not to have been convicted. *Commonwealth v. Knapp,* 10 *Pick.* 481.

But the accessory in such case is not restricted to proof of facts that were not shown on the former trial, and which are incompatible with the guilt of the principal. *Ib.*

If an indictment allege a burglarious entry with intent to steal, and then and there stealing, it is only the offence of burglary, and a count charging one as accessory to "the offence aforesaid," is good. *Stoops v. Commonwealth,* 7 *S. & R.* 491.

In an indictment against an accessory before the fact in felony, it is not necessary to set forth the conviction or execution of the principal. *State v. Crank, 2 Baily,* 66; *State v. Sims, ib.* 29.

Where one was indicted as accessory to a murder committed by a slave, it was held sufficient to describe the slave by his own name, without setting out that of his master. *State v. Crank, 2 Baily,* 66.

But yet the court may if they please arraign the accessory in the first case, (b) for if he be found accessory he shall have judgment, but if acquitted of being accessory to *A.* yet that acquittal dischargeth him not of being accessory to *B.* or *C.* and therefore when they come in and plead and are attaint, *D.* may be arraigned *de novo* as accessory to *B.* and *C.* *Plowd. Com.* 98. b. *Gittin's case.* So that it is in the discretion of the court to arraign him or not before *B.* and *C.* be attaint, tho it be the safer course to respite the arraignment of the accessory till *B.* and *C.* appear or are outlawed.

If *A.* be indicted or appealed as principal, and *B.* as accessory *before* or *after* by the same indictment, and the principal plead in bar or abatement, or *autrefois acquit*, the accessory shall not be forced to answer, till that plea be determined, for if it be found for *A.* the accessory is discharged, if against *A.* yet he shall after plead over to the felony, and may be acquitted. 9 *H.* 7. 19. b.

If *A.* be indicted as principal, and *B.* as accessory, they may be both arraigned together, and plead together, and put upon their trial by the same jury, and the jury shall be charged to inquire first of the principal, and if they find him not guilty, then to acquit the accessory; but if they find him guilty, then to inquire of the accessory. *Seigneur Sanchar's case*, (c) 40 *Assiz.* 8. 7 *H.* 4. 36. b. [3] *Coke super statute Westm.* 1. cap. 14. (d) but in that case judgment must be first given of the principal, for if any thing obstruct judgment, as clergy, a pardon, &c. the accessory is to be discharged. [625]

If *A.* be attaint of murder upon an appeal, and then *A.* is indicted of murder as principal, and *B.* as accessory, the principal pleads the former attainder, *B.* shall not be put to answer as accessory, because he is not attaint upon the same suit, and so it is if the attainder of *A.* were first upon the appeal. 7 *H.* 4. 36. a. *Stamf. P. C.* 47. a. *Coke ubi supra.*

If the principal be attainted and hath his clergy, or be pardoned after attainder, the accessory shall be put to answer; but if the principal be only convict and hath his clergy, or be pardoned, or stand mute, or die in prison before judgment, or challenge above thirty-six peremptorily, the accessory shall not be put to answer, for the principal was never attainted, (e) and altho formerly there were diversity of opinions in the books in these cases, (f) yet the law is now

(b) To make this consistent with what goes before, we must understand the former passage to mean, that where he is indicted as accessory to all, he shall not be arraigned as accessory to them all till all be attaint or outlawed, and this, that the court may in such case, if they please, arraign him only as accessory to him who is attaint, tho the others do not appear.

(c) 9 *Co. Rep.* 119. a.

(d) 2 *Co. Inst.* 184.

(e) It was for this reason, that *Weston* the principal actor in the murder of Sir *Thomas Overbury* could not for a long while be prevailed with to plead, that so the earl and countess of *Somerset*, who were the movers and procurers might escape. See *State Tr.* Vol. I. p. 314.

(f) See *Coron.* 51, 58.

settled as above, (g) 4 *Co. Rep.* 43, 44. *Bibith's case* and *Syer's case*, *Coke super Westm.* 1. cap. 14.

If the principal be erroneously attainted, the accessory shall be put to answer, and shall not take advantage of the error in that attainder, 2 *R.* 3. 21, 22. but the principal reversing the attainder, reverseth the attainder of the accessory. 18 *E.* 4. 9. b.

If *A.* be indicted as principal, and *B.* as accessory *before* or *after*, and both be acquit, yet *B.* may be indicted as principal, and the former acquittal as accessory is no bar. [4] 4 *E.* 6. *B. Coron.* 186. *Knightley's case*, *Crompt. f.* 43. a.

But if *A.* be indicted as principal and acquitted, he shall [626] not be indicted as accessory *before*, and if he be, he may plead his former acquittal in bar, for it is in substance the same offense, *Stamf. P. C. Lib. II. cap. 36, fol. 105, a.* 2 *E.* 3. *Coron.* 150 & 282. but the antient law was otherwise. 8 *E.* 2. *Coron.* 424.

But if he be indicted as principal and acquitted, he may yet be indicted as accessory *after*, for they are offenses of several natures. 27 *Assiz.* 10. 8 *H.* 5. *Coron.* 463. *Stamf. P. C. ubi supra.*

And so it is if he be indicted as accessory *before* and acquitted, yet for the same reason he may be indicted as accessory *after*. [5]

(g) But since our author wrote, it is settled quite otherwise by 1 *Ann. cap. 9.* for by that statute, "If any principal offender shall be convicted of felony, stand mute, or challenge above twenty, it shall be lawful to proceed against the accessory, either before or after the fact, in the same manner as if such principal felon had been attainted thereof, notwithstanding such principal felon be admitted to his clergy, or otherwise delivered before attainder; and every such accessory, if convicted, stand mute, &c. shall suffer the same punishment, as if such principal had been attainted."

[4] But Mr. Justice Foster observes upon this, that in the eye of the law the offences of principal and accessory do specially differ; and if a person indicted as principal cannot be convicted upon evidence tending barely to prove him to have been accessory before the fact, which must needs be admitted, it doth not appear how an acquittal upon one indictment can be a bar to a second, for an offence specially different from it. *Fest.* 362. And the distinction is also taken in *Rex v. Winfred Gordon*, 1 *East's P. C.* 352. and there it was held, by all the judges, that *W. G.* having been indicted as accessory before the fact, and acquitted upon that indictment, might be indicted again as principal.

[5] *Indictment of Accessory together with his Principal.*—Where the parties are thus joined in the same proceeding, the proper course is first to state the guilt of the principal according to the facts, as if he alone had been concerned; and then in case of accessories before the fact, to aver "that *C. D.*, late of, &c. (the procurer) before the committing of the said felony and murder, (or burglary, as the case is,) in form aforesaid, to wit, on, &c., with force and arms, &c., did maliciously and feloniously incite, move, procure, aid and abet," (or counsel, hire, and command,) following the words of the statute, if the defendant be made an accessory thereby, or else the effect of such words, see *Rex v. Gravel*, 1 *And.* 195; "the said *A. B.*, (the principal felon) to do and commit the said felony and murder, and in manner aforesaid, against the peace," &c.

And where a man is indicted as accessory *after* the fact, together with his principal, the original felony is to be stated in the same way, and the conclusion must aver that the accessory did receive, harbour, and maintain, &c., the principal felon, well knowing that he had committed the felony. The averment of knowledge is indispensably requisite, because without it the guilt does not manifestly appear. *Com. Dig. Justices, t.*; 2 *Henk. c.* 29. s. 33; c. 25. s. 67; *R. v. Thompson*, 2 *Lev.* 308.

A person may be indicted for receiving stolen property, if it remain the same substance, though the name be changed; and therefore a principal may be indicted for stealing of a live sheep, and the accessory with receiving twenty pounds of mutton. *Rex v. Crowell and Green*, 2 *East's P. C.* 781; *R. v. Puckering*, *R. & M. C. C.* 242.

In an indictment against the receiver of stolen property, the property stated to have

been received should agree with that averred to be stolen; but in *Morris's* case, *Leach*, 525, where the indictment charged the principal with stealing two bank notes, the property of S. S., and charged the accessory with receiving the said notes, the property and chattels of the said S. S., it was *held*, that the word "chattels" might be rejected as surplusage.

It is not necessary to use the word "accessary" in the indictment, (*Rex v. Burridge*, *Plow.* 477,) or to set forth the means by which the accessory before the fact incited the principal to commit the felony, or the accessory after received or comforted him; for it is perfectly immaterial in what way the purpose of the one was effected, or the harbouring of the other secured; and as the means are frequently of a complicated nature, it would lead to great inconvenience and perplexity if they were always to be described upon the record. *Co. Entr.* 56, 57; *Rost. Entr.* 48; 9 *Co.* 114; 2 *Hawk. c.* 29. s. 17.

If two are charged jointly with receiving stolen goods, a joint act of receiving must be proved; a proof that one received in the absence of the other, and afterwards delivered to him, will not suffice. Successive receivers are all separate receivers, and all punishable. *Rex v. Messingham*, *R. & M. C. C.* 257.

Indictment against the Accessary alone, after the conviction of the Principal.—It is not necessary in this case to aver that the latter committed the felony, or on the trial to enter into a detail of the evidence adduced against him; but it is not sufficient to recite with certainty the record of the conviction, because the court will presume every thing on the former occasion to have been rightly and properly transacted. *Holmes v. Walsh*, 7 *T. R.* 465; *Fest.* 365.

It is sufficient in an indictment for felony against a receiver of stolen goods to state, that the principal was "*tried and duly convicted*," without going on to show what judgment was passed upon him, or how he was delivered. *Hymen's case*, 2 *Leach*, 925.

Indictment against Accessary alone for a substantive felony or misdemeanor.—In this case it is not, it seems, necessary to allege the original felony or misdemeanor with that particularity as to time and place, as in an indictment against the defendant together with the principal. See 1 *Stark. C. L.* 168; *R. v. Scott*; 2 *East's P. C.* 781.

The indictment against a receiver of stolen goods, need not allege time and place to the fact of the stealing, it is sufficient if they be alleged to the fact of the receipt. 2 *East, P. C.* 780. In this indictment it is not necessary to aver that the principal has not been convicted. *R. v. Baxter*, 5 *T. R.* 83.

An indictment is properly framed which states that the principal felon cast away and destroyed a vessel, and that the accessory incited, moved, aided, counselled, hired, and commanded him to do it; and the accessory may be convicted on an indictment so framed, although the principal felon has not been tried, and does not appear to be amenable to justice. *R. v. Wallace*, 1 *C. & M.* 200. In other respects the indictment will assimilate that against principal and accessory jointly.

If the principal be *unknown*, the indictment may state the offence to have been committed by "some person or persons to the jurors aforesaid unknown." Thus in the case of *John Thomas*, the indictment was for receiving goods stolen by persons unknown, which was objected to be insufficient, in not ascertaining the principal thief, and that it ought to appear to whom in particular the prisoner was accessory. This objection being referred to the judges, they were unanimously of opinion that the indictment was good, that the greater view of the statutes was to reach the receivers where the principal thieves could not easily be discovered. *R. v. Thomas*, 2 *East's P. C.* 781.

Where the principal is *known*, it seems proper to state it according to the truth; and the common form of the indictment is to state the fact of stealing the goods by the principal and the receipt of them by the receiver, he then and there well knowing the said goods and chattels to have been feloniously stolen, &c. *R. v. Hymen*, 2 *Leach*, 925. Or an allegation that the goods were stolen "by a certain evil disposed person" is good, and without stating the name of the principal felon, or averring that he is unknown. *R. v. Jervis*, 6 *C. & P.* 156. And this in many cases, may be the best mode of stating the offence.

Where, in an indictment against an accessory to a felony, it was stated that the felony was committed "by a person to the jurors unknown," and it appeared that the principal felon was a witness before the grand jury, it was *held* that the indictment could not be supported. *R. v. Waker*, 3 *Comp.* 264; *Rex v. Casper*, 9 *C. & P.* 289.

If a charge against an accessory be that the principal felony was committed by persons *unknown*, it is no objection that the same grand jury have found a bill imputing the principal felony to J. S. Thus in *R. v. J. Bush*, the prisoner was tried before Mr. Baron Garrow, at the Gloucester Summer Assizes, 1818, and was convicted and received

sentence of transportation for fourteen years, but execution was stayed in order that the opinion of the judges might be taken upon the propriety of the conviction. The indictment stated that "a certain person or persons to the jurors unknown," the dwelling-house of *Hannah Wilmot*, burglariously did break and enter and certain silver plate commonly called a silver cream-jug he of her goods did steal; and that *Bush* feloniously did receive and have the same, he then and there well knowing the same to have been feloniously and burglariously stolen, &c. Upon the trial it appeared that among the records of indictments returned by the same grand jury, there was one charging one *Henry Moreton* as principal in the burglary, and the prisoner *Bush* as accessory after in receiving the cream jug. Mrs. *Wilmot* proved that her house had been broken but once, that she had lost only one cream-jug, and that she had preferred two indictments to the grand jury. The counsel for the prosecution had declined to proceed on the indictment against *Moreton*. *Ladlow*, for the prisoner, objected that the allegation in the present indictment, that the person or persons who committed the burglary were unknown to the jurors, is negatived by the other record, and that the prisoner was entitled to be acquitted. This point was reserved for the opinion of the judges, who in *Michaelmas Term*, 1818, held the conviction right, being of opinion that the finding by the grand jury of the bill imputing the principal felony to *J. S.* was no objection to the second indictment, although it stated the principal felony to have been committed by certain persons to the jurors aforesaid unknown. *R. v. Bush*, *R. & R. C. C.* 372.

In a late case it was made a question, but not decided, whether upon a charge from receiving from *T. S.* the receipt from *S. S.* must be proved, the statute making it criminal without regard to the person from whom the stolen property is received. *R. v. Mesingham*, *R. & M. C. C.* 257.

On indictment against principal and accessory before the fact, the evidence in this case must consist of proof of the guilt of the principal so as to obtain his conviction. The accessory may enter into the full defence of the principal, and avail himself of every matter of fact, and every point of law tending to the acquittal of the principal, for the accessory in this case is to be considered as *particeps in lite*, and this sort of defence necessarily and directly tendeth to his own acquittal. *Fost.* 265.

The prosecutor must prove that the accessory had, previous to the crime, procured, hired, advised or commanded the principal to commit it, and whether this were done directly or through the intervention of a third person, is immaterial. *Fost.* 125. It must appear the accessory was absent when the crime was committed, so that he was not a principal.

On indictment against an accessory after the fact together with the principal, the prosecutor should prove the guilt of the principal. He must prove that the defendant received, harboured or maintained him, and knew he had committed a felony. If the prisoner, at different times, receive property stolen from the prosecutor, although the substantive charge must be confined to some one receiving, yet the other receivings may be given in evidence, to show a guilty knowledge that the goods were stolen. *Rex v. Dunn*, *Car. C. L.* 131; *R. & M. C. C.* 146. *S. C.* and see *Rex v. Burridge*, 3 *P. Wms.* 439. He must be proved to have done some act to assist the felon personally, or employed another person to do so. *Reg. v. Chapple*, 9 *Car. & P.* 355; *Reg. v. Jervis*, 2 *M. & Rob.* 40.

On indictment against the accessory after conviction of principal, the prosecutor should prove the conviction of the principal; where the accessory is tried in the same county in which the principal was convicted, this is easily effected. But if the accessory be tried in a different county, it is necessary to produce either the record itself or an examined copy of it. This is evidence against the accessory sufficient to put him upon his defence, for it is founded upon a legal presumption that every thing in the former proceeding was rightly and properly transacted. *Holmes v. Walsh*, 7 *T. R.* 465.

But a presumption of this kind must, as it seems, give way to facts manifestly and clearly proved. *Fost.* 365. As against the accessory, therefore, the conviction of the principal will not be conclusive; it is as to him, *res inter alios acta*: for an accessory may controvert the guilt of the principal, notwithstanding the record of his conviction. *Smith's case*, *O. B.* 1783. 1 *Leach*, 289. And therefore if it shall come out in evidence upon the trial of the accessory, as it sometimes hath, and frequently may, that the offence of which the principal was convicted, did not amount to felony in him, or not to that species of felony with which he was charged, the accessory may avail himself of this, and ought to be acquitted. *Fost.* 365. and see *Danelly's case*, 1 *Russ.* 30; 2 *Marsh.* 371; *Russ. & R. C. C.* 310.

And as in point of law so also in point of fact, if it shall manifestly appear in the course of the accessory's trial, that the principal was innocent, common justice seemeth to re-

quire that the accessory should be acquitted. As suppose a man is convicted upon circumstantial evidence, strong as that sort of evidence can be, of murder, another is afterwards indicted as accessory to this murder, and it cometh out upon the trial by incontestable evidence that the person who was supposed to be murdered is still living, in this case, certainly, the person indicted as accessory, shall be acquitted. Or suppose the person to be in fact murdered, and that it should come out in evidence, to the satisfaction of the court and jury, that the witnesses against the principal were mistaken in his person, (a case of this kind Sir Michael Foster says he has known,) that the person convicted as principal, was not, nor could possibly have been present at the murder. *Fost.* 367, 368. 1 *Hawk.* 457.

Whatever is evidence against the principal is *prima facie* evidence of the principal felony, as against the accessory. If an indictment against a receiver, state the principal felony to have been committed by A. B. whatever would have been evidence of the principal felony to convict A. B. is receivable, to prove this allegation on the trial of the receiver, but is not conclusive. Therefore if A. B. confessed the principal felony, that confession is admissible on trial of the receiver to prove the commission of the principal felony. *Rex v. Blish*, 4 C. & P. 377.

Competency of Witnesses.—The principal, though not convicted or pardoned, may be examined as a witness against the accessory or receiver. In two prosecutions for a misdemeanor, on statute 22 Geo. III. c. 58. the principal felon, though not convicted, were admitted as witnesses on part of the crown. *Rex v. Patram Bridgewater*, Sum. Ass. Cor. Grosse, L. 1787. 2 East, 782. *Rex v. Haslam*, 1 Leach, 418. 2 East, P. C. 728; *sed vide Reg. v. Lyons*, 9 Car. & P. 555, where principal and accessory were charged in the same indictment. So in *Jonathan Wild's* case, on a prosecution on statute 4 Geo. I. c. 11, for taking a reward to help to stolen goods. 2 East's P. C. 782, 783.

In a case where the principal was indicted for burglary and larceny in a dwelling-house, and the accessory charged in the same indictment as accessory before the fact, to the said "felony and burglary," and the jury acquitted the principal of the burglary, but found him guilty of the larceny; it seems the judges were of opinion that the accessory should have been acquitted, for the indictment charged him as accessory to the burglary only, and the principal being acquitted of that, the accessory should be acquitted also. *R. v. Dannelly, and Vaughan*, 1 Russell, 30; 2 Marsh, 571; 1 R. & R. C. C. 310. S. C.

CHAPTER LVIII.

CONCERNING FELONIES BY ACT OF PARLIAMENT, AND FIRST CONCERNING RAPES.

HAVING thus considered the felonies that are by the common law, I now proceed to the handling of felonies by act of parliament, and because it is hardly possible to reduce the titles of them under any dependent method, and difficult to digest them under heads, I shall take them up in order of time, according to the series and order of the reigns and years of the several kings wherein they were enacted, only where I meet with any felony in the time of any king's reign, I shall as near as I can bring together those Acts of Parliament both before and after, that concern that subject.

And first concerning rape.

Rape was antiently a felony, as appears by the laws of *Adlestane* mentioned by *Bracton*, Lib. III., (a) and was [627] punished by loss of life.

But in process of time that punishment seemed too hard; but the truth is, a severe punishment succeeded in the place thereof, viz. cas-

(a) *De Corona*, cap. 28. f. 147. a.

tration and the loss of eyes, (b) as appears by *Bracton* (who wrote in the time of *Henry III.*) *Lib. III. cap. 28.* but then, tho the offender were convict at the king's suit, the woman that was ravished (if single) might, if she pleased, redeem him from the execution, if she elected him for her husband, and the offender consented thereunto, as appears by *Bracton ubi supra.*

This kind of punishment it seems continued till 3 *E. 1.* and then by the statute of *Westm. 1. cap. 13., (c)* it was enacted, "That none ravish or take with force a damsel within age with her consent nor against her consent, nor no dame, damsel of age, nor any other woman against her will; and if any do it, the party may sue within forty days, and common right shall be done; and if none sue within forty days, the king shall have the suit, and the party convict shall suffer two years imprisonment, and be ransomed at the king's pleasure.

This statute gives a punishment by imprisonment and ransom only, if attaint at the king's suit, and takes away castration and putting out of eyes; but it seems as to the suit of the party, if commenced within forty days, it alters not the punishment before, *Le roy lui ferra common droiture.*

But by the statute of *Westm. 2. cap. 34. (d)* the offense of rape is made felony, "If a man ravish a married woman, dame, or damsel, where she neither assented before nor after, *Eyt judgment de vy & member*; if she assent after, yet the king shall have the suit."

This created rape a felony, and therefore it was not inquirable in a leet, for it was made felony *de novo* by this statute, 22 *E. 4. 22. a. 6 H. 7. 4. b.*

Rape is the carnal knowledge of any woman above the [628] age of ten years against her will, and of a woman-child under the age of ten years with or against her will. *Co. P. C. cap. 11. p. 60. [1]*

(b) By the laws of *William I.* this offense was punished with castration. *Vide Leges Gul. I. l. 19. Wilk. Leg. Anglo-Sax. p. 222 & 290.*

(c) 2 *Co. Instit.* 180.

(d) 2 *Co. Inst.* 433.

[1] To constitute the offence there must be a penetration. *Rex v. Hill*, 1 *East's P. C.* 439. It was held in *Russen's case*, 1 *East, P. C.* 438, that the least degree of penetration was sufficient, though not attended with the deprivation of the marks of virginity. In that case it was proved, that the parts of the injured party were so narrow that a finger could not be introduced, and that the hymen was whole and unbroken; and yet this was held a sufficient penetration to constitute the offence, (emission having been also proved, which was necessary as the law stood at that time;) and see *Reg. v. McKee*, 8 *C. & P.* 541.

The offence may be complete though the hymen was not ruptured. *Reg. v. Hughes*, 9 *C. & P.* 752; overruling *Rex v. Gammon*, 5 *C. & P.* 321.

If penetration cannot be proved, still the defendant may be convicted of the assault. 7 *Will. IV. & 1 Vict. c. 85, s. 11.*

Before the 9 *Geo. IV. c. 31, s. 18*, it was necessary to prove emission, which might be proved either positively by the evidence of the woman that she felt it, or it might be presumed from circumstances; as for instance, that the defendant, after having connection with the prosecutrix, arose from her voluntarily without being interrupted in the act.

Rex v. Harmwood, 1 East, P. C. 440; *Rex v. Sheridan*, 1 East, P. C. 438; *Rex v. Burrows*, R. & R. 519. But now by that act, s. 18, reciting, "And whereas upon trials for the crimes of buggery and of rape, and of carnally abusing girls under the respective ages hereinbefore mentioned, offenders frequently escape by reason of the difficulty of the proof which has been required of the completion of those several crimes;" for remedy thereof it is enacted, "That it shall not be necessary in any of those cases to prove the actual emission of seed in order to constitute a carnal knowledge, but that the carnal knowledge shall be deemed complete upon proof of penetration only." Since this enactment, even though the jury negative the fact of emission, or the circumstances be proved to have been such as that no emission did or could take place, the offence is complete. *Rex v. Cox*, cited *post*.

Any, the slightest, penetration is sufficient, even though it do not break the hymen. *Rex v. Russen*, 1 East, P. C. 438.

Though it is not necessary in order to complete the offence of rape, that the hymen should be ruptured, provided that it is clearly proved that there was penetration; yet where that which is so very near to the entrance has not been ruptured, it is very difficult to come to the conclusion that there has been penetration, so as to sustain the charge. *Reg. v. McRue*, cited *supra*.

In a case of rape if there has been penetration, the jury ought to convict of the capital offence, even though the penetration has not proceeded to the rupture of the hymen. *Reg. v. Hughes*, 9 Car. & P. 752. Confirmed by the judges; and the case of *Rex v. Gammon*, 5 Car. & P. 321, held to be no authority, *Gurney, B.* concurring. *Ib.*

Since the Stat. 9 Geo. IV. c. 31, the offence of rape is made out by proof of penetration; and in such case a prisoner must be found guilty, although there was no emission, and although he did not withdraw himself merely because he was satisfied. *Rex v. Jennings*, 4 Car. & P. 249, 1 Lewin, C. C. 93.

The 9 Geo. IV. c. 31, s. 18, does not make emission unnecessary to complete the offence of rape. *Rex v. Russell*, 1 M. & Rob. 122. See *Rex v. Coulthart*, 1 Lewin, C. C. 94. But in case of *Rex v. Cox*, 5 C. & P. 297, 1 Mood. C. C. R. 337, which is subsequent to all these cases, the jury found that there had been penetration, but there had not been any emission from the prisoner, and the fifteen judges held that the prisoner was rightly convicted of rape. See *Rex v. Reekpear*, 1 Mood. C. C. R. 342.

Quære, if emission be expressly negatived, the offence of rape is complete under 9 Geo. IV. c. 31, s. 18. *Brook's case*, 2 Lewin, C. C. 267.

In a case of rape since the passing of the statute 9 Geo. IV. c. 31, s. 18, the only question for the jury is, whether the private parts of the man did or not enter into the person of the woman; and the reason for the limitation to that single inquiry seems to be, that it was thought that the law was holding itself up to contempt by having the subtle and critical subjects of emission, &c. discussed before judges and juries. Therefore, though it appear from the evidence beyond all possibility of doubt that the party was disturbed immediately after penetration, and before the completion of his purpose, yet he must be found guilty of having committed the complete offence of rape. *Reg. v. Allen*, 9 Car. & P. 31.

Proof of *injectio seminis*, as well as penetration, was essential in an indictment for rape before the Stat. 9 Geo. IV. c. 31. *Rex v. Hill*, 1 East, P. C. 439; *S. P. Rex v. Cave*, 1 East, P. C. 438; but see *Rex v. Sheridan*, 1 East, P. C. 438; *Rex v. Harmwood*, 1 East, P. C. 440; 1 Russ. C. & M. 560.

Before the Stat. 9 Geo. IV. c. 31, s. 18, if something occurred to create an alarm to a party while he was perpetrating the offence of a rape, it was left to the jury to say, whether he left the body *re infecta* because of the alarm, or whether he left it because his purpose was accomplished. *Rex v. Burrows*, R. & R. C. C. 519; 1 Russ. C. & M. 561.

In case of rape, &c. the capital offence is completed if there be penetration, although there has been no emission, and the prisoner has been interrupted in the commission of the offence. *Rex v. Coxins*, 6 Car. & P. 351.

If in a case of rape the jury are satisfied that non resistance on the part of the prosecutrix proceeded merely from her being overpowered by actual force, or from her not being able, from want of strength, to resist any longer, or that from the number of persons attacking her, she considered resistance dangerous and absolutely useless, the jury ought to convict the prisoners of the capital charge; but if they think from the whole of the circumstances that although when the prosecutrix was first laid hold of, it was against her will, yet she did not resist afterwards, because she in some degree consented

The essential words in an indictment of rape are *rapuit & carnaliter cognovit*, but *carnaliter cognovit*, nor any other circumlocution

to what was afterwards done to her, they ought to acquit the prisoners of the capital charge, and convict them of an assault only. *Reg. v. Hallet*, 9 Car. & P. 748.

At the time when the 9 Geo. IV. c. 31. passed, it is perfectly clear that in order to constitute the crime of rape, there must have been both penetration and emission, consequently it lay upon the prosecutor either to give express evidence of actual emission, or to prove such facts as were sufficient to induce the jury to infer that emission had actually taken place. In some cases the woman was unable to prove emission, either because she did not perceive it, or (as was the case in *Rex v. Preston*, *Stafford Spr. Ass.* 1828, where a father was convicted of ravishing two of his daughters) because after penetration she fainted away. In such cases it was the course to leave it to the jury to infer that emission had taken place, as there was nothing to show that the prisoner had not fully completed his purpose, and acquittals sometimes took place because juries were unwilling to infer a fact which had not been clearly proved, especially when such an inference subjected the prisoner to capital punishment. Such being the state of things, the 9 Geo. IV. c. 31, was passed; and the question is whether that act has altered the crime of rape so that instead of consisting of both penetration and emission, it now consists of penetration. According to all the recent decisions (see *Rex v. Great Bently*, 10 B. & C. 520; *Williams v. Roberts*, 5 Tyrw. 421; *Flight v. Thomas*, 11 Ad. & E. 688.) this ought to be determined upon the grammatical construction of the words of the statute alone. In sect. 16 there is a separate substantive clause providing that "every person convicted of the crime of rape shall suffer death as a felon." Now here the crime is treated as one as clearly settled and defined as the crime of murder, i. e. as consisting of both penetration and emission. It is, however, upon sect. 18 that the question mainly turns. That section recites that "upon trials for the crimes (*inter alia*) of rape, offenders, (that is persons guilty of these crimes) "frequently escape by reason of the difficulty of the proof which has been required of the completion of those several crimes," (the mischief therefore was that persons who had committed rapes consisting both of penetration and emission, had escaped by reason of the difficulty of proving both penetration and emission) "for remedy thereof, (that is to remedy the escape of persons who had committed such rapes consisting of both penetration and emission,) be it enacted that it shall not be necessary in any of these cases to prove the actual emission of seed," (not that emission shall be no part of the crime) "but that the carnal knowledge" (i. e. both penetration and emission) "shall be deemed" (presumed) "complete upon proof of penetration only." Now, it is to be observed that there is no intimation whatever of any intention to alter the crime: on the contrary, the clause evidently treats the crime as continuing the same, but is framed to render the means of proving it more easy. It is submitted that upon the true construction of this clause, its effect is, that whereas before the passing of the statute the prosecutor was bound not only to prove penetration, but to go further and give such evidence as satisfied the jury that emission had actually taken place, he is now only bound to prove penetration; on proof of which a presumption arises by virtue of the clause that emission has also taken place, but that this presumption is liable to be rebutted, by showing that in fact emission did not take place. In other words, all the prosecutor has now to prove is penetration, and upon that the jury ought to convict, unless it be proved by the prisoner that he did not in fact complete his purpose. This is the view which seems to have been taken by *Alderson, B.* in *Coulthart's case*, (1 Russ. C. & M. note, p. 683, 3d. ed.) and it is submitted is the correct construction of the clause. There are several statutory provisions of a similar character, as the 23 Geo. II. c. 11. s. 3. for remedying the difficulties attending prosecutions for perjury, and the statutes which make a certificate of the clerk of assize evidence of a previous conviction, &c. and it is evident that none of these alter the offence, but only facilitate the proof of it. At all events, the clause does not alter the crime, and it is against all the authorities to hold that felony can be created by any but express and clear words. In *Searle v. Williams*, *Hob.* 293, it is laid down that "felonies and capital crimes shall never be made by doubtful and ambiguous words." And in *Courteen's case*, *Hob.* 270, it was "resolved clearly that no statute could be extended to life by doubtful and ambiguous words;" and see *Hawk. P. C. c.* 41. s. 3. In *Rex v. Cale*, *R. & M. C. C. R.* 11, it was held by a majority of the judges that the 3 Geo. IV. c. 24. s. 3. which provided that the receiving stolen goods should be "deemed and construed to be felony," did not create a felony; and although that case be overruled by *Rex v. Solomons*, *R. & M. C. C. R.* 292, still it is a strong authority to show how clear and distinct the words which create a

without the word *rapuit* are not sufficient in a legal sense to express rape. 1 H. 6. 1. a. 9 E. 4. 26. a. [2]

new felony are required to be even where the words be such as to leave no doubt that it was intended to create such felony. It may be added that the decision in *Rex v. Cox*, gives a great facility to convict the innocent in those cases which not unfrequently occur, where the parties being accidentally discovered in coitu, the woman makes a false charge in order to save her character. *Greave's note*, 1 Russ. op. Cr. & M. 685. 3d Lond. ed. & 5th Am. ed. 1845.

In this country proof of emission seems never to have been required. *The State v. Le Blanc*, 3 Brev. Rep. 339. In several instances it has been held that as the essence of the crime is the violence done to the person and feelings of the woman, which is completed by penetration without emission, it is sufficient to prove penetration only. *Pennsylvania v. Sullivan*, Add. R. 143. *Stroud v. Com.* 11 S. & R. 177. *Com. v. Thomas*, 1 Virginia Cas. 307.

The slightest penetration is sufficient. *Rex v. Russen*, cited *supra*.

In New York, penetration alone without emission will support a conviction under the Rev. Stat. 2 Rev. Stat. 663.

For the statutes of the U. S. see the Crimes Act, 3d March, 1825, sect. 4 and sect. 7.

For the Massachusetts statutes, see Rev. Stat. c. 125, s. 18, ch. 187. s. 11. As to the construction of this stat. see *Com. v. Cooper*, 15 Mass. R. 197; and see *Com. v. Roby*, 12 Pick. R. 496, 507, though this is upon an earlier statute, still as they are in *pari materia*, the authority is valuable. *Com. v. Goodhue*, 2 Metc. Rep. 193. *Com. v. Bruce*, 6 Penn. L. J. 236. S. P. on a like act.

For the New York statutes, see 2 Rev. Stat. 603. sects. 22 & 23.

For the New Jersey statutes, see Statutes of N. J. 1847. tit. "Crimes and Punishments," p. 259. § 10.

For the Pennsylvania statutes, see *Stroud's Purd. Dig.* 984. § 4. 6th ed.; *Id.* 943. 7th ed. § 36; Act of April 23d, 1829; *Stroud's Purd. Dig.* 992. 7th ed.

For statutes of Virginia, see Rev. Code, c. 158, sect. 1; *Id.* c. 258, sect. 3; Act of 1837, c. 71.

[2] It must be alleged that the rape was committed with violence and against the will of the woman. 3 Chit. C. L. 815. Also, that she was ravished, alleging merely that the defendant carnally knew her is not sufficient. 1 Russ. C. & M. 686. It is proper to allege that the defendant carnally knew her, but the omission would, it seems, be cured by verdict. *Rex v. Warren*, 1 Russ. C. & M. 3d ed. 686; and see 2 Inst. 180; 2 Hawk. P. C. c. 25. s. 56. An indictment charging that the defendant in and upon A. B. "feloniously and violently did make [omitting the words "an assault,"] and her, the said A. B. then and there against her will, violently and feloniously did ravish and carnally know," &c. was held sufficient in arrest of judgment. *Reg. v. Allen*, 9 C. & P. 521. It seems necessary to conclude that the offence was against the form of the statute. 1 Russ. C. & M. 687. 3d ed.; see *Rex v. Scott*, R. & R. 415.

In *Rex v. Burgess and others*, Chester Spr. Ass. 1813, upon an indictment charging three persons jointly with the commission of a rape, an objection was taken that three persons could not be guilty of the same joint act, but it was overruled upon the ground that the legal construction of the averment was only that they had done such acts as subjected them to be punished as principals in the offence. The execution was, however, respited, probably with a view to enable the learned judges to consult other authorities on the accuracy of their opinion; but the prisoners were afterwards executed. 5 Ev. Col. Stat. Cl. 6. p. 244. note (17). 2d ed. and see 1 Russ. C. & M. 801.

A general conviction of a prisoner, charged both as principal in the first degree, and as aider and abetter of other men in rape, is valid, on the count charging him as principal. And on such an indictment evidence may be given of several rapes on the same woman, at the same time by the prisoner and other men, each assisting the other in turn, without putting the prosecutor to elect on which count to proceed. *Rex v. Folkes*, R. & M. C. C. 354; and see *Reg. v. Gray*, 7 C. & P. 164.

An indictment is good which charges that A. committed a rape, and that B. was present aiding and assisting him in his commission of the felony. *Reg. v. Crisham*, 1 Car. & M. 187. In such case the party aiding may be charged either as he was in law, a principal in the first degree, or as he was in fact, a principal in the second degree. *Id.* See Arch. Crim. P. C. 481. 10th Lond. Ed.

To make a rape there must be an actual penetration or *res in re*, (as also in buggery) and therefore *emissio seminis* is indeed an evidence of penetration, but singly of itself it makes neither rape nor buggery, but it is only an attempt of rape or buggery, and is severely punished by fine and imprisonment. *Co. P. C. cap. 10. p. 59.*

But the least penetration maketh it rape or buggery, yea altho there be not *emissio seminis*. *Co. P. C. ubi supra*; the old expression was *abstulit ei virginitatem*, and sometimes *pucellagium suum*. *Bract. Lib. III. (e).*

And therefore I suppose the case in my lord Coke's 12 *Rep. 36. 5 Jac.* that saith, there must be both, *viz. penetratio & emissio seminis* to make a rape or buggery, is mistaken, and contradicts what he saith in his pleas of the crown; and besides, it is possible a rape may be committed by some, *quibus virgæ erectio adsit, & emissio seminis ex quodam defectu desit*, as physicians tell us.

If *A.* actually ravish a woman, and *B.* and *C.* were present, aiding, and abetting, they are all equally principal, and all subject to the same punishment both at common law and since the statute of *Westm. 2. de quo infra*.

It appears by *Bracton ubi supra*, that in an appeal of rape it was a good exception, *quod ante diem & annum contentas in appello habuit eam ut concubinam & amicam, & inde ponit se super patriam*, and the reason was, because that unlawful cohabitation carried a presumption in law, that it was not against her will.

But this is no exception at this day, it may be an evidence of an assent, but it is not necessary that it should be so, for the [629] woman may forsake that unlawful course of life.

But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract. [3]

A. the husband of *B.* intends to prostitute her to a rape by *C.* against her will, and *C.* accordingly doth ravish her, *A.* being present, and assisting to this rape: in this case these points were resolved, 1. That this was a rape in *C.* notwithstanding the husband assisted in it, for tho in marriage she hath given up her body to her husband, she is not to be by him prostituted to another. 2. That the husband being present, aiding and assisting, is also guilty as a principal in rape, and therefore, altho the wife cannot have an appeal of rape against her husband, yet he is indictable for it at the king's suit as a principal. 3. That in this case the wife may be a witness against her

(e) *De corona, cap. 28. f. 147 b.*

[3] A man having connexion with a woman under a deceit practised on her, she supposing him to be her husband, is not guilty of the offence of rape. *Rex v. Jackson, R. & Ry. 487*; *Rex v. Saunders, 8 Car. & P. 265*; *Rex v. Williams, Id. 286*. He might, however, be convicted of an assault under 7 Wm. IV. & 1 Vict. c. 85. s. 11; *Reg. v. Stanton, 1 Car. & Kir. Rep. 415*; *Hays v. The People, 1 Hill's N. Y. Rep. 351*; *The People v. Metcalf, 1 Wheeler's Cr. Cas. 378. 381.*

husband; and accordingly she was admitted, and *A.* and *C.* were both executed. 8 *Car.* 1. *Casus comitis Castlehaven.*(*f*)[4].

If *A.* by force take *B.* and by force and menace compel her to marry him, and then with force *A.* hath the carnal knowledge of *B.* against her will, tho this marriage be voidable, yet it is not so simply void as to enable her to maintain an appeal of rape against *A.* for she may by her consent affirm this voidable marriage, and therefore in the like case, *Rot. Parl.* 15 *H.* 6. n. 15. there was a special act of parliament to enable the lady *Isabel Butler* to bring an appeal of rape against *William Pull* in that case notwithstanding that marriage; but that marriage had been dissolvable by a declaratory sentence in court christian, because obtained by a plain force; and if such a dissolution of the marriage had been obtained, then it seems to me, that, if the carnal knowledge of her were forcible and against her will as well as the marriage, that rape was punishable as well by appeal at the suit of the lady, as by indictment at the suit of the king, without the aid of an act of parliament, for it was really a rape, only the marriage *de facto* was an impediment of its punishment so long as *de facto* the marriage continued, but now that [630] impediment being removed by the declaratory sentence, and the marriage made void *ab initio*, it is all one as if it had never been, and tho relation be a legal fiction and *intenta ad unum*, yet in this case the marriage and carnal knowledge being one intire act of force, and consecutive one upon another, in the real effect of that first force, it shall remain punishable as if there had been no marriage at all; but the statute of 3 *H.* 7. cap. 2.(*g*) hath provided a remedy in this case, so that this difficulty need not come in question.

An infant under the age of fourteen years is presumed by law unable to commit a rape, and therefore it seems cannot be guilty of it, and tho in other felonies *malitia supplet ætatem* in some cases as hath been shewn, yet it seems as to this fact the law presumes him impotent, as well as wanting discretion.[5]

But he may be a principal in the second degree, as aiding and assisting, tho under fourteen years, if it appear by sufficient circumstances, that he had a mischievous discretion, as well as in other felonies.[6]

Thus far of the nature of rape, and who may be culpable of it. Now we will consider upon whom it may be committed, and some other considerations touching this fact.

(*f*) See *Hut.* 115. *Rush. Coll.* Vol. II. p. 93.—101. *State Tr.* Vol. I. p. 366. 12 *Mod.* 340.

(*g*) By this statute a forcible taking away and marrying a woman against her will is made felony.

[4] 1 *Russ. on O. & M.* 676. 3d. Ed.

[5] See *Com. v. Lanigan*, 2 *Bost. Law Reporter*, 49. Per *Thatcher, J.*; *Rex v. Bromlow*, 2 *Mood. C. C.* 122; *Rex v. Groomridge*, 7 *Car. & Pay. R.* 562; *Best on Presump.* 22; *Reg. v. Phillips*, 8 *Car. & Pay.* 736; *Rex v. Jordan*, 9 *Id.* 118; see *vide Com. v. Green*, 2 *Pick. R.* 380; *ante* p. 26. note.

[6] *Lord Audley's case*, 3 *How. St. Tr.* 419; *Rex v. Eldersham*, 3 *Car. & P.* 391.

It was doubted, whether a rape could be committed upon a female child under ten years old, *Mich. 13 & 14 Eliz. Dy. 304. a.* By the statute of 18 *Eliz. cap. 7.* it is declared and enacted, "That if any person shall unlawfully and carnally know and abuse any woman-child under the age of ten years, it shall be felony without the benefit of clergy."

My lord *Coke* adds the words, *either with her will or against her will*, as if were she above the age of ten years, and with her will, it should not be rape; but the statute gives no such intimation; only declares that such carnal knowledge is rape.

And therefore it seems, if she be above the age of ten [631] years and under the age of twelve years, tho she consent, it is rape. 1. Because the age of consent of a female is not ten but twelve. 2. By the statute of *Westm. 1 cap. 13. Roy defend, que nul ne ravise ne prigne a force damsel deins age, ne per son gree ne sans son gree*; and my lord *Coke* in his exposition upon that statute(*h*) declares, that these words *deins age* must be taken for her age of consent, *viz.* twelve years, for that is her age of consent to marriage, and consequently her consent is not material in rape, if she be under twelve years old, tho above ten years old, altho those words are by some mistake crept into my lord *Coke's* definition of rape, *Co. P. C. cap. 11.* but if she be above the age of twelve years, and consenting at the time of the fact committed, it is not felony. [7]

(*h*) 2 *Instit.* 182. See 4 *Bl. Com.* 212.

[7] Attempting to carnally know and abuse a girl between the ages of ten and twelve, is not an assault, if the girl consents to all that is done, but is a misdemeanor. *Reg. v. Martin*, 9 *Car. & P.* 213; 2 *Mood. C. G. R.* 123. The person making such attempt, with the consent of the girl, is not indictable for an assault, but is indictable for the misdemeanor of attempting to commit the misdemeanor of carnally knowing and abusing her. *Ib.* On an indictment for attempting to carnally know and abuse a girl under ten years of age, with a count for a common assault, the attempt was proved, but it could not be shown that the child was under ten years of age, and it also appeared that no violence was used by the prisoner, and no actual resistance made by the girl: *Held*, that although consent on the part of the girl would put an end to the charge of assault, yet there was a great difference between consent and submission, and that, although in the case of an adult submitting quietly to an outrage of this kind, would go far to show consent, yet, that in the case of a child, the jury should consider whether the submission of the child was voluntary on her part, or was the result of fear, under the circumstances in which she was placed. *Reg. v. Day*, 9 *Car. & P.* 722.

Where the prisoner decoyed a female child into a building for the purpose of ravishing her, and was there detected, while standing within a few feet of her, in a state of indecent exposure, it was held, that though there was no evidence of his having actually touched her, he was properly convicted of an assault with intent to ravish. *Hays v. The People*, 1 *Hill's N. Y. Rep.* 351. *Reg. v. Neale*, 1 *Car. & Kir.* 591. *Archb. Crim. Pl.* 484. 10th *Lon. Ed.*

An indictment in the first count charged the defendant with having assaulted "*E. R.*, an infant, above the age of ten years, and under the age of twelve years," with intent to carnally know and abuse her; and in the second count charged that the defendant "unlawfully did put and place the private parts of him, the said *T. M.* against the private parts of her, the said *E. R.* and did then and there unlawfully attempt and endeavour to carnally know and abuse her, the said *E. R.*" *Held*, that the second count was bad, as it did not allege that *E. R.* was between the ages of ten and twelve: *Held* also, that the words "the said *E. R.*" merely meant that she was the person as mentioned in the first

But if she were above the age of twelve years, and consented upon menace of death, if she consented not, this is not a consent to excuse a rape. 5 *E.* 4. 6. *a.* *Dalt. cap.* 107 (*i*)

And therefore that opinion of Mr. *Finch* cited by *Dalton ubi supra*, and by *Stamford, cap.* 14. *fol.* 24. out of *Britton*, that it can be no rape, if the woman conceive with child, seems to be no law; *mulier enim vi oppressa concipere potest.*

If the woman consented not at the time of the rape committed, but consented after, she shall not have an appeal of rape by the statute of *Westm. 2. cap.* 34. but yet the king shall have the suit by indictment, and by the statute of 6 *R.* 2. *cap.* 6. if she have a husband, he shall have an appeal, and if she have none, then her father or other next of blood shall have an appeal of such rape; and by the same statute as well the ravisher as the ravished, that so assented, are disabled to have any dower, inheritance or jointure; and the next of blood of such ravisher or assenting ravished, to whom their lands should revert, remain or fall after their death, shall enter upon the same, and hold it as an estate of inheritance.

But an assent after through menace of death is not such an assent, as incurs this penalty; *quod vide* 5 *E.* 4. 6. *a.*

As in other felonies, so in this there are or may be accessories *before* and *after*, for tho this be a felony by act of parliament, that speaks only of those that commit the offense, yet consequentially and incidentally accessories *before* and *after* are included, and so in every new statute making a felony without speaking of accessories *before* or *after*: *Co. P. C. cap.* 10. *p.* 59. and so in buggery.

And note, that at the time of the making of the statute of 13 *E.* 1.

(*i*) *New Edit. cap.* 160. *p.* 524.

count, but that those words did not impart into the second count the description of *E. R* with respect to her age. *Reg. v. Martin*, 9 *Car. & P.* 215. A count charging *A.* with a rape, as a principal in the first degree, and *B.* as a principal in the second degree, may be joined with another count, charging *B.* as principal in the first degree, and *A.* as principal in the second degree. *Rex v. Gray*, 7 *Car. & P.* 164.

The first count of an indictment charged an assault with intent to ravish: the second a common assault. The record went on to state that the jury found the defendant guilty of the misdemeanor and offence in the said indictment specified, in manner and form as by the said indictment is alleged against him, and the judgment was imprisonment and hard labour: *Held*, on writ of error, that the "misdemeanor" was *novem collectivum*, and that the finding of the jury was in effect, that the defendant was guilty of the whole matter charged, and that the judgment was therefore warranted by the verdict. *Rex v. Powell*, 2 *B. & Adol.* 75.

The words "forcibly and against the will," are necessary in the indictment. See *Reg. v. Stanton*, before cited, *p.* 628, though in *Pennsylvania* it has been held in the case of *Harmon v. The Com.* 12 *Ser. & R.* 69, (*Acc. Com. v. Bennett*, 2 *Virg. Cas.* 235;) that their omission was not fatal, when it was charged that the defendants "feloniously did ravish and carnally did know her." Where an indictment for a rape charged that the defendant "with force and arms, &c. in and upon one *Mary Ann Taylor*, in the peace of the State, &c. violently and feloniously did make an assault, and her the said *Mary Ann Taylor*, then and there violently and against her will, feloniously did ravish and carnally know," it must be shown with certainty that *Mary Ann Taylor* was a female. *The State v. Farmer*, 4 *Iredell, R.* 224.

rape was not felony, for it had long continued under the nature only of a misdemeanor and not a felony, and therefore it is not at this day inquirable in a leet, because it is a felony newly created. 6 H. 7. 4. b. 22 E. 4. 22. a.

The regular means of bringing this offense to judgment was either at the suit of the king by indictment, or at the suit of the party by appeal.

The indictment ought to have these ingredients. 1. It must be *felonice*. 2. It must be *rapuit & carnaliter cognovit*. 3. It must conclude *contra formam statuti* 13 & 14 Eliz. Dy. 304. a. See *ante p. 628. note*.

It may be prosecuted by indictment at any time, *for nullum tempus occurrit regi*.

An appeal of rape lies for the party ravished, and if she consent after the rape, she is barred of her appeal, and her husband, if married, or the next of kin, if single, may have the appeal by the statute of 6 R. 2. cap. 6.[8]

If the next of kin were the ravisher, his next of kin shall have the appeal by the equity of the statute of 6 R. 2. 28. H. 6. Coron. 459.

As to the appeal of the party ravished two things are necessary, 1. That she make fresh discovery and pursuit of the offense and offender, otherwise it carries a presumption that her suit is but malicious and feigned; this *Bracton* at large describes *Lib. III. cap. 28. f. 147.*

a. Cum igitur virgo corrupta fuerit & oppressa, statim cum factum recens fuerit cum clamore & lutesio debet accurrere ad villas vicinas, & ibi injuriam sibi illatam probis hominibus ostendere, sanguinem & vestes suas sanguine tinctas & vestium scissuras, & sic ire debet ad præpositum hundredi & ad servientem domini regis, & ad coronatores & vicecomitem, & ad primum comitatum faciat appellum,

[633] &c. 2. That the appeal be speedily prosecuted, for it seems, that a year and a day be not allowed in this appeal, but some short time, tho it be not defined in law what time, but lies much in the discretion of the court upon the circumstances of the fact, yet the statute of *Westm. 1. cap. 13.* allowed but forty days: long delay of prosecution in such a case of rape always carries a presumption of a malicious prosecution. 3. If the wife hath once consented after, her appeal is barred.

By the statute of 18 Eliz. cap. 7. the principals in rape are ousted of clergy, whether they be principals in the first degree, viz. he that committed the fact, or principals in the second degree, viz. present aiding, and assisting; but accessaries *before* and *after* have their clergy.[9]

Touching the evidence in an indictment of rape given to the grand jury or petit jury.[10]

[8] Appeal for rape is now abolished. See 59 Geo. III. c. 46. 4 Steph. Com. 385.

[9] Abolished by 7 & 8 Geo. IV. c. 29. See 4 Steph. Com. 121.

[10] The fact of the woman having made a complaint after the commission of the alleged rape is evidence, but not, it seems, the particulars of such complaint: *R. v. Walker*,

The party ravished may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury, and is more or less credible according to the circumstances of fact that concur in that testimony.

2 *Moo. & Rob.* 212; 1 *Russ. C. & M.* by *Greaves*, 3d ed. 689, even though the woman is dead; *Reg. v. Megson*, 9 *C. & P.* 420. And where the woman is absent, it is not allowable to prove that she made a complaint soon after the alleged rape; for such evidence is merely confirmatory of the story of the woman, and no part of the *res gestæ*. *Reg. v. Guttridge*, 9 *C. & P.* 471.

The defendant may give evidence of the woman's notoriously bad character, for want of chastity or common decency, or that she had before been connected with the prisoner himself; but he cannot give evidence of any other particular facts to impeach her chastity. *Rex v. Hodgson*, *R. & R.* 211; 1 *Phil. Ev.* 190; *Rex v. Clarke*, 2 *Stark*, 243. So what she herself said so recently after the fact, as to preclude the possibility of her being practised, has been holden to be admissible in evidence as a part of the transaction, but the particulars of her complaints are not evidence of the truth of her statements. *Rex v. Brazier*, 1 *East's P. C.* 444; *Rex v. Clarke*, 2 *Stark*, 241. The woman, however, is not compellable to answer whether she had any connexion with other men, or with a particular person named; nor is evidence of her having had such connexion admissible. *Rex v. Hodgson*, *R. & R.* 211.

On the trial of an indictment for rape, it was held that the prisoner's counsel might ask the prosecutrix the following questions, with a view to contradict her, "Were you not, &c. (since the time of the alleged offence) walking in *High street*, at *Oxford*, to look out for men?" "Were you not on, &c. (since the time of the alleged offence) walking in *High street* with a woman reputed to be a common prostitute?" It was also held, that evidence might be adduced by the prisoner to show the general light character of the prosecutrix, and that general evidence might be given of her being a street walker; but *semble*, that evidence of specific acts of criminality by her, would not be admissible. *Rex v. Barker*, 3 *C. & P.* 589; *Rex v. Martin*, 6 *C. & P.* 562.

The party grieved is so much considered as a witness of necessity, in this as in other personal injuries, that if one man assist another man to ravish his own wife, she is admissible as a witness against him. *Lord Audley's case*, 3 *Howell's St. Tr.* 419, cited in 1 *East's P. C.* 444.

Punishment.—By the 9 *Geo. IV. c. 31. s. 16*, this offence was punishable with death; but now by the 4 & 5 *Vict. c. 56. s. 3*, reciting the 9 *Geo. IV. c. 31. ss. 16 & 17*, it is enacted, "That from and after the commencement of this act (1st October, 1841) if any person shall be convicted of any of the said offences hereinbefore last specified, such person shall not be subject to any sentence, judgment, or punishment of death, but shall, instead of the sentence or judgment in and by the said act hereinbefore last recited, ordered to be given or awarded against such persons convicted of the said last mentioned offences, or any of them respectively, be liable to be transported beyond the seas for the term of his natural life." As to punishment of accessaries, see 9 *Geo. IV. c. 31. s. 31*.

Evidence.—A prisoner may be convicted of rape, upon the unsupported evidence of an infant under years of discretion, if the jury are satisfied that the evidence is such as to leave no reasonable doubt of the prisoner's guilt. *Anon.* 1 *Russ. C. & M.* 556. In cases of carnal knowledge of children, the infant witness, though under seven years of age, if advised of the nature of an oath, must be sworn. *Rex v. Brazier*, 1 *Leach, C. C.* 199; 1 *East, P. C.* 443. And see *Rex v. Dunnell*, 1 *East, P. C.* 442.

A prisoner was charged with carnally abusing a child under ten years old, on *February 5, 1832*. To prove the child under ten years old, an examined copy of the register of her baptism, on *February 9, 1822*, was put in, and the child's father stated that he left his house about a week before the 9th of *February, 1822*, his wife not being then confined, and that on his return on that day, he found this child, and was told by his wife's mother that it had been born on the day before: *Held*, that this was not sufficient evidence of the child's being under ten years old. *Rex v. Wedge*, 5 *Car. & P.* 298.

On the trial of an indictment for a rape, the prosecutrix may be asked, whether previously to the commission of the alleged offence, the prisoner had not intercourse with her by her own consent. *Rex v. Martin*, 6 *Car. & P.* 562. A defendant will be acquitted

For instance, if the witness be of good fame, if she presently discovered the offense made pursuit after the offender, shewed circumstances and signs of the injury, whereof many are of that nature, that only women are, the most proper examiners and inspectors, if the place, wherein the fact was done, was remote from people, inhabitants or passengers, if the offender fled for it; these and the like are concurring evidences to give greater probability to her testimony, when proved by others as well as herself.

But on the other side, if she concealed the injury for any considerable time after she had opportunity to complain, if the place, where the fact was supposed to be committed, were near to inhabitants, or common recourse or passage of passengers, and she made no outcry when the fact was supposed to be done, when and where it is probable she might be heard by others; these and the like circumstances carry a strong presumption, that her testimony is false or feigned.

If the rape be committed upon a child under twelve years [634] old, whether or how she may be admitted to give evidence may be considerable. (*)

(*) For she might at that age maintain an appeal *pro raptu*, Pasch. 33. E. 1. Rot. 16. in dorso. London. Coram Rege. James Pochin merchant was attached, and brought Coram Rege to answer to Isabel daughter of Emma de Langeleye de raptu & pace regis fractâ, who appeal'd him after this manner, *per quendam narratorem suum dicens*,—*Isabella filia Emme de Langeleye, de ætate novem annorum & dimidii dicit, quod prædictus Jacobus die dominicâ proximâ post festum sancti Martini, anno R. R. E. 33, apud London in altâ stratâ regis ex opposito ecclesiæ sancti Benedicti de Scherhog horâ vespertinâ ipsam Isabellam cepit, & in quâdam tabernâ suâ portavit, & contra pacem domini regis cum eâ concubuit, & virginitatem suam rapuit; & petit quod justitarii domini regis super hoc sibi faciant justitiam & remedium. Et queritur, quod prædicta transgressio sibi facta fuit die & anno prædictis ad dampnum ipsius Isabellæ centum librarum, &c. Et prædictus Jacobus venit, & defendit omnem feloniam, raptum, &c. Et petit allocutionem de appello ipsius Isabellæ, desicut ipsum Jacobum per verba in appello usualia, & necessaria, ac convenientia, non appellat. Et quia constat curiæ quod appellum, &c. insufficient est, consideratum est, quod prædicta Isabella committatur marescallo; & postea ei remittitur prisona, & prædictus Jacobus quoad appellum ipsius Isabellæ est imperpetuum quietus, &c.* He was then arraigned at the king's suit *de raptu prædicto*, and was tried, and convicted; but the king afterwards remitted prædicto Jacobo *judicium vite & membrorum*; & quod faciat redemptionem pro delicto prædicto, & finem fecit cum domino rege per centum libras.

in an indictment for an assault with intent to ravish, if the evidence amounts to proof of an actual rape. *Rex v. Harmwood*, 1 Russ. C. & M. 563, 564; 1 East, P. C. 411. Under an indictment for an assault with intent to commit a rape, the defendant may impeach the prosecutrix's character for chastity, by general but not particular evidence. *Rex v. Clarke*, 2 Stark, 241. But the character of the prosecutrix as to general chastity, may be impeached by general evidence. *Ib.* The fact of her making complaint of the outrage, and the state in which she was at the time of making the complaint, are evidence. *Ib.*

On an indictment for an assault with an intent to commit a rape, evidence that the prisoner, on a prior occasion, had taken liberties with the prosecutrix, is not receivable to show the prisoner's intent. *Rex v. Lloyd*, 7 Car. & P. 318. In order to convict on a charge of assault, with intent to commit a rape, the jury must be satisfied, not only that the prisoner intended to gratify his passions on the person of the prosecutrix, but that he intended to do so at all events, and notwithstanding any resistance on her part. *Ib.*

In an indictment for a rape, the deposition of a girl taken before the committing magistrate and signed by him, may, after her death, be read in evidence at the trial of the prisoner, although it was not signed by her, and she was under twelve years of age, provided she was sworn, and appeared competent to take an oath, and all the facts necessary to complete the crime may be collected from her testimony so given in evidence. *Rex v. Flemming*, 2 Leach, C. C. 854; 1 East, P. C. 440.

It seems to me, that if it appear to the court, that she hath that sense and understanding that she knows and considers the obligation of an oath, tho she be under twelve years, she may be sworn; thus we find it done in case of evidences against witches, an infant of nine years old was sworn. *Dalt: cap. 111: p. 297.(k)*

But if it be an infant of such tender years, that in point of discretion the court sees it unfit to swear her, yet I think she ought to be heard without oath to give the court information, tho singly of itself it ought not to move the jury to convict the offender, nor is it in itself a sufficient testimony, because not upon oath, without concurrence of other proofs, that may render the thing probable; and my reasons are, 1. The nature of the offense, which is most times secret, and no other testimony can be had of the very doing of the fact, but the party upon whom it is committed, tho there may be other concurrent proofs of the fact when it is done. 2. Because if the child complains presently of the wrong done to her to the mother or other relations, their evidence upon oath shall be taken, yet it is but a narrative of what the child told them without oath, and there is much more reason for the court to hear the relation of the [635] child herself, than to receive it at second-hand from those that swear they heard her say so; for such a relation may be falsified, or otherwise represented at the second-hand, than when it was first delivered.

But in both these cases, whether the infant be sworn or not, it is necessary to render their evidence credible, that there should be concurrent evidence to make out the fact, and not to ground a conviction singly upon such an accusation with or without oath of an infant.

For in many cases there may be reason to admit such witnesses to be heard, in cases especially of this nature, which yet the jury is not bound to believe; for the excellency of the trial by jury is in that they are the triers of the credit of the witnesses as well as the truth of the fact; it is one thing, whether a witness be admissible to be heard, another thing, whether they are to be believed when heard.

It is true rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.

I shall never forget a trial before myself of a rape in the county of *Sussex*.

There had been one of that county convicted and executed for a rape in that county before some other judges about three assizes before, and I suppose very justly: some malicious people seeing how easy it was to make out such an accusation, and how difficult it was for the party accused to clear himself, furnished the two assizes

following with many indictments of rapes, wherein the parties accused with some difficulty escaped.

At the second assizes following there was an antient wealthy man of about sixty-three years old indicted for a rape, which was fully sworn against him by a young girl of fourteen years old, and a concurrent testimony of her mother and father, and some other relations. The antient man, when he came to his defense, [636] alledged that it was true the fact was sworn, and it was not possible for him to produce witnesses to the negative; but yet, he said, his very age carried a great presumption that he could not be guilty of that crime; but yet he had one circumstance more, that he believed would satisfy the court and the jury, that he neither was nor could be guilty; and being demanded what that was, he said, he had for above seven years last past been afflicted with a rupture so hideous and great, that it was impossible he could carnally know any woman, neither had he upon that account, during all that time carnally known his own wife, and offered to shew the same openly in court; which for the indecency of it I declined, but appointed the jury to withdraw into some room to inspect this unusual evidence; and they accordingly did so, and came back and gave an account of it to the court; that it was impossible he should have to do with any woman in that kind, much less to commit a rape, for all his bowels seemed to be fallen down in those parts, that they could scarce discern his privities, the rupture being full as big as the crown of a hat, whereupon he was acquitted.

Again, at *Northampton* assizes, before one of my brother justices upon the *Nisi prius*, a man was indicted for the rape of two young girls not above fourteen years old, the younger somewhat less, and the rapes fully proved, tho' peremptorily denied by the prisoner, he was therefore to the satisfaction of the judge and jury convicted; but before judgment it was most apparently discovered, that it was but a malicious contrivance, and the party innocent; he was therefore reprieved before judgment.

I only mention these instances, that we may be the more cautious upon trials of offenses of this nature, wherein the court and jury may with so much ease be imposed upon without great care and vigilance; the heinousness of the offense many times transporting the judge and jury with so much indignation, that they are over hastily carried to the conviction of the person accused thereof, by the confident testimony sometimes of malicious and false witnesses.

CHAPTER LIX.

CONCERNING THE FELONY DE UXORE ABDUCTA SIVE RAPTA CUM
BONIS VIRI, SUPER STATUTUM WESTM. 2 CAP. 34.

THE words of the statute arē, *De mulieribus abductis cum bonis virorum suorum habeat rex sectam de bonis sic asportatis.*

This part of the statute hath affinity with what goes before in the same statute concerning rape; and tho this learning hath been long antiquated, yet it is of use to be known.

If a wife goes away of her own consent with another man, and takes with her the goods of the husband, this seems to be felony neither in the man nor in the wife, tho *Dalt. cap. 108. p. 266. (a)* takes it to be a felony in the man that takes her and the goods; but it is a trespass, for which at common law the husband may have an action of trespass, *quare uxorem suam cepit & abduxit cum bonis viri.*

But if *A.* take the wife of *B.* against her will with the goods of her husband, but doth not actually ravish the wife, it is felony as to the goods, for which the party may be indicted; but as to the taking away of the wife it is but a trespass, for which the husband may have his action of trespass at common law, *quare uxorem suam rapuit & eam cum bonis & catallis ad valent', &c. abduxit & adhuc detinet*, and in that action shall recover damages for the taking of his wife and goods at common law.

But it should seem, that he might have his action grounded upon the statute of *Westm. 2.* which differs only in this from a trespass at common law, 1. That the trespass at common law is *pone per vados*, &c. but this is *attachies*, 14 *H. 6. 2 b.* Again, 2. The writ at common law is general, but this upon the statute concludes *contra formam statuti*, quod vide *Fitz. N. B. 89. [638] 9 H. 6. 2 a.*

But without question, if the wife were actually ravished and the goods taken, this action lies for the husband, and he shall recover damages for the rape as well as the goods, tho the wife were dead or divorced after the rape. 44 *Assiz. 13. 47 E. 3. Action sur statute 37.*

And it seems such an action was antiently in the nature of an appeal of rape and robbery grounded upon the statute of *Westm. 2.*

And by the antient law the defendant being convicted in a writ founded upon this statute, as before, was to have judgment of death, which appears most evidently by the ordinance of parliament, *Rot. Parl. 8 E. 2 M. 3.* and afterwards sent by *Mittimus* into the king's bench, *T. 11 E. 2. Rot. 4. London*, which recites, that in such case

the defendant was notailable, *Eo quod idem implacitatus, si hujusmodi transgressione convictus fuisset, suspensioni adjudicari deberet*, and therefore provides, that the defendant, if of good fame, shall be bailed.

And according to this are the books 13 *Assiz.* 5. 15 *E. S. Ullagarie* 49. *Coron.* 122. 18 *E. 3.* 32. *a.* and a case of a vicar cited to be 13 *E. 2.* who had his clergy in this case, but it should seem it was intended, 1. When a rape was actually committed, *vide* 44 *Assiz.* 13. and 2. When the action was grounded upon the statute, and not barely at common law.

But the law hath been long disused to give a capital judgment upon this writ, and in process of time nothing, as it seems, was recovered but damages, tho the writ were brought upon the statute, for *rapuit* is now intended of a simple taking. 9 *Eliz. Dy.* 256. *b.* 2 *Co. Instit.* 435. *super Westm.* 2 *cap.* 34. 43 *E. 3.* 23. *a.*

And it seems the law was accordingly taken, for the statute of 6 *R. 2. cap.* 6. gives an appeal to the husband for the rape of his wife in some cases, which it needed not have done, if by the law, as it was then used, the husband might upon such a writ convict the party, and obtain judgment of death against him.

And besides, it was very inconvenient, that in a civil [639] action formed for damages, and that wants the material terms of law to express a felony, (namely *carnaliter cognovit* and *felonice*) judgment of death should be given, and so this course expired of itself. (1)

[1] The offence of abduction may be divided into two clauses—first, the forcible taking away of a woman on account of her fortune, with intent to marry her or defile her; and secondly, the unlawful abduction of a girl under the age of sixteen from her parents or guardians.

The 9 *Geo. IV. c.* 31. *s.* 19. enacts, "That where any woman shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate, or shall be an heiress, presumptive, or next of kin to any one having such interest, if any person shall, from motives of lucre, take away or detain such woman against her will, with intent to marry or defile her, or to cause her to be married or defiled by any other person; every such offender, and every person counselling, aiding or abetting such offender, shall be guilty of felony, and being convicted thereof, shall be liable to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding four years." And the act repeals the 3 *Hen. VII. c.* 2; 39 *Eliz. c.* 9; and 3 *Edw. I. c.* 13; 1 *Geo. IV. c.* 115; as also so much of 6 *Rich. st.* 1. *c.* 6. as relates to ravishers, and to women ravished.

It is not necessary, as was the case under the prior statutes, that an actual marriage or defilement should take place. Under the present act, the taking or detaining, for the purpose of lucre, coupled with an intent to marry or defile, constitutes the offence. The taking must be against the will of the woman. It seems, however, that although it be with the will of the woman, yet if that be obtained by fraud practised upon her, the case will be within the act. *Wakefield's case, Lancaster, March Assizes, 1827; Desc. C. Law, 4.* It is no excuse that the woman was at first taken away with her own consent, if she afterwards refuse to continue with the offender, because if she so refuse she may from that time as properly be said to be taken against her will, as if she had never given any consent at all; for till the force was put upon her, she was in her own power. 1 *Hawk. c.* 41. *s.* 7; 1 *Russ.* 571. Moreover, the detaining against her will is an offence. It seems also, it is not material whether a woman so taken contrary to her will, at last consent thereto or not, if she were under the force at the time, for the offence is complete at

the time of taking. *Fullwood's case*, *Cro. Car.* 488; *Sevendon's case*, 5 *St. Tr.* 459; *Hawk. c.* 41. s. 8.

It will be observed that the above enactment expressly makes accessories before the fact liable as principals, which was a doubtful point under the prior statutes.

The indictment must set forth that the woman taken away had the property, or that she was heiress presumptive, &c. as required by the act, in order to show defendant's interested motives. *Moulin v. Sir G. Dallison*, *Cro. Car.* 484. The place and manner of taking must also be set forth in the proceedings. *Id. ibid.* It must also be alleged, that the taking was against her will, and that it was for lucre, (*Burton v. Morris*, *Hob.* 182; 1 *Hawk. c.* 41. s. 5;) and with an intent to marry or defile.

To sustain the indictment, the prosecutor should look to the averments in it, and prove them accordingly, and in the order stated in such indictment, as that the woman was possessed of the real or personal estate, or was the heiress presumptive, or next of kin to some one having the property required by the act. It should be proved that the defendant, from motives of lucre, took away or detained the person mentioned in the indictment, against her will, and the jury ought not to convict the prisoner unless they are satisfied that the prisoner committed the offence from motives of lucre; but evidence of expressions used by the prisoner respecting the property of the lady, such as his stating that he had seen the will of one of her relatives, (naming him) and that she would have £220 a year, are important for the consideration of the jury in coming to a conclusion whether the prisoner was actuated by motives of lucre or not. *Reg. v. Barratt*, 9 *Car. & P.* 387.

A prisoner was taken into custody at the house of his brother, on a charge of abduction. When he was taken, a letter was found in a writing desk, in the room where he and his brother were. The letter was directed to a person in the neighbourhood of the prisoner's late residence. The police officer was going to open it, when the prisoner told him it had nothing to do with the business he had come about; *held*, that the letter was receivable in evidence on the trial of the prisoner for the abduction. *Id.*

The party injured, though the force continued till the time of the marriage, will be a good witness for or against the offender, because she is not his wife *de jure*, and may herself swear to the compulsion. *Sevendon's case*, 5 *Harg. St. Tr.* 456; *Brown's case*, 1 *Ventr.* 243; *Fullwood's case*, *Cro. Car.* 488; *Rex v. Parry*, 1 *Hawk. c.* 41. s. 13; 1 *Greenl. Ev. s.* 343.

But some writers seem to think that where the actual marriage was good in consequence of a subsequent consent, the wife cannot be sworn; though the better opinion seems to be that the offender should not be allowed to take advantage of his own wrong, and that the act of marriage, which is the completion of his offence, should not be construed to disqualify the witness on whose testimony he may be convicted. 4 *Bla. Com.* 209; 1 *East, P. C.* 454; *Rex v. Wukefield*, *supra*.

Punishment.—This crime is a felony, and punishable accordingly with transportation for life, or for not less than seven years, or with imprisonment with or without hard labour for not more than four years. 9 *Geo. IV. c.* 31, s. 19. By sect. 31 of the same act accessories after the fact are punishable with imprisonment with or without hard labour not exceeding two years.

Abduction of Girls under sixteen.—The 9 *Geo. IV. c.* 31, s. 20, enacts, "That if any person shall unlawfully take, or cause to be taken, any unmarried girl being under the age of sixteen years out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her; every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable to suffer such punishment by fine or imprisonment, or by both as the court shall award." And the act repeals 4 & 5 *P. & M. c.* 8.

This provision was passed in order to meet those cases where the girl is of so tender an age that she might be easily imposed on, and her consent obtained. It alters the law as it stood under the 4 & 5 *P. & M. c.* 8.

An illegitimate child, appears to be within the act. *Rex v. Cornforth and others*, 2 *Str.* 1162; better reported in *Bolt*, by *Const.* *Rex v. Sweeting*, 1 *East, P. C.* 457; and see *Moritz v. Garnhard*, 7 *Watts, R.* 303, where this case is cited and approved by *Gibson, Ch. J.* The mother retains her authority though she marry again, and the assent of the second husband is not material. *Ratcliffe's case*, 3 *Rep.* 39.

But the statute extends only to the custody of the mother where the father has not disposed of the custody of the child to others. *Id.*

It seems that if the taking were with the consent of the parent or person having the charge of the child, no restriction could do away with the effect of such approval. *Calthorpe v. Artell*, 3 Mod. 169; 1 East. P. C. 457.

Under the prior act it was holden, that if a parent place a daughter under the care of another, who by collusion marries her to his own son, the case was not within the act if the marriage were solemnized in a parish church, at a canonical hour, and without any attempt at privacy. 3 Mod. 88. The principle of this case was disputed by Mr. East, who contended that it would protect a schoolmistress in disposing of the female infants under her care in marriage, when it is manifest no power of that kind is ever deputed, but is impliedly reserved by the parent. 1 East, P. C. 457.

And where a man by false and fraudulent representations, induced the parents of a girl between ten and eleven years of age to allow him to take her away, such taking away has been considered an abduction within this statute. *Reg. v. Hopkins*, 1 Carr. & M. 254.

It appears to be an offence at common law to take a child from her parents or guardians, or others entrusted with the care of her, by any sinister means, either by violence, deceit, conspiracy, or any other corrupt or improper practice, as by intoxication, for the purpose of marrying her, although she herself might have consented to the marriage. 1 East, P. C. 459; *Rex v. Twisleton*, 1 Lev. 257; *Rex v. Lord Ossulton*, 2 Stra. 1107; *Rex v. Lord Grey*, 3 St. Tr.; 3 Chit. C. L. 713; and see *Mifflin v. Com.* 5 W. & S. Rep. 461, opinion of Gibson, C. J.

No particular suggestions as to the framing the indictment are necessary. The usual allegation of the girl being unmarried is sufficient. *Rex v. Moore*, 2 Lev. 179; *Rex v. Boyal*, 2 Burr R. 832.

The prosecutor should be prepared to prove that the defendant took away the girl out of the custody of the parent or temporary guardian; that she was under sixteen years of age; that the taking was against such parent's or guardian's consent, and for which purpose any of these parties may be called.

This offence is a misdemeanor, and punishable by fine or imprisonment, or by both as the court think fit. See the 9 Geo. IV. c. 31, s. 20. See 1 Burns's Just. 29 ed. Lond. 1845, tit. "Abduction."

It appears to be the better opinion, that if a man marry a woman under age, without the consent of her father or guardian, it will not be an indictable offence at common law. 1 East, P. C. c. 11. s. 9. p. 458. But if children be taken from their parents or guardians, or others entrusted with the care of them, by any sinister means, either by violence, deceit, conspiracy, or any corrupt or improper practice, as by intoxication, for the purpose of marrying them, it appears that such criminal means will render the act an offence at common law, though the parties themselves may be consenting to the marriage. 3 Chit. Cr. Law, 713.

And seduction may be attended with such circumstances of combination and conspiracy as to make it an indictable offence. A case is reported, where Lord Grey and others were charged, by an information at common law, with conspiracy and intending the ruin of the Lady Henrietta Berkeley, then a virgin unmarried, within the age of eighteen years, one of the daughters of the Earl of Berkeley, (she being under the custody, &c. of her father,) soliciting her to desert her father and commit whoredom and adultery with Lord Grey, who was the husband of another daughter of the Earl of Berkeley, sister of the Lady Henrietta, and to live and cohabit with him: and further, the defendants were charged, that in prosecution of such conspiracy, they took away the lady Henrietta, at night, from her father's house and custody, and against his will, and caused her to live and cohabit in divers secret places with Lord Grey, to the ruin of the lady, and to the evil example, &c. The defendants were found guilty, though there was no proof of any force; but, on the contrary, it appeared that the lady, who was herself examined as a witness, was desirous of leaving her father's house, and concurred in all the measures taken for her departure, and subsequent concealment. It was not shown that any artifice was used to prevail on her to leave her father's house, but the case was put upon the ground that there was a solicitation and enticement of her to unlawful lust, by Lord Grey, who was the principal person concerned, the others being his servants, or persons acting by his command, and under his control. *Rex v. Lord Grey and others*, 3 St. Tr. 519. 1 East, P. C. c. 11. s. 10. p. 460.

The forcible abduction of a woman from motives of lucre, is an offence of the degree of felony, by the 9 Geo. IV. c. 31, which repeals several former statutes upon this subject. See this note *supra*.

Upon an indictment for abduction, on the 9 Geo. IV. c. 31. s. 19, it must be proved that the prisoner took away the woman from motives of lucre, but his expressions relative to her property are evidence that he was actuated by such motives. Upon an indictment for having feloniously, and from motives of lucre taken away and detained *M. E.* against her will, she having a future interest in certain personal property, containing a count with intent to marry, and a count with intent to defile, it appeared that the prisoner had taught *M. E.* music, and had paid his addresses to her, which were favourably received by her, but which her relatives insisted upon her breaking off, and by their advice she wrote to the prisoner to tell him that the intimacy must cease forever. One day when she was walking out, the prisoner came in a gig, got out, came behind her, and having placed his hand on her shoulder, carried her in his arms to the gig, she struggling and screaming all the time he was doing so. He then drove away with her, but was pursued and overtaken at a distance. She was cross-examined with a view to show that she had consented to the abduction. *M. E.* would, on her attaining the age of twenty-one, be entitled to the sum of £2100, and the prisoner had said that he knew that she would be entitled to £200 a year. It was contended that if the prisoner carried her off even against her own consent, to make her his wife from affection to her person, and not as the means of getting at her property, the offence was not proved. In *Rex v. Wakefield*, cited *supra*, the parties had no previous intimacy, and therefore all inducement to the act arising from real passion and affection, was out of the question, and the abduction in that instance, as well as almost every other which had been the subject of penal inquiry, could be accounted for on no other grounds than those of cold and sordid calculation to get possession of a lady's property by first obtaining possession of her person. *Parke, B.* "I agree with the learned counsel for the prisoner, that there is a great distinction between this case and the case of *Rex v. Wakefield*, as there was not in that case any previous intimacy between the parties. I also agree with him as to his argument that if all the other requisites of the statute constituting the offence are satisfied, and the evidence of the motive being the base and sordid one of lucre, is unsatisfactory or insufficient, it will be your duty to acquit the prisoner of the charge of felony. It is clearly made out that *Miss Ellis* is entitled to personal property, and that the prisoner took her away with the intention of marrying her; and I think that the other count may be entirely laid out of your consideration, as there is no evidence of it whatever. You will therefore say, whether the prosecutrix, being a lady entitled to property, the prisoner either took her away or detained her against her will with intent of marrying her but for the base purpose of getting possession of her property; and if you come to the conclusion that that was so, it will be your duty to find him guilty of the felony. With respect to the motives of the prisoner, evidence has been given of expressions used by the prisoner respecting the property of *Miss Ellis*, such as having told one of the witnesses that he had seen *Mr. Whitwell's* will, and that she would be entitled to £200 a year. These expressions are important for you to consider, in order to your forming a judgment whether the prisoner was actuated by motives of lucre or not. Unless you are satisfied that such a motive prompted him to take away the prosecutrix against her will, he is entitled to be acquitted of the felony, and you will then consider whether he used any force to her person in taking her away, and took her away against her consent; for if he did, and he is not guilty of the felony, you may under the present indictment convict him of the assault." *Reg. v. Barratt*, 9, C. & P. 387, cited *supra*.

This case also shows that if the prisoner be acquitted of the felony, he may be convicted of an assault under the 1 Vict. c. 85. s. 11, if he used force to the person of the female in taking her away. - 1 *Russ on Crimes*, 701, 702. See also the remarkable case of *Rex v. Gordon*, coram *Lawrence J. Oxford Lent Ass.* 1804, fully reported in 1 *Russ. on Crimes*, 704. 3d *London* ed.

CHAPTER LX.

OF FELONY BY PURVEYORS TAKING VICTUALS WITHOUT WARRANT.

By the statute of *Articuli super Cartas*, cap. 2. It is enacted, Si nul face prises sans garrant, & les emport encountre volunt de celui, a qe les biens sont, soit maintenant arrest per le vill, ou le prise serra fait, & amesne al prochein gaol: Et si de ceo soit atteint, soit fait de lui, come de laron, si la quantite de biens le demand.

If *A.* having no commission take goods by pretense of a commission as purveyor, and the party not knowing that he hath no commission sell and suffer him to take it, yet this is felony; but if the owner knew he had no commission, and yet willingly sell it to him as a purveyor, and he take and carry it away, this is not a carrying away against the consent of the owner to make a felony within this statute. 2 *Co. Instit. p. 546. super Articulis*, cap. 2.

This point of felony is confirmed by the statute of 18 *E. 3. cap. 7.* and 4 *E. 3. cap. 4.*

Afterwards by the statute of 5 *E. 3. cap. 2.* and 25 *E. 3. cap. 1.* "If a purveyor shall take goods above the value of twelve-pence without testimony and appraisement of the constable, or without tallies given, this is also felony."

Again, by the statute of 25 *E. 3. cap. 15.* "[640] If a purveyor take sheep and their wool betwixt *Easter* and *Midsummer*, it is felony, if he shorn them at his own house."

Again, by the statute of 36 *E. 3. cap. 2.* "If any purveyor take goods or carriage, otherwise than is contained in their commission, it is felony."

But in all these felonies the offender is not ousted of clergy, but he shall have it: *vide Co. P. C. cap. 24.*

But these acts of parliament and the punishment of purveyors is now out of date, because by the statute of 12 *Car. 2. cap. 24.* all purveyance is taken away.

Only by two subsequent acts, namely 13 *Car. 2. cap. 8.* and 14 *Car. 2. cap. 20.* there is a special purveyance of carriage settled for the king's household, and for the navy and carriage of ordnance; but the statute of *Articuli super cartas*, and the other statutes making felony in case of undue purveyance do not concern this new established purveyance, because settled in another way; and therefore I shall say no more touching this matter.

CHAPTER LXI.

CONCERNING THE NEW FELONIES ENACTED IN THE TIMES OF E. 2.
E. 3. AND R. 2.

In the times of those kings there were but few new felonies enacted other than those touching purveyors, whereof in the former chapter.

By the statute of 1 *E. 2. De frangentibus prisonam*, the law was settled in that point, whereof I have said sufficient *supra*, cap. 54.

By the statute of 14 *E. 3. cap. 10.* "If a gaoler or under keeper by too great duress of imprisonment, and by pain make any prisoner in his ward to become an appellor against his [641] will, and thereof be attaint, he shall have judgment of life and member."

These words in any act of parliament *Eit judgment de vy & member* create a felony.

This act extends to a gaoler *de facto*, tho he be not a gaoler *de jure*.

The offender hath the benefit of clergy: *vide Co. B. C. cap. 29. p. 91.* touching this felony.

By an act *Rot. Par. 17 E. 3. n. 15.* but not printed, the importation of false and evil money is prohibited under pain of life and member, and the exportation of coin or bullion prohibited under pain of forfeiture, and if the searcher be of confederacy with the exporter, it is enacted to be felony in the searcher.

If it be said this act was needless to make importation of false money felony, because declared treason by the statute of 25 *E. 3.* the answer is obvious. By the act of 17 *E. 3.* before-mentioned licence was granted to *Dutch* merchants and others to import their own coin so it were as good as sterling, and that, if they pleased, the merchants might trade between themselves with that foreign money; and it was necessary in respect of that foreign money to impose a new penalty upon the importers of false money of that kind, because *that* foreign coin was not within the statute of 25 *E. 3.*

But this seems to be but a temporary law during that special intercourse between the *English* and *Dutch*, and besides by subsequent statutes the penalty of treason is annexed to the importation of counterfeit coin made current by proclamation: *quod vide supra*, cap. 20. p. 225.

By the statute of 27 *E. 3. cap. 3.* of the staple, the exportation of wools, wool-fells, leather or lead by any *English, Irish, or Welchman*, is prohibited under pain of loss of life and member, and for-

feiture of lands and goods,^(a) but this was repealed by the statute of 36 *E. 3. cap. 11.* whereby it was enacted, that merchants denizens may pass with their wool as well as foreigners without being restrained.

But yet this was not full enough, and therefore by the [642] statute of 38 *E. 3. cap. 6.* there was a fuller repeal of the statute of 27 *E. 3.* as to the point of felony, yet the forfeiture of lands and goods continued upon merchants denizens, and the statute of the staple was confirmed in all points by 38 *E. 3. cap. 7.*

But by the statute of 43 *E. 3. cap. 1.* the staple of *Calais* was abolished, yet by 14 *R. 2. cap. 5.* exportation of wool, wool-fells, leather and lead are prohibited to denizens under pain of forfeiture of them.

By the statute of 27 *E. 3. de provisoribus, cap. 5,* ingrossing of *Gascoign* wines made felony, but that penalty repealed by the statute 37 *E. 3. cap. 16.*

So that these statutes stand now repealed.

But yet by the statute of 18 *H. 6. cap. 15.* the carrying of wool or wool-fells out of the realm to other places than to the staple of *Calais* without the king's licence is felony, excepts wools carried to the streights of *Morocco.*

This statute is supposed by my lord *Coke, P. C. cap. 32* to be in force, but that being doubted, because the staple of *Calais* then in use hath been long since abolished, a new provision and a better is made by acts of this present parliament.^(b)

But whether that act be in force or not, the offender was not thereby excluded of the benefit of clergy.

By the statute of 34 *E. 3. cap. 22.* the concealing and taking away of an hawk was two years imprisonment; but by the statute of 37 *E. 3. cap. 19.* the stealing of a faulcon, tercelet, lanner, or laneret is made felony.

See the commentary *Co. P. C. cap. 34.* where it is declared, that this act extends only to faulcons, and those of that kind.

The proof intended by this act is not by jury but by circumstances, as varvels, &c.

The offender is within benefit of clergy.

As to the laws in the time of *Richard II.*

6 *R. 2. cap. 6.* concerning the punishment of rape, *de quo satis, cap. 58.*

7 *R. 2. cap. 8.* of purveyors, *de quo supra, cap. 60.*

By the statute of 13 *R. 2. cap. 3.* " If any man bring [643] or send into this realm or the king's power any summons, sentence of excommniation against any person for the cause of making motion, assent or execution of the statute of provisors, he shall be taken, arrested, and put in prison, and forfeit all his lands, tenements, goods and chattels for ever, and incur the pain of life and

^(a) *Co. P. C. p. 95.*

^(b) 12 *Car. 2. cap. 32-13* & 14 *Car. 2. cap. 18.*

member; and if any prelate make execution of such summons, sentence or excommunication, his temporalities shall be taken and abide in the king's hands till due redress made.

"And if any person of less estate than a prelate makes such execution, he shall be taken and arrested and imprisoned, and make fine and ransom by the discretion of the king's council."

The bringing in of bulls of this nature is against the common law, and sometimes antiently punished as high treason, *vide Co. P. C. cap. 36. & libros ibi.*

But now by the statute 13 *Eliz. cap. 2.* the offense as well in the bringers in, as executors of these bulls, &c. is made high treason, as well in persons ecclesiastical as temporal.

There is nothing else in these kings reigns that enacts a new felony, only some statutes directing the process and jurisdiction, whereby felonies may be tried, as 13 *R. 2. cap. 2.* of the constable and marshal, &c.

CHAPTER LXII.

[644]

CONCERNING THE NEW FELONIES ENACTED IN THE TIMES OF H. 4.
H. 5. H. 6. E. 4.

By the statute of 5. H. 4. *cap. 4.* it is ordained, "That none from thenceforth shall use to multiply gold or silver, nor use the craft of multiplication, and if any do, he shall incur the pain of felony in this case." (a)

And the reason of this act was not, because they thought the real transmutation of metals into gold or silver was feasible, but the reason is given in the petition of the commons. *Rot. Cur. 5. H. 4. n. 63.*

Car plusers homes par colour de cest multiplication font faux monny a grand deceit du roy & damage de son people: vide tamen Co. P. C. cap. 20. dispensations granted to particular persons by 34 & 35 H. 6. for the using of this art with a *non obstante* of the statute of 5 H. 4.

The offender is to have his clergy.

And altho the statute mentions not accessories *before* or *after*, yet this statute making the fact felony doth consequentially subject accessories *before* and *after* to the penalty, tho this be made a *quære*. *Dy. 88. in Eden's case*; yet it seems now settled according to the opinion

(a) The offense prohibited by this act was not the extracting gold or silver out of lead or other metals, which is now known by the name of refining, for that is not the multiplication of gold or silver, but only a separation thereof from the coarser metal, but the design of the act was to prohibit the transmutation of one metal into another, which was pretended to be done by the philosopher's stone or elixir, whereby great numbers were bubbled and cheated; but however, because some persons were (groundlessly) afraid to exercise the art of smelting and refining metals, lest they should fall under the penalty of this statute, it was therefore repealed by 1 W. & M. *cap. 30.* provided that the gold or silver extracted by the said art be carried to the Tower of London for the making of monies, and be not otherwise disposed of.

of my lord *Coke*, *P. C. cap. 20.* that there may be accessaries to this new felony *before and after.*

By the statute of 5 *H. 4. cap. 5.* cutting the tongues or [645] putting out the eyes of the king's subjects of malice pre-pensed is enacted to be felony.

This was extended to other dismembring; as cutting off ears, by 37 *H. 8. cap. 6.* but by an act of this present parliament^(b) this and some other dismembrings are made felonies out of the benefit of the clergy.

By the statute of 3 *H. 5. cap. 1.* "If any person do make, buy, coin, or bring into the kingdom *Galli-half-pence, Suskins* or *Dodkins*, to sell, or put them in payment in this realm, it is felony."

And by the statute of 2 *H. 6. cap. 9.* If any man pay or receive the money called *Blanks*, it is also felony; but both these are within clergy, and by the whole disuser of these coins these statutes are of little use.

By the statute of 3 *H. 5. cap. 3.* it is enacted, "That proclamation shall issue, that all *Britons* depart out of the realm before the feast of *St. John Baptist* next, upon pain of loss of life and member."

But this was but a temporary law and expired.

By the statute of 3 *H. 6. cap. 1.* it is enacted, "That no congregations or confederacies be made by masons in their assemblies, whereby the good order of the statute of *Labourers* is violated; and they that cause such assemblies to be holden, shall be adjudged felons."

But the statute of *Labourers* being repealed by the statute of 5 *Eliz. cap. 4.* this law is consequentially repealed. *Co. P. C. cap. 35. p. 99.*

By the statute of 8 *H. 6. cap. 12.* it is enacted, "That if any record or parcel of the same, writ, return, panel, process, or warrant of attorney in the king's courts of chancery, exchequer, the one bench or the other, or in the treasury, be willingly stolen, taken away, withdrawn, or avoided by any clerk, or by any other person, [646] by cause whereof the judgment shall be reversed; that such stealer, taker away, withdrawer, or avoider, their procurators, counsellors, and abettors thereof indicted, and by process there-upon made, duly convict upon their own confession, or inquest there-upon taken of lawful men, half whereof shall be of men of any court of the same courts, and the other half of others, shall be judged for felons; and that the judges of the same courts, or of the one bench or the other, have power to hear and determine such defaults before them, and thereof to make due punishment, as is aforesaid."

In the consideration of this statute, it will be convenient to examine, 1. How the law stood in reference to the matters abovesaid

(b) 22 & 23 *Car. 2.* whereby the cutting out or disabling the tongue, putting out an eye, slitting the nose, cutting off a nose or lip, cutting off or disabling any limb or member, if done with an intention to maim or disfigure, is felony without benefit of clergy; upon this statute *Coke* and *Woodburne* were convicted and executed for slitting the nose of Mr. *Crispe*, 8 *Geo. I.* See *State Tr. Vol. VI. p. 212.*

before this act made. 2. What is the import of the several parts of this act.

At the common law, the undue rasure, or embezzling of a record, was a great offense, for which even a judge himself was punishable by fine and imprisonment. 2 R. 3. 10. *Hengham* a judge was fined eight hundred marks for rasing the record of a fine of thirteen shillings and four pence imposed upon a poor man, and reducing it to six shillings and eight pence.(c)

By the statute of *Westm.* 1. viz. 3 E. 1. cap. 29. it is enacted, "That if any serjeant, pleader or other, do any manner of deceit or collusion to the king's court, or consent to it in the deceit of the court, or to beguile the court or the party, and be thereof attaint, he shall be imprisoned for a year and a day, and from thenceforth shall not be heard to plead in that court."

And if he be no pleader, he shall be imprisoned in like manner, and if the trespass requires greater punishment, it shall be at the king's pleasure.(d)

Upon this act it was that *Robert de Greshope* a common attorney was imprisoned for a year and a day, and banished [647] the court of common pleas, for embezzling a part of a record, viz. T. 19 E. 1. Rot. 57. in dorso, C. B. mentioned in Co. P. C. cap. 19. p. 71. vide simile. H. 22. E. 1. Rot. 33. in dorso, Cant Coram Rege.(*)

T. 5 E. 3. Rot. 13. in dorso. Rex B. R. Thomas of Carleton convict of the rasure of the word *et* in a writ, is committed to the marshal, & *inhibitum est ei, ne amodo deserviat in officio sive servitio vicecom', periculo quod incumbit*, and this it seems was upon the same act of 3 E. 1.(e)

If a clerk had made a misentry of record, the judge, before whom it was, might, *ore tenus*, rectify that misentry, tho a considerable time after.

M. 24 E. 3. Rot. 41. Kanc. Rex. it was presented before *Richard de Kelleshull*, and his fellow justices of *oyer* and *terminer*, 18 E. 3. that one *Waresius atte Capele* had trespassed in the free warren of the earl of *Huntingdon*, and the abbot of *Battel*, and he was convicted by his own confession, and the clerk had entred the fine ten shillings. The record being sent into the king's bench, *Richard de Kelleshull* came into court, & *inspecto irrotulamento*, said, Quod

(c) *Hengham* was a judge in the reign of *Edward I.* and his fine was employed for building a clock-house at *Westminster*, and furnishing it with a clock, which made *Southcot* (one of the judges of the king's bench in the reign of queen *Elizabeth*.) when prest by the chief justice to consent to a rasure of the roll, say, that he would not do it, for he meant not to build a clock-hous. Co. P. C. p. 72.

(d) 2 Co. Instit. 213.

(*) This was the case of *Giles de Berton*, who was convict *eo quod scieniter procuravit omissionem dici in processu & recordo coram justitiariis de banco, quod coram rege venire fecit*; on account of which omission the judgment of the court of common pleas had been reversed, *pro deceptione predicta committitur marescallo, & postea finem fecit cum domino rege pro 10 solidis.*

(e) It does not appear from the record, whether the judgment was grounded on statute 3 E. 1. or on the common law.

clericus suus finem illum surreptivè & contra recordum suum intra-
vit, & dicit quòd finis ille assessus fuit per ipsum & socios suos pro
quolibet articulo ad decem libras, & sic finis ejus ejusdem *Waresii*
summatus fuit ad viginti libras, & illud expressè ore tenus hic recor-
datur, and prayed for the king, quòd finis ille secundum recordum
suum intretur in rotulis extractorum, and it was accordingly entred;
so that a judge of record is as it were a living record, and controuls
the entry of the clerk.

In the time of *Richard II.* there happened two great complaints
against the judges and clerks for the misentry of a record: the one

Rot. Par. 7 R. 2. pars 1. n. 57. for the lady *Spencer*, who
[648] pleaded to a *Quare Impedit* brought against her by the
king; but at the end of *Trinity* term last, the record of
her plea was rased in a material place to her great disadvantage,
and the judges refused to amend it, because after the term: the
answer was,

Tiel plee come les justices voillent recorder qe ent estoit pledez,
soit de novel entre en le lieu de la rasure, nient contrestean qe le
terme, en qel le dit plee fuit pled, soit ja pass, & roy voit qe celui, qe
fist la rasure, soit punish par son malfait.

The other was *Rot. Par. 7 R. 2. pars 2. n. 20.* at the complaint of
the prior of *Mountague*, That whereas in a writ of right brought
against him he prayed in aid of the king, and was ousted of aid by
the court, who entred *quæsitum est a Priore, si quid, &c.* the judg-
ment that was given was *dictum est Priori, quod respondeat sine*
auxilio; and accordingly the judges came into parliament and
agreed, that new entries should be made, as was desired by the
prior, and thereupon the prior brought a writ of error in parliament
upon the record so amended.

These occurrences did the next parliament following, *viz. 8. R. 2.*
draw on the act of *8 R. 2. cap. 4.* against the rasing of records, and
the false entring of pleas, whereby it is enacted, "That if any judge
or clerk be of default (so that by the same default ensueth disherison
of any of the parties) sufficiently convict before the king and his
council, in that way that the king and his council shall deem rea-
sonable, within two years after the default made, &c. he shall be
punished by fine and ransom at the king's will, and satisfy the
party."

Thus this act settled it, and so it stood till *8 H. 6.* but in this act
there occurred some inconveniences. 1. The way of trial before the
king and council was difficult and inconvenient. 2. The punish-
ment as to the clerks seemed too gentle. 3. It did not meet with the
inconveniences of stealing records. 4. It was found of great incon-
venience to the due administration of justice; for the judges have
often occasion upon their own memory of the record, and some-
times upon examination, to rectify undue entries, and were
[649] required in some cases to amend the misentries, or small
mistakes in records by the statute of *14 E. 3. cap. 6.* and

other statutes, which could not be done without rasures and alterations of the record and roll.

To remedy the latter of these inconveniences in the beginning of this very statute of 8 *H. 6. cap. 12.* and farther by the statute of 8 *H. 6. cap. 15.* a liberal power is given to the justices to amend records, in the pursuance of which power they were by these acts of 8 *H. 6.* protected against the dangers and severity of the act of *R. 2.*

And then this act proceeds to inflict punishment of felony against clerks and others, that willingly avoid records, &c. which penal law did not at all extend to judges upon three apparent reasons. 1. Because by this very law, judges had power upon examination to amend records. 2. Because the judges of the several courts are made the judges to hear and determine these offenses. And, 3. This clause not mentioning judges (as that of 8 *R. 2.* did,) but beginning with clerks and other persons, judges shall not be included, who are superior officers, upon the reason given in the 2 *Co. Rep. casus archiepiscopi Cant'*, and accordingly it is agreed by my lord Coke, *P. C. cap. 19. p. 72.*

Now I come to the consideration of the statute itself, wherein my lord Coke, *P. C. cap. 19.* hath made a full collection, to which I can add little.

1. It extends only to the four great courts of *Westminster*, and not to inferior courts.

But as to the *English* part of the court of chancery, it extends not, because as to the *English* proceeding it is no court of record.

But yet it seems it doth extend to those processes, that issue out of that court under the great seal, tho they be processes in order to the *English* proceeding, as *subpœna's*, attachments, commissions to examine witnesses, because these being under the great seal, are matters of record.

2. The *Treasury* is added, which doth not only extend to the records of the treasury of the courts of king's bench and common pleas, but also to the records in the receipts of the exchequer, under the custody of the treasurer and chamberlains [650] of the exchequer: and also to the records in the *Tower*, and in the chapel of the rolls, yea, and the records in the custody of the clerk of the lords house in parliament, (but not to the journals,) for those are the king's treasuries of records of the highest moment.

3. The offenses mentioned are four, *stealing, carrying away, withdrawing, or avoiding*; and this last word *avoiding* is comprehensive, for it extends to rasing, cutting off, clipping, yea, and cancelling a record.

4. But these must be done *voluntarily*, as well as *felonically*, and both these words must be contained in the indictment upon this statute.

A rasing or cancelling of a record by the order of that court in whose custody the record is, is no felony in him that doth it, nor in

the court that commands it, for the court hath a superintendence, as well over the record as over the clerks.

5. It extends not to judges for the reasons before given.

6. It must be such an embezzling or avoiding of the record, by reason whereof a judgment is reversed, and therefore it extends only to judicial records in any of those four courts or treasuries, be the judgment in a case criminal or civil.

And therefore it is equally an offense against this statute whether the avoiding, &c. be after judgment given or before, in case judgment be given after the offense; and it is held, that an outlawry, tho it be *per judicium coronatorum*, is a judgment within this statute.

If the judgment be not actually reversed by such embezzling, &c. yet if it be reversible by reason thereof, it is within this statute, 2 R. 3. 10.

And it extends not only to a reversibleness by writ of error, but a reversibleness or avoidableness of judgment by plea, by reason of such embezzling, &c. is within this statute, 2 R. 3. 10.

But what if the offense of embezzling, avoiding, or rasing, be such as goes in affirmance of the judgment, and makes it [651] good, which otherwise were reversible, if it stood as before that offense committed? tho this in some cases be punishable by the court as a misdemeanor in the clerk, yet it seems not felony within this act.

And the common practice at this day is, if the *Venire facias* or *Distringas* be erroneous, and would make the judgment erroneous, if filed, but being not filed, is aided by the statute of 18 *Eliz. cap. 14*. the court never compels the clerk to file such writs after verdict, much less punishes them for not doing it.

But if *A. B.* be sued by the original to the *exigent* and outlawed, and afterwards the *exigent* is made *C. B.* and the original is also made *C. B.* to make all agree, this is felony as well in the clerk that raseth the original, as him that raseth the *exigent*. 2 R. 3. 10.

7. If the offense riseth in two counties, then it is dispunishable. 2 R. 3. 10.

8. The trial is to be one half by the clerks of the court, and the other half by others.

9. The judges of the court of the one bench and the other are by this statute enabled to hear and determine it without any other commission, and each of these courts have a concurrent jurisdiction, and where it first begins there it is to proceed.

So that it seemeth, if the offense were in the record of the king's bench, the justices of the common bench may hear and determine the offense, if it be there first indicted.

This power is to hear and determine; the consequence whereof is, that it enables these respective courts to take indictments of these offenses; this, tho it be intrinsical to the court of king's bench, (for they swear a grand inquest and take indictments every term,) yet it is a new power in the common bench.

And altho the trial of the offense is to be by a party-jury of clerks

and others, yet the indictment may be taken either of clerks alone, or of foreigners alone, or of both, for it is only the trial that is to be by a party-jury.

In the case of *Danby* and others, 2 R. 3. 10. these points were resolved upon this statute, 1. If the offense be entirely [652] committed in the county where the court of king's bench or common pleas sit, it may be tried, heard and determined by either court without a special commission, for the act of parliament is a commission. 2. If it be committed entirely in a foreign county, or be committed in the county where the court sits, and then the court remove into another county, it must be heard and determined in the county where the fact was committed, and cannot be indicted, heard or determined in another county than where it was done. 3. That therefore in that case there must be a special commission to the justices of the one court, or to the justices of the other, to hear and determine the offense in that other county, and then they may there take the indictment and try the offender by a party-jury according to the act; but it seems, if the indictment be taken by virtue of such commission, it may be removed into the king's bench by *Certiorari*, if indicted before them, and then tried according to the direction of the act. 4. If the offense were committed in *London*, where, by privilege and charter of the city, the mayor is to be one in commission and of the *quorum*; yet in this case the mayor must not be named in the commission, but only the justices of one of the courts. 5. If the offense be mixt, and partly in *Middlesex*, where the court sits, and partly in *London*, or any other foreign county, the felony is punishable, and so it remains at this day, notwithstanding the statute of 2 & 3 E. 6. cap. 24. 6. But yet in this case the offender committing part of the offense in *Middlesex*, may be indicted of misprision of felony in *Middlesex*, or committing part of the offense in *London*, may be indicted of misprision of felony in *London*, and thereupon fined and imprisoned: and accordingly it was done by the advice of all the judges, and the parties fined, for every felony includes misprision.

And yet observe, 1. The felony was one entire felony committed in two counties, and therefore neither enquirable nor determinable in one county; for the jury of that county cannot take notice of part of the fact committed in another, and yet the mispri- [653] sion of that felony was inquirable and punishable in either county, where but part of the felony was committed, and yet the jury in that case must take notice of the entire felony, part whereof was committed in another county. 2. Altho the felony itself is by the act limited to special jurisdiction and manner of trial, yet the misprision of that felony was tried by a common jury, and before the general commissioners of *oyer and terminer* in the county where the offense was committed. In this offense the offender hath the benefit of clergy.

11 H. 6. cap. 14. It was made felony for three years to ship merchandizes of the staple in any creeks; but this is expired.

18 *H. 6. cap. 15.* Exportation of wools, other than to the staple of *Calais* or straights of *Morocco*, felony. *Vide supra, cap. 61. p. 642. & infra.*

18 *H. 6. cap. 19.* Soldiers departing from their captain without license, felony. This, together with those other statutes, of the same kind, as 7 *H. 7. cap. 1.* 3 *H. 8. cap. 5.* I shall refer to the statute of 2 *E. 6. cap. 2.* where I shall take the whole matter of soldiers departing into consideration.

28 *H. 6. cap. 4.* It is felony to take a distress in the counties and royal seignories in *Wales* or dutchy of *Lancaster*, and carry them out of the said counties, dutchy or seignories, &c. saving for the lords of fees distraining. This act was to continue only five years, and then expired.

33 *H. 6. cap. 1.* If household servants, after the death of their master, violently and riotously take and spoil the goods of their master, and the same distribute among themselves, upon complaint made by the executors, or two of them, to the chancellor, the chancellor with the advice of the chief justices and the chief baron, or two of them, shall direct writs of proclamation to the sheriff for the offenders to appear in the king's bench upon some day certain, fifteen days at least after the proclamation.

And if he appear, he shall be committed to answer the [654] suit of the executors by bill or writ; but if he appear not at the return of the writ, after proclamation so made, he shall be attaint of felony.

This statute extends to one executor, if but one, and to administrators, if no executors, to a lord keeper of the great seal, when no chancellor.

This was a process much in use in case of great offenses, especially about this king's reign, to convict men sometimes in civil offenses, sometimes in cases criminal upon default of appearance at the return of the proclamation. *Vide Stat. 5 H. 4. cap. 6. 11 H. 6. cap. 11.*

But this attainder doth not exclude the offender from clergy. *Co. P. C. cap. 43. p. 104.*

12 *E. 4. cap. 5.* All wools, woolfells, morling and shorling of *Westmoreland, Cumberland, Northumberland*, and *Durham*, to be shipped out, shall be shipped at *Newcastle upon Tyne*, and thence to *Calais* or *Middleborough*, there to be stapled and uttered, and all other wools, woolfells, morling and shorling, to be conveyed only to the staple of *Calais*; if any attempt to the contrary, it shall be felony, saving the king's prerogative to license transportation elsewhere. This act to continue for five years only, and so it expired.

17 *E. 4. cap. 1.* If any shall carry or cause to be carried out of this realm or *Wales*, any manner of money of the coin of this realm, or any other realm, plate, vessel, mass bullion, jewels of gold wrought or unwrought, or silver without the king's license, except the persons dispensed with by the statute of 2 *H. 6. cap. 6.* it shall be felony.

This act was to continue only for seven years.

And by the act of 4 *H. 7. cap. 23.* it was re-enacted again to continue twenty years; and by the statute of 1 *H. 8. cap. 13.* it was continued till the next parliament, (f) and then discontinued; but by the act of 7 *E. 6. cap. 6.* it was revived for twenty years, and then expired; so that at this day the exportation of gold and silver is not felony, but remains only under the penalty of those statutes that prohibit its exportation under pains of forfeiture; for the act of 17 *E. 3.* did not make exportation felony. (g) [655] And having this occasion I shall here once for all give an account of the laws in force against the exportation of money and bullion.

By the statute of 9 *E. 3. cap. 1.* None are to carry any sterling out of the realm of *England*, nor silver in plate, nor vessel of gold or silver, upon pain of forfeiture of the same, that he shall so carry, without the king's license; this is confirmed in substance by 38 *E. 3. cap. 2.* 5 *R. 2. cap. 2.*

By the statute of 2 *H. 4. cap. 5.* If any gold or silver be found in the keeping of any upon his passage over sea, in any ship or vessel to go out of any port or creek without the king's license, it shall be forfeit, saving his reasonable expenses.

Merchants strangers to lay out one half the proceed of their merchandize upon *English* merchandize, and may carry over the other moiety.

By the statute of 4 *H. 4. cap. 15.* All merchants, and strangers, and others, that sell merchandizes here, shall lay out the money thereby arising in other merchandizes of *England*, to carry the same without carrying any gold or silver in coin, plate or mass out of this realm, upon pain of forfeiting all the same, saving always their reasonable expenses.

This act is still in force, and received a farther confirmation by the statute of 5 *H. 4. cap. 9.* 9 *H. 5. cap. 1.*

2 *H. 6. cap. 6.* No gold or silver to be carried out of the realm contrary to the former statutes, except for payment of the king's soldiers, upon pain of forfeiture of the value of the sum so carried, one fourth part to the discoverer, except ransom of prisoners, and money that soldiers carry for their necessary costs, and for horses and sheep bought in *Scotland*.

3 *H. 7. cap. 8.* All foreign merchants shall employ their money received in ports, &c. upon merchandize or commodities of this real, the proof to lie upon the merchant, upon pain of forfeiture of all his goods, and a year's imprisonment. This clause of the statute of 17 *E. 4.* made perpetual.

19 *H. 7. cap. 5.* None to convey any coin, bullion, or plate, above the value of 6s. 8d. out of this realm into *Ire-* [656] *land*, nor convey such bullion, plate or coin into any ship, boat or other vessel, upon pain of forfeiture thereof, and making fine and ransom at the king's will.

(f) But not as to the penalty of felony, for that is excepted in the act.

(g) Except in the searcher, if he confederated with any to export it.

So these several statutes lie in the way of transportation of bullion or coin, tho the act of 17 *E. 4.* and other acts making it felony are now expired.^(h)

CHAPTER LXIII.

CONCERNING THE NEW FELONIES ENACTED IN THE TIMES OF *R. 3.*
H. 7. H. 8. E. 6. AND QUEEN MARY.

I FIND no new felony enacted in the short reign of *R. 3.*

By the statute of 1 *H. 7. cap. 7.* "At every time as information shall be made of any unlawful hunting in any forest, park or warren by night, or with painted faces, to any of the king's council, or to any of the justices of peace in the county where any such hunting shall be had, of any person so suspected thereof, it shall be lawful to any of the same council or justices of peace, to whom such information shall be made, to make a warrant to the sheriff of [.657] the county, constable, bailiff, or other officer within the same county, to take and arrest the same person or persons, of whom such information shall be made, and to have him or them before the maker of the said warrant, or any other of the king's said council or justices of peace of the said county, and that the said counsellor or justice of peace, before whom such person or persons shall be brought, by his discretion have power to examine him or them so brought of the same hunting, and of the said doers in that behalf; and if the same person wilfully conceals the same hunting, or any person with him defective therein, that then the same concealment be against every person so concealing, felony; the same felony to be inquired of and determined as other felonies within this realm have used to be; and if he *then* confess the truth, and all that he shall be examined of and knoweth in that behalf, that then the said offenses by him done be against the king our sovereign lord but trespass fineable, by reason of the said confession, at the next sessions of the peace to be holden for the same county by the king's justices of the same sessions to be there sessed; and if any rescous or disobedience be made by any person, the which so should be arrested, so that the execution of the same

(h) By 13 & 14 *Car. 2. cap. 31.* The melting down the silver money of this realm is prohibited, on pain of forfeiting it, and double the value; and by 15 *Car. 2. cap. 7.* it is lawful to export foreign coin or bullion, provided an entry be made thereof at the custom-house: but by 6 & 7 *W. 3. cap. 17.* and 7 & 8 *W. 3. cap. 19.* before the same be shipt, it is necessary there should be a certificate from the lord mayor and court of aldermen of London, that oath had been made before them by the owner of the said bullion, and by two or more credible witnesses, that the said bullion, and every part thereof, is foreign bullion, and that no part thereof was the coin of this kingdom, or clippings thereof, or plate wrought within this kingdom.

warrant thereby be not had, then the same rescue and disobedience be felony iniquitable and determinable, as is aforesaid; and if any person be convict of such hunting with painted faces, vizors, or otherwise disguised, to the intent he should not be known, or of any unlawful hunting in the night, then the same person so convict to have such punishment, as he should have, if he were convict of felony.”(a)

My lord *Coke*, *P. C. cap. 21.* hath given us the whole learning of this statute, *viz.*

1. The hunting with vizors or painted faces in the day-time, and the hunting in the night with or without such [658] vizors, is felony; but the party may make it trespass only, if he pleases. *Dy. 50. a.*

2. It doth not extend to the forest, or chase, or park of the king's, (b) nor to forests, parks, or warrens in reputation only, and not in right.

3. The complaint may be made to any one justice of peace or of the council, and the warrant may be granted by any one.

4. The warrant must be in writing under seal, and grounded upon an examination shewing a probable cause of suspicion.

5. When the offender is brought, he must be examined of the fact done by himself, and then of the fact done by others, but not upon oath.

6. A hunting without killing is within the penalty.

7. Tho the hunting be not felony, yet the rescue or disobedience is felony.

8. But the rescue or disobedience made felony is only that which is done by the party, not by a stranger.

And altho the party rescue himself, yet if he be re-taken, so as execution of the warrant be had, it is no felony.

9. If the party plead not guilty, and is convict of the fact, it is felony; but if he confess upon his arraignment, it then becomes only a trespass finable, tho he denied it upon his first examination.

10. It is held, that if he confess not but conceals upon his examination before the justice, this alone makes it not felony; neither can he be indicted upon this statute for such concealment; but it must be a judicial concealment, namely, if being indicted for the hunting he upon his arraignment conceal, then he shall be indicted *de novo* for such concealment; and if convict thereof, he shall be attaint of felony

(a) But now by 9 Geo. 1. cap. 22. (continued by 6 Geo. 2. cap. 37.) it is made felony without benefit of clergy for any person being armed with any offensive weapons, and having their faces blacked or disguised, to appear in any forest, chase, &c. or unlawfully to hunt, kill or steal any deer, or rob any warren, or steal fish out of any river or pond, or for any person unlawfully to hunt any deer in the king's forests, &c. or maliciously to break down the head of any fish-pond, whereby the fish shall be lost or destroyed.

(b) As to this case, a remedy was provided by 31 H. 8. cap. 12. whereby this offense, if committed in the king's forests, &c. is absolutely made felony; but that statute being repealed by the general clause of 1 E. 6. cap. 12. a remedy was again provided by the statute of 9 Geo. 1. above-mentioned.

for concealment, tho this seems a difficult exposition ;(c) for upon his arraignment for the hunting he only answers to that indictment, and is not examined touching others; and besides, if he be indicted for the hunting, if there be evidence to convict him of the fact, he is convicted of felony before the indictment for concealment comes; and if there be not evidence to convict him of the principal, how shall there be evidence to convict him of the concealment?

11. The concealment that makes a felony, must be a wilful concealment.

By the statute of 3 H. 7. cap. 2. It is enacted, "That whereas women, as well maidens, as widows and wives having substances, some in moveable goods, some in lands and tenements, and some being heirs apparent to their ancestors, had been often taken by misdoers contrary to their wills, and after married to such misdoers, or to others by their assent, or defiled to the great displeasure of God, contrary to the king's laws, and disparagement of the said women, and utter heaviness and discomfort of their friends, and to evil example of others, it is therefore ordained, established and enacted by our sovereign lord the king, by the advice of the lords spiritual and temporal, and commons in the said parliament assembled, and by authority of the same, That what person or persons from henceforth taketh any women so against her will unlawfully, that is to say, maid, widow, or wife, that such taking, procuring, abetting to the same, and also receiving wittingly the same woman so taken against her will, and knowing the same, be felony; and that such misdoers, takers, and procurators to the same, and receivers, knowing the same offense in form aforesaid, be henceforth reputed and judged as principal felons. Provided that this act extend not to any person taking any woman, only claiming her as his ward or bond-woman." [1]

For the making of a felony within this statute, there must be these circumstances on the part of the woman: 1. That the maid, wife, or widow, have substance of goods or land, or be heir apparent. 2. That she be taken away against her will. 3. That she be married to, or defiled by the misdoer, or some others by his consent. Without these three concurring, it makes no felony within this statute, 3 & 4 P. & M. *Dallison* 22. 4. That she be not in ward, or a bond-woman to the person that taketh her, or causeth her to be taken only as his ward or bond-woman. *Co. P. C. cap. 12. p. 61.*

In *Fullwood's* case, *M. 13. Car. 1. B. R. Cro. p. 482. 484. 486.*

(c) This difficulty arises from the aforesaid construction of the act, that it must intend a judicial concealment, whereas the act seems plainly to mean a concealment upon his examination before the justice; for after the act had given power to the justice to examine the suspected person, it immediately adds, *and if the same person wilfully conceals, &c. the said concealment shall be felony; and if he then confess the truth, and all that he shall be examined of, his offense shall be but trespass;* the word then shows the time of confession to be at the examination, and therefore the concealment likewise must be intended to be at that time.

[1] Now repealed and supplied by 9. Geo. IV. c. 31. See *ante*, note to c. 59. p. 639.

492. these points were resolved: 1. That if a woman be taken away forceably in the county of *Middlesex*, and married in the county of *Surrey*, the fact is indictable in neither county; for the taking without the marriage, nor the marriage without the taking, make not felony. 2. But if she were taken in the county of *Middlesex*, and carried into the county of *Surrey*, so that it is a continuing force in *Surrey*, tho begun in *Middlesex*, and then she is married in *Surrey*, there the offender may be indicted upon this statute in *Surrey*. 3. Tho possibly the marriage or the defilement might be by her consent, being won thereunto by flatteries after the taking, yet this is felony, if the first taking away were against her will.(d) 4. That if as well the marriage as the taking away were against her will, so that the marriage was voidable, yet it is a marriage *de facto*, and therefore being taken away against her will, and also married against her will, it is felony within this statute. 5. That it is not necessary in the indictment to say, that she was taken *ad intentione* to marry or defile her, because the statute hath no such words of *ad intentione*. But farther, he marrying her the same day he took her, it must needs appear, that it was *ad intentione*; yet these words, *ad intentione ad ipsam maritandam*, are usually added in indictments upon this statute, and it is safest so to do. 6. That the woman thus taken [661] away and married may be sworn and give evidence against the offender, who so took and married her, tho she be his wife *de facto*. [2]

And all these points were accordingly resolved, *H. 24 & 25 Car. 2.* in *Brown's case*,(e) upon this statute, only the indictment ran, *cepit ad intentione ad ipsam maritandam*: the offender was convict and executed: and the reasons why the woman was sworn and gave evidence in the case of *Brown* were, 1. Because the taking away of the woman and marrying were the same day, and she was rescued out of their hands, and the offender taken the next day, and so all done *flagrante crimine*. 2. It was but a forced marriage, and so no marriage *de jure*. 3. There was no cohabitation. 4. Concurring evidence to prove the whole fact. But had she freely without constraint lived with him that thus married her, any considerable time, her examination in evidence might be more questionable.

By the statute of 39 *Eliz. cap. 9.* Clergy is taken away from the principals, procurers, and accessaries before the offense committed.

By this act of 3 *H. 7.* the procurers, as well as the misdoers themselves, and any person that receives the woman thus taken away, are

(d) And so it was resolved in *Swendsen's case*, *M. 1 Ann. State Tr. Vol. V. p. 468.* in which case most of the other points here mentioned were likewise ruled.

(e) 3 *Keb. 193. 1 Ven. 243.*

[2] 2 *East's P. C. 454*, who cites *Hale 301*, and the passage *supra*. *Rex v. Brown*, 1 *Ventr. R. 243.* *Hangen Swendsen's case*, 5 *St. Tr. 456.* *Wakefield's case*, 2 *Lew. C. C. 1. 20. 289.* *Reg. v. Yore*, 1 *Jebb & Sy. R. 563. 572.* *Rex v. Sergeant. Ry. & M. 352.* 3 *Chitty's Cr. L. 817. note (y).* *Rosc. on Cr. Ex. 115. 121.* 1 *Greenl. on Ev. § 343.* 1 *Russ. on Crim. 709, 710. Ed. 1845.*

principals by this statute, and so ousted of clergy; but he that receives the offender knowingly, is only accessory *after*, and not excluded from clergy.

Quære, Whether tho the receiver of the woman be made principal by the act of 3 *H. 7.* he were intended to be ousted of clergy by 39 *Eliz. cap. 9.*

The statute of 3 *H. 7. cap. 14.* recites, "That forasmuch as by quarrels made to such as have been in great authority, office, and of council with the kings of this realm, hath ensued the destruction of the kings and undoing of this realm, so as it hath appeared evidently, when compassing of the death of such as were the king's true subjects was had, the destruction of the prince was imagined thereby, and for the most part it hath grown by the malice of the king's own household servants, as now of late such a thing was like to

[662] have ensued; and forasmuch as by the law of this land, if actual deeds be not had, there is no remedy for such false compassings, imaginations, and confederacies had against any lord, or any of the king's council, or any of the king's great officers in his household, as steward, treasurer, comptroller, and so great inconveniences might ensue, if such ungodly demeaning should not be straitly punished before that actual deed were done; therefore it is ordained by the king, and the lords spiritual and temporal, and the commons of the said parliament assembled, and by authority of the same, that from henceforth the steward, treasurer, and comptroller of the king's house for the time being, or one of them, shall have full power and authority to inquire by twelve sad men and discreet persons of the exchequer roll of the king's household, if any person admitted to be his servant, sworn, and his name put into the chequer roll of his household, whatsoever he be, serving in any manner, office or room, reputed, had or taken, under the state or degree of a lord, make any conspiracies, compassing, confederacies or imaginations with any person or persons to destroy or murder the king, or any lord of this realm, or any other person sworn to the king's council, steward, treasurer, or comptroller of the king's house, that if it be found before the said steward for the time being by the said twelve sad men, that any such of the king's servants as is abovesaid, hath confederated, compassed, conspired, or imagined, as is abovesaid, that he so found by that inquiry be put thereupon to answer, and the steward, treasurer, and comptroller, or two of them, have power to determine the same matter according to the law; and if he put him in trial, that then it be tried by other twelve sad men of the same household; and that such misdoers have no challenge but for malice. And if such misdoers be found guilty by confession or otherwise, that the said offense be judged felony, and they to have judgment and execution as felons attaint ought to have by the common law."

Vide the observations of my lord *Coke* upon this act, *Co.* [663] *P. C. cap. 4.* where on the part of the offender there must be these qualifications, *viz.* 1. He must be the king's sworn servant. 2. His name must be in the chequer roll. 3. He must be

under the degree of a lord. 4. Tho his conspiring with another not of the houshold be an offense, yet he only of the houshold is the felon.

On the part of the person against whom the conspiracy is, are these requisites: 1. The conspiracy to murder the king; or 2. A lord of the realm, but yet only such as is sworn of the king's privy council. 3. Any other of the king's privy council, tho under the degree of a lord. 4. The steward, treasurer, or comptroller of the king's house, tho neither a lord nor of the privy council.

The power to hear and determine. 1. The steward, treasurer, and comptroller, [or any two of them, have power to determine,*] tho the act saith, they or any one of them may inquire. 2. If a servant of the king's house, *ut supra*, conspire the death of the steward, treasurer, and comptroller, yet they remain the only judges in this cause by this act, tho they may take others to their assistance, yet none but they sit as judges. 3. The presentment and trial must be only by the servants of the houshold. 4. The inquiry may be by twelve or more, but the trial only by twelve. 5. No challenge but for malice. 6. The conspiracy must be plotted in the king's houshold. 7. The offender is to have his clergy.

And *note*, this being a new made felony, and the manner of its determination particularly limited, it is not determinable before any other judges, or in any other courts, neither in the king's bench, oyer and terminer, or gaol delivery. *Quære*, whether their session must not be in the king's house.

By the statute of 7 *H. 7. cap. 1.* There is provision of felony against captains and soldiers leaving their service; but this I shall take up hereafter, as also the statute of 3 *H. 8. cap. 5.* which I shall refer to 4 & 5 *P. & M. cap. 3.*

I come to the time of *H. 8.* which was fruitful in enacting new treasons and new felonies, and new offenses as to [664] *Præmunire*.

But there were two acts of parliament, that repeald as all new treasons and misprisions of treasons, so all new felonies enacted at any time after the first day of the reign of *Henry 8. viz.*

1 *E. 6. cap. 12.* Whereby it is enacted, "That all offenses made felony by any act or acts of parliament made since the 23d day of *April*, in the first year of the reign of king *H. 8.* not being felony before, and also all and every the branches and articles mentioend, or in any ways declared in any of the said statutes concerning the making of any offense or offenses to be felony, not being felony before; and all pains and forfeitures concerning the same, or any of them, shall from henceforth be repeald, and utterly void and of none effect."

1 *Mar. cap. 1.* whereby it is enacted, "That all offenses made felony, or limited to be within the case of *Præmunire*, by any act or acts of parliament, statute or statutes made since the first day of the

* The words here in the MS. are, *Or any one or any two of them have power to inquire*, but they seem plainly to have been so written by mistake, the sense requiring them to be as above.

first year of the reign of king *Henry* 8. not being felony before, nor within the case of *Præmunire*, and all and every branch, article and clause mentiond, or in any ways declared in any of the said statutes concerning the making of any offense or offenses to be felony, or within the case of *Præmunire* before, and all pains and forfeitures concerning the same, or any of them, shall from henceforth be repeald and utterly void, and of none effect."

The former of these statutes, and also the latter repeald all new felonies enacted in the time of *H.* 8. who began his reign *April* 22. 1509. and the latter of these statutes repeald also the new created felonies in the reign of *E.* 6.

But neither of these statutes did extend to piracy or robbery upon the sea, nor any such act as concerned matter of proceedings touching felonies, that were such before the time of *H.* 8. and therefore those statutes in the time of *H.* 8. that concerned clergy, sanctuary, peremptory challenge, place or manner of trial of felons, or [665] the erecting of new jurisdictions for their trial, as that of 33 *H.* 8. *cap.* 12. for felonies in the king's court; for these acts were not constitutive of new felonies, but only directions of the course of proceedings in cases of old felonies.

Those statutes that made new felonies both in the time of *H.* 8. and *E.* 6. are therefore of these kinds, *viz.*

1. Such as were enacted *de novo* in the times of *H.* 8. and *E.* 6. and were never after revived or re-enacted by any subsequent act of parliament; such were those of 31 *H.* 8. *cap.* 2. of breaking the heads of ponds, and taking fish, 31 *H.* 8. *cap.* 12. and 32 *H.* 8. *cap.* 11. stealing of hawks eggs, and hunting in the king's forests, &c. 33 *H.* 8. *cap.* 8. of witchcraft. 33 *H.* 8. *cap.* 14. of prophecies. 37 *H.* 8. *cap.* 6. The burning of a frame of timber. 37 *H.* 8. *cap.* 10. Libellous papers charging men to have spoken treason. 23 *H.* 8. *cap.* 11. Breaking prison.

2. Such as were repeald but enacted again in the same kind, but with some alterations, as 22 *H.* 8. *cap.* 10. concerning *Egyptians*, altered by 1 & 2 *P. & M.* *cap.* 4. and by 5 *Eliz.* *cap.* 20.

3. Such as were *de novo* enacted to be felonies in the times of *H.* 8. and *E.* 6. and repeald, but re-enacted again, as 22 *H.* 8. *cap.* 11. touching cutting of *Powdike*, renewed by 2 & 3 *P. & M.* *cap.* 19. 3 *H.* 8. *cap.* 5. concerning soldiers, re-enacted in a great measure by 2 *E.* 6. *cap.* 2. and 4 & 5 *P. & M.* *cap.* 3. 21 *H.* 8. *cap.* 7. servants embezzling their masters goods, by 5 *Eliz.* *cap.* 10. 25 *H.* 8. *cap.* 6. concerning buggery, by 5 *Eliz.* *cap.* 17. 23 *H.* 8. *cap.* 16. concerning *Scotchmen*, re-enacted by 1 *Eliz.* *cap.* 7. but finally repeald by 4 *Jac.* 1. *cap.* 1.

4. Some offenses were made felony by former acts of parliament before *H.* 8. but had additions to them, extending the felonies farther than the old acts, some such thing may be found in the statute of 3 *H.* 8. *cap.* 5. concerning soldiers in relation to the statute of 7 *H.* 7. *cap.* 1. and then the old felonies stand, but the additional felonies are repeald.

Concerning the first of these ranks of acts I shall say nothing, because they are now utterly void; but concerning the other three ranks of statutes, I shall proceed according to their order of time.

First, For the statute of 3 *H. 8. cap. 5.* as also that of 2 *E. 6. cap. 2.* concerning soldiers, I shall refer them to the statute of 4 & 5. *P. & M. cap. 18.*

By the statute of 21 *H. 8. cap. 7.* it is enacted, "That all and singular servants, to whom any caskets, jewels, money, goods or chattels, by his or their masters or mistresses, shall from henceforth be delivered to keep, that if any such servant or servants withdraw themselves from their masters or mistresses, and go away with the said caskets, jewels, money, goods or chattels, or any part thereof, to the intent to steal the same, and defraud his or their masters or mistresses thereof, contrary to the trust and confidence to him or them put by his or their masters or mistresses, or else being in the service of his or their master or mistresses without any assent or commandment of his master or mistress, embezzle the same caskets, jewels, money, goods or chattels, or any part thereof, or otherwise convert the same to his own use with like purpose to steal it, that if the said casket, jewels, money, goods or chattels, that any such servant shall go away with, or which he shall embezzle with purpose to steal as aforesaid, be of the value of forty shillings, or above, that then the same false, fraudulent, or untrue act and demeanor shall from henceforth be deemed and adjudged felony, &c. Provided it extends not to apprentices, nor to any person under the age of eighteen years; but every such apprentice or person within that age doing that act shall be and stand in the like case as they were before the making of this act. This act to endure till the next parliament."

By the act of 27 *H. 8. cap. 17.* Clergy was taken away in this case, if the indictment were laid specially upon the act of 21 *H. 8.* and pursuant to the same; and by the act of 28 *H. 8. cap. 2.* this act of 21 *H. 8.* was made perpetual; but by the act of 1 *E. 6. cap. 12.* these acts were both repealed.

But again, by the act of 5 *Eliz. cap. 10.* this act of 21 *H. 8.* was re-enacted and revived, yet it did not revive the [667] act of 27 *H. 8. cap. 17.* for taking away clergy. 1. Because the words of the reviving act of 5 *Eliz.* revive only the act of 21 *H. 8.* specially and particularly by name, and not any other incident act concerning clergy. And again, 2. Because the acts taking away clergy were specially repealed by the statute of 1 *E. 6. cap. 12.* except in those cases there particularly enumerated, so that at this day a party indicted and convict upon this statute hath his clergy.(f)

And note, that in this case, and all other cases of this nature where a statute is repealed and re-enacted, an indictment or infor-

(f) But by 12 *Ann. cap. 7.* Clergy is in such case taken away from facts committed in any house or out-house, except as to apprentices under the age of fifteen years, robbing their masters.

mation may conclude either *contra formam statutorum*, or *contra formam statuti*, for it shall be intended the last statute. And so it is, if a statute be but temporary and then expires, and then is re-enacted; but if a statute be continued till the end of the next session of parliament, and before that next session be ended it is continued over, the indictment may run *contra formam* of the first statute, for it never was interrupted, or it may conclude *contra formam statutorum*. *P. 42 Eliz. B. R. Dingly and Moore*, (g) *M. 31 & 32 Eliz. B. R. Mill's case*.

This statute was introductive of a new law, when the goods were actually delivered to the servant that goes away with them; for where there is such a delivery it could not at common law be a felony.

But yet a servant might be guilty of felony at common law, if he takes the goods of his master feloniously, nay, tho they be goods under their charge, as a shepherd; butler, &c. *vide supra, cap. 48. p. 505.* and for this he may be indicted at this day as a felony at common law, and of this felony at common law, an apprentice or servant under the age of eighteen years may be guilty, and indicted thereof at common law.

And therefore tho the statute of 21 *H. 8.* exempt an apprentice or servant under the age of eighteen years from the pain of [668] felony enacted *de novo* by this statute, namely, where goods are actually delivered to him, yet it leaves him in the same condition as to any felony at common law, as if he were not excepted; and therefore if my butler or shepherd, under the age of eighteen years, or if my apprentice takes away my goods feloniously without my actual delivery, tho they are under the value of forty shillings, he is indictable of felony at common law.

If I deliver my servant a bond to receive money, or deliver him goods to sell, and he receives the money upon the bond or goods, and goes away with it, this is not felony at common law because the money is delivered to him, nor felony by this statute, because tho the bond or goods were delivered him by the master, yet the money was not so delivered by the master. *Dy. 5. a. Co. P. C. cap. 44.* And yet by the very payment of the money to the servant to the master's use, the master is by law said to be actually possessed of this money; and if taken away from the servant by a trespasser or robber, the master may have a general action of trespass, or action upon the statute of hue and cry.

But it is held, that if the master delivers to the servant twenty pounds in silver to change it into gold at the goldsmith's or leather to make shoes, and he run away with the gold or shoes, it is felony. *Crompt. Justic. 35. b.*

If *A.* hath two servants, *B.* and *C.* *B.* by the command of *A.* the master, and in his presence delivers the master's goods to *C.* by the

(g) *Cro. Eliz. 750.*

master's command, and C. runs away with it, this is felony within the statute, for it is the master's delivery; but suppose it be delivered by the master's command, but in the master's absence, *quære*, whether this be within the statute, and what difference there is between this case and the receiving money from a creditor by the master's directions? yet *vide Dy. 5.* it seems felony.

If the master's wife delivers goods of the master to the servant to keep, and he goes away with it, it seems this is within the statute, for he hath them by delivery of his mistress, and the master's wife is as well his mistress, as if she were sole, *vide statute 25 E. 3.* for petit treason.

By the statute of 23 H. 8. cap. 11. Every perverse and malicious cutting down of the new *Powdike* of *Marshland*, [669] or of the old *Powdike* of the isle of *Ely*, or of any part thereof, or of any other bank, being part of the rind and uttermost part of the country of *Marshland*, made for the defense thereof, other than working upon the same for repairing or amending the fortifying thereof, is enacted to be felony.

This act was repealed by 1 E. 6. cap. 12. and 1 Mar. cap. 1. but is revived by 2 & 3 P. & M. cap. 19. and so continues.

But the offender hath the benefit of clergy.

By the statute of 23 H. 8. cap. 16. The selling of a horse to a *Scotchman*, or delivering a horse in *Scotland* is made felony.

This was repealed by 1 E. 6. cap. 12. and tho made penal by the act of 1 E. 6. cap. 5. yet never revived, (h) and the acts of this kind are repealed by 4 Jac. 1. cap. 1. as to *Scotland*.

By the act of 25 H. 8. cap. 6. buggery with mankind or beast is enacted to be felony, and the felon excluded from clergy.

This statute was repealed by the general act of 1 E. 6. cap. 12. and in 2 E. 6. cap. 29. it was enacted to be felony without clergy, but without loss of lands or goods, or corruption of blood.

But this act of 2 E. 6. was repealed by the statute of 1 Mar. cap. 1. and so both acts stood repealed until 5 Eliz.

But by the statute of 5 Eliz. cap. 17. the entire act of 25 H. 8. cap. 6. is revived and re-enacted, so that this offense stands at this day absolutely felony without benefit of clergy.

To make buggery there must be *penetratio*, as in case of rape. *Vide supra*, p. 628.

A woman may be guilty of buggery with a beast within this statute.

If buggery be committed upon a man of the age of discretion, both are felons within this law.

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But if with a man under the age of discretion, viz. fourteen years old, then the buggerer only is the felon.

Those that are present, aiding and abetting, are all principals; the statute making it felony generally; there are or may be accessaries

(h) This must be some mistake in the MS. for this statute was revived, as our author himself says a little above, p. 665. by 1 Eliz. cap. 7. tho afterwards repeal'd by 4 Jac. 1 cap.

before and *after*, as in case of rape. But tho none of the principals are admitted to their clergy, yet accessaries *before* and *after* are not excluded from clergy.

Touching the time of *E. 6.* I do not find any new felony enacted, but that of 2 & 3 *E. 6. cap. 6.* which I shall hereafter consider, when I come to 4 & 5 *P. & M. cap. 3.*

In the time of queen *Mary* we find these statutes following making new felonies.

By the statute of 1 & 2 *P. & M. cap. 4.* "If any outlandish people calling themselves or being called *Egyptians*, shall remain in this realm or *Wales* one month at one or several times. And if any person being fourteen years old, which hath been seen or found in the fellowship of such *Egyptians*, or which hath disguised him or herself like them, shall remain here or in *Wales* one month either at one or several times, it is felony."⁽ⁱ⁾

The trial to be by the inhabitants of the county, where they are taken, and not *per medietatem linguæ*, no sanctuary or clergy to be allowed.

A proviso, that it extend not to their children under thirteen years old.

And by the statute of 5 *Eliz. cap. 20.* the act of 1 & 2 *P. & M.* is confirmed and extended to all above the age of fourteen years, that shall be found in the company of vagabonds, commonly called or calling themselves *Egyptians*, or counterfeiting or disguising themselves by their apparel, speech or behaviour like them, if they continue one month, altho they are persons born in the king's dominions. Clergy is ousted.

I have not known these statutes much put in execution, [671] only about twenty years since at the assizes at *Bury* about thirteen were condemned and executed for this offense.

I am now come to that, which I have all along promised, namely, the felony of soldiers running from their captains, enacted by several statutes, as namely, 18 *H. 6. cap. 19.* 7 *H. 7. cap. 1.* 3 *H. 8. cap. 5.* 2 & 3 *E. 6. cap. 2.* repeal'd by 1 *Mar. cap. 1.* and revived by 4 & 5 *P. & M. cap. 5.* and the statute of 5 *Eliz. cap. 5.*

I shall take up the whole matter together, beginning with the antient statutes, and so descending downwards to the latter.

By the statute of 18 *H. 6. cap. 18.* It is recited, "That divers captains, that were retained by indenture to serve the king, some beyond the seas and some in the marches, had defrauded the soldiers under their retinue of their pay; and enacts, that no captain, which shall have the conduct of such retinue, and shall receive the king's wages or the same, shall abate his soldiers their wages, except it be for their cloathing, that is to say, if they shall be waged for half a year, ten shillings a gown for a gentleman, six shillings and eight pence for

(i) Our author has here copied from *Co. P. C. cap. 39.* where the two statutes of 1 & 2 *P. & M.* and 5 *Eliz. cap. 20.* are blended together; for this last clause and the words *at one or several times* in the first clause belong to 5 *Eliz.* and not to 1 & 2 *P. & M.*

a yeoman, upon pain to forfeit twenty pounds for a spear, ten pounds for a bow to the king, for whom he did abate."

And by the statute of 18 *H. 6. cap. 19*. It is recited and enacted, as followeth, "Whereas many soldiers, which have taken parcel of their wages of their captains, and so have muster'd and been entred of record the king's soldiers before his commissioners for such terms, for which their masters have indented, have sometimes, presently after their muster and receiving part or all of their wages, departed and gone where they will, and have not passed the sea with their captains, and some passed the sea, and long within their terms departed from their captains and the king's service, without apparent license to them granted by their captains, to the great damage, &c. it is enacted, that every man *so(k)* mustering and receiving the king's wages, which departeth from his captain within his term, in any manner aforesaid, (except notorious sickness by the visi- [672] tation of God suffers him not to go, and which he shall certify presently to his captain, and repay his money, so that he may provide him for another soldier in his place) he shall be punished as a felon, and the justices of the peace shall have power to hear and determine the same; and that no soldier, man of arms or archer so mustered of record, and going with his captain beyond the sea shall return into *England* within the term for which his captain hath retained him, nor leave his captain there in the king's service, and in adventure of the war, except he hath reasonable cause by him shewed to his captain, and by him to the chief in the country having royal power, and thereupon shall have a license of the said captain witnessed under his seal, and shewing the cause of his license; and if any that doth muster of record come without letters testimonial of his captain within his term on this side the sea, the mayors, &c. shall arrest them, and detain them until it be inquired of, and if it be found by inquiry before the justice of peace, and proved, that they have mustered of record and departed from their captains without license, as aforesaid, they shall be punished as felons." But it took not away clergy.

By this act it appears, that the method of those times was, that as well the soldiers as the captains were under a contract to serve in the war, some for longer time, some for shorter, and sometimes the subordinate soldiers contracted with the king, but most commonly the captain contracted with the king to serve him with such a number of men raised by himself for such a time, as half a year or the like, and the captain made his contract with his soldiers (therefore called his retinue,) and the captain received the pay for himself and them.

And this method continued until 7 *H. 7.* and for a long time after, as appears by the whole preamble and body of the statute of 7 *H. 7. cap. 1.*

(k) This word [*so*] restrains the statute to soldiers retain'd in the manner mentioned in the act, which method of retainer being now disused, this statute is consequently become of little force.

By that statute it is enacted, "That every captain and petit captain having under them retinue of any soldier or soldiers at the king's wages shall, under pains in the same act limited, pay to their retinue of soldiers their wages rateably, as it is allowed by the king or the treasurer of his wars, and that within six days next after they have received it; and if any soldier, being no captain, immediately retained with the king, which hereafter shall be in wages and retained, or takes any *prest* to serve the king upon the sea or upon the land beyond the sea, departs out of the king's service without license of his captain, that such departing be felony without the privilege of clergy; and the justices in every shire, where such offender is taken, shall hear and determine the offense, as if done in the same county; and their departure and retainer, if traversed, shall be tried in the same county where taken." But this act extended not to soldiers impressed to serve in *England*.

By this statute it appears, that the retainer of the captain was by contract with the king, and he by the same contract was to provide the soldiers, which were to be at the king's pay. This is continued also till 3 *H. 8.* as appears by the preamble and body of the act of 3 *H. 8. cap. 5.*

By that act of 3 *H. 8. cap. 5.* The same punishment is enacted upon soldiers departing without license, only here it is without license of the king's lieutenant.

By the statute of 7 *H. 7.* It is receiving wages or *prest* to serve the king upon or beyond the sea; here it is to serve the king upon the sea, or upon the land, or beyond the sea, which is larger than 7 *H. 7.* for it extends to land service, and the punishment is limited to the justices of the peace of the counties where taken.

Proviso, that it extend not to captains or soldiers retained to serve in *Calais, &c. Berwick or Wales.*

It is resolved 6 *Co. Rep. 27. a.* in the case of soldiers, that both these statutes have continuance, and the word (*king*) extends to the successors of those kings, (*m*) and altho by the statute of [674] 1 *E. 6.* and 1 *Mar.* all new felonies made since the first day of the reign of *H. 8.* that were not felonies before, are repealed; yet inasmuch as the statute of 3 *H. 8.* enacts no new felony, but what was felony by 7 *H. 7. cap. 1.* tho it vary as to the person, that is to grant the license, and the persons that are to try it, (*) yet it was in truth no new felony, and therefore it is held the statute of 3 *H. 8.* was not repealed by 1 *Mar.* or 1 *E. 6.*

But it seems to me to be repealed by 1 *E. 6.* and 1 *Mar.* for to depart without license of the captain, and to depart without license of the king's lieutenant, are several offenses, for suppose he had the lieutenant's license and not the captain's, it is not excuse enough within 7 *H. 7.* and if he had the captain's license and not the lieutenant's, it excuseth not within the statute of 3 *H. 8.* But then *quære*, whether the exception for clergy of men in orders, or of sol-

(m) *Vide antea, pag. 100.*

(*) The persons empower'd to try it are the same by both statutes.

diets in *Calais*, *Berwick*, and *Wales*, extends to the statute of 7 *H. 7. cap. 1.*

If this variance by the statute of 3 *H. 8.* be a repeal of the statute of 7 *H. 7.* then they are both repealed, that of 7 *H. 7.* by 3 *H. 8.* and that of 3 *H. 8.* by 1 *E. 6.* and 1 *Mar.*

The statute of 2 & 3 *E. 6. cap. 2.* recites, "That whereas divers of the king's subjects, according to their bounden duties, have appointed and sent into the parts beyond the seas and into *Scotland* many able persons and soldiers with horses and harness meet to serve the king in his wars to their great charges and costs, yet some of the soldiers so sent have, contrary to their bounden duty, sold or converted the said horses or harness, whereby the king hath been destitute of their service, and the owners who sent them have been deceived of their horses and harness, and less able to refurnish other like soldiers with horses and harness at such time as they shall be commanded by the King."

It is enacted, "That if any soldier hereafter serving the king in his wars in any of his dominions, or on the seas, or beyond the seas, shall hereafter purloin, &c. such horses or arms, he shall be committed by the lieutenant, &c. upon due proof or testimony, till satisfaction, &c. And if any soldiers serving, as is aforesaid, [675] depart without license of his lieutenant or other above-named with booty or otherwise, being in the enemies country, or elsewhere in the king's service, or out of any garrison, where he or they be appointed to serve, that then every such soldier so departing without license, shall be taken and judged as a felon without benefit of clergy or sanctuary; and the justices of every shire, where he is taken, shall have power to hear and determine the offense, as if committed in the same county.

"Provisions against captains short pay, &c. Provided not to extend to detaining of wages for victuals, harness, weapons, or for any *prest* money provided and delivered to such soldier."

Nota, This act, tho it vary from the preamble of the other acts of 7 *H. 7.* and 3 *H. 8.* and recites, that the king's subjects according to their *bounden duty* had sent men and soldiers, doth not necessarily infer a compulsive power upon the persons so to send, or so to go; 1. Unless they were bound by tenure to attend in person or send; such were tenants by knights service.(n) 2. Unless obliged by the statute of 11 *H. 7. cap. 18.* or 19 *H. 7. cap. 1.* as having offices, pensions, or lands given by the king; who by these statutes were bound to follow the king in his wars, but at the king's wages, by those statutes which were held perpetual. 3. Or unless they had contracted with the king to find him soldiers, for this course was not wholly out of use, and the preamble seems to import as much, for they sent their soldiers, and when they thus departed with their arms were bound to refurnish others.

And tho there be mention of *prest* money in this act; yet in truth

(n) See *Co. Lit.* p. 76. a. § 103.

it was *imprest* money, or the earnest of the contract between the king by the captain and the soldiers, and not as is now used.

But yet upon this act two things are observable. 1. That this act did not make the departure of any soldier to be felony, [676] unless he were actually in the king's service in his wars. 6 *Co. Rep.* 27. *a.* case of soldiers.

2. Tho this felony was in substance the same, that was enacted by 7 *H.* 7. yet the general clause of the act of 1 *Mar. cap.* 1. repealed it.

And this is accordingly so recited by the statute of 4 & 5 *P. & M. cap.* 3. which doth recite it to be repealed, and therefore by an express enacting clause renews that clause of the statute of 2 & 3 *E.* 6. that makes such departure felony.

By the statute of 5 *Eliz. cap.* 5. It is recited, "That it hath been doubted, whether the statute of 18 *H.* 6. *cap.* 19. did or ought to extend to mariners and gunners serving on the seas taking wages of the king or queen. It is expressed, ordained, and enacted and declared, that the said statute in all pains, forfeitures and other things did and doth, and hereafter shall extend as well to all and every mariner and gunner having taken, or that shall hereafter take *prest* or wages to serve the queen, her heirs or successors, to all intents and purposes, as the same did or doth to any soldier; any diversity of opinion, doubt, or matter to the contrary notwithstanding." But this takes not away the benefit of clergy.

In *Co. Rep.* 27. *a.* The case of soldiers. The case was, that divers soldiers after they were *prest*, and going towards *Ireland* to serve against the rebels there, and before they had served in the war, did depart and *esloigne* themselves; hereupon it was resolved by all the judges of *England*, 43 *Eliz.* upon a reference to them made, as it seems, 1. That this case was not within the statute of 18 *H.* 6. but that act is now of little use, because that act refers to the antient manner of retaining soldiers, which was usual between the king and great men, to serve the king with such a number of men for a certain time. 2. That the statute of 2 & 3 *E.* 6. *cap.* 2. revived by 4 & 5 *P. & M.* extended not to this case, for that statute extended to the departure of a soldier after he had been in actual service in the war. 3. That the statutes of 7 *H.* 7. *cap.* 1. and 3 *H.* 8. *cap.* 5. which in substance are both of one [677] effect, are perpetual laws, and the word *king* extends to his successors, and upon those two acts divers soldiers were attaint and executed.

The reason thereof cannot be grounded upon any supposition, that the course of military retainers was altered in 7 *H.* 7. from what it was in the time of *H.* 6. for there are very many indentures of retainers of record according to the antient form long after that time, and indeed the statutes of 7 *H.* 7. and 3 *H.* 8. do import as much, as will easily appear to an attentive reader of them: But that which seems to extend the acts of 7 *H.* 7. and 3 *H.* 8. to this case, are the words *or take any prest, to serve the king*; which words

are in these statutes and in that of 5 *Eliz. cap. 5.* which are wanting both in the statute of 18 *H. 6. cap. 19.* and 2 & 3 *E. 6. cap. 2.* for that makes them subject to the penalty for departing without license, as well as if they had received wages, or had been mustered, or been in actual service in the wars.

All the difficulty rests in the word *prest*, viz. whether it be to be intended passively from *premo pressi*, as it is commonly used at this day, and is so exprest in the case of soldiers, *Après ceo quilz fueront prest*: Or whether to be taken actively, as it is exprest in the statutes of 7 *H. 7. 3 H. 8.* and 5 *Eliz. having taken prest to serve, &c. præstitium*, or the earnest of their contract.(o)

All do agree, that if a man do voluntarily receive or take *prest* to serve as a soldier, mariner, or gunner, either upon or beyond the seas, he is bound thereby, and if he depart without license, it is felony within the statute of 7 *H. 7. cap. 1. 3 H. 8. cap. 5.* [678] and 5 *Eliz. cap. 5.* for the words of the statutes are express in it; only in the case of a soldier it is without benefit of clergy; but of a mariner or gunner it is within benefit of clergy, because the statute of 18 *H. 6. cap. 19.* doth not exclude clergy, and the statute of 5 *Eliz.* extends only the statute of 18 *H. 6.* to mariners and gunners, and mentions nothing of the statute of 7 *H. 7.* or 3 *H. 8.* which exclude clergy. But of the business of clergy hereafter in this chapter.

But on the other side, the compulsion of men to go beyond or upon the sea, or otherwise of imprisoning of them, or compelling men to take *prest* money, or otherwise to imprison them hath been, I confess, a practice long in use; how far it is justifiable or not the books that have treated of it are to be consulted. *Vide* the argument of *Calvin's* case, 7 *Co. Rep. 7. b.* He that reads the comment of my lord *Coke* upon *Confirmatio Cartar, cap. 5.* and his observations and conclusions there upon the statutes of 1 *E. 3. cap. 5 & 7. (p)* 18 *E. 3. cap. 7. (q)* 25 *E. 3. cap. 8. (r)* 4 *H. 4. cap. 13. (s)* may reasonably think he varied

(o) Whatever doubts may formerly have been about the meaning of the word *prest*, yet it seems now to be fixt to the latter sense by 5 & 6 *W. & M. cap. 15.* for it is there enacted, "That no person, that shall be listed for the land service, should for the future be esteemed a listed soldier, or be subject to the penalties of this act, or any other penalty for his behaviour as a soldier, unless before his being listed or inserted in any muster-roll he shall have been brought before a justice of peace, (not being an officer in the army) or chief magistrate of some city, or high constable of the hundred or division where the party shall be listed, and before such justice, &c. shall declare his free consent to be listed as a soldier." Altho the former clause of this statute for reviving the punishment of mutiny or desertion be limited to the time mentioned in the act, yet this clause coming after that limitation, and being general not only in relation to the penalties of this act, but of any other act, seems to be perpetual.

(p) This statute provides, that no man shall be charged to arm himself otherwise than was formerly wont, and that no man be compelled to go out of his shire, but where necessity requireth, and sudden coming of strange enemies into the realm.

(q) This statute ordains, that men of arms, &c. chosen to go in the king's service out of *England*, shall be at the king's wages, till their coming again.

(r) This statute enacts, that no man shall be constrained to find men of arms, other than those who hold by such service, except it be by common assent in parliament.

(s) The design of this statute is chiefly to confirm the three acts above mentioned.

his opinion.(t) And he, that looks upon the acts enabling pressing of soldiers and mariners for foreign service upon or beyond the sea, namely 17 *Car.* 1. *cap.* 12. *cap.* 25. *cap.* 26. may think that

[679] those times made some doubt of it.(u) But of this matter I deliver no opinion.(x) Howsoever, to make a felony within those acts of 7 *H.* 7. *cap.* 1. 3 *H.* 8. *cap.* 5. 5 *Eliz.* *cap.* 5. it must be laid in the indictment and proved upon evidence. 1. That either they received wages, or took *prest* to serve the king upon sea or land. 2. That he, that thus imprested them, was commissioned by the king so to impest them.

Touching clergy in these offenses.

1. He that is convict upon the statute of 18 *H.* 6. *cap.* 19. shall have his clergy. *Co. P. C. cap.* 26.

2. Consequently a mariner or gunner, that hath taken wages or prest, shall have his clergy, for the statute of 5 *Eliz.* *cap.* 5. extends only the pains and penalties of the statute of 18 *H.* 6. to this case, and by that statute of 18 *H.* 6. clergy was not taken away.

3. That a departing contrary to the statute of 7 *H.* 7. or 3 *H.* 8. is by those statutes exempted from clergy, only the statute of 3 *H.* 8. *cap.* 5. allows men in orders the benefit of clergy.

4. The statute of 2 & 3 *E.* 6. takes away clergy from those, that depart without license after they have served the king in his wars.

5. By the statute of 1 *E.* 6. *cap.* 12. All persons convict of any felony not excepted in that act, whereof this is none, shall have their clergy, as he might have had before 24 *April*, 1 *H.* 8. and therefore an offender against 7 *H.* 7. *cap.* 1. is ousted of his clergy, because ousted thereof by 7 *H.* 7. *cap.* 1. only if they be in orders, they have privilege of clergy by the statute of 3 *H.* 8. *cap.* 5.

6. But if he be indicted upon the statute of 3 *H.* 8. *cap.* 5. [680] *quære*, whether he shall not have his clergy, for tho the felony in substance be the same, yet this statute makes it felony to depart without the license of the king's *lieutenant*; but the statute

(t) In *Calvin's* case he was of opinion, that the subject is bound to serve the king in his wars both within and without the realm; and in his comment upon *confirmatio cartar. cap.* 5. 2 *Instit.* 528. he says, that the statutes above mentioned, (which provide, that none shall be compelled to go to the king's war out of his shire, except in case of necessity, nor shall be constrained to find men of arms, except by consent of parliament,) were but declarations of the antient law of *England*. And again, in his comment on *Magna Charta, cap.* 29. 2 *Instit.* 47. he says, that the king cannot send any subject against his will to serve him out of the realm, not even into *Ireland*, for then under pretence of service he might send him into banishment.

(u) Or rather were clear, that it could not be legally done without a special act of parliament for that purpose; the like may be argued from some other temporary statutes enacted since our author's time, for authorizing the pressing of soldiers and mariners, viz. 2 & 3 *Ann. cap.* 19. 3 & 4 *Ann. cap.* 11. 4 *Ann. cap.* 10. 5 *Ann. cap.* 15. 6 *Ann. cap.* 10. &c. &c.

(x) But it may be easily perceived, that the reason why our author declines delivering any opinion was, because he did not concur with the then prevailing practice, a practice which seems repugnant to the liberties of an *Englishman*, and irreconcilable to the established rules of law, viz. that a man without any offense by him committed, or any law to authorize it, should be hurried away like a criminal from his friends and family, and carried by force into a remote and dangerous service.

of 7 *H. 7. cap. 1.* makes it felony to depart without license of the captain, and therefore *vide supra*, p. 674. whether 3 *H. 8.* be not repealed by 1 *E. 6.* as a felony newly made since the first day of the reign of *H. 8.*

If a man receive imprest to serve the king beyond the sea, and is delivered over to a conductor to be brought to a certain place at the sea side, and is in the king's wages, and runneth away without license of the conductor, all besides [*Croke,*] *Yelverton* and *Hutton*, agreed it to be felony, and the conductor is as to this purpose a captain; but all agreed, that if the conductor at the place delivers him over to another conductor, this second conductor is not a captain within the statute; (y) but *Yelverton* and *Hutton* held, that in neither case it is felony, unless the conductor be also a captain, and so named in the indenture between the king and him, which all agreed to be the safest way.

It was held, that it could not be tried before other justices, than such as are limited by the act, because a new felony, and limited to be tried in another manner than the law directs, *viz.* in the county where taken. *M. 3 Car. Hutt. Rep. 134.* nine judges *versus Croke, Hutton,* and *Yelverton, vide Cro. Car. 71.* the better [greater] opinion was, that it was felony and may be tried before justices of *oyer and terminer* or gaol delivery, as well as of the peace.

But surely the press-masters or constables, that usually take up men for service, are not captains within the act, neither is the running from them felony within these statutes. (z)

There are no other felonies newly enacted in the time of queen *Mary*, but those that were temporary, as 1 & 2 *P. &* [681] *M. cap. 3.* telling false news, &c. after a former conviction, (*) and 1 *Mar. cap. 12.* concerning riots.

(y) The resolution here did not distinguish between a first and second conductor, but between a conductor, who by agreement with the captain had the leading them quite thro to the place of rendezvous, and one who was hired to carry them part of the way, and then deliver them to another conductor; a conductor of this last sort, whether first or second, it was agreed was not a captain within the statute. See *Hut. 134.*

(z) These several acts of parliament enacted for the punishment of soldiers running away from their captains are now in a manner useless, by reason of the frequent statutes for punishing mutiny and desertion by the martial law, a method more concise and effectual; which, however necessary it may be in the time of war, is by many thought not suitable to *English* freedom in times of peace and tranquility. See the statutes 1 *W. & M. Sess. 1. cap. 5.* and 6 *Geo. 2. cap. 3.* between which years they have been often renewd, it not having been judged proper to make them of long continuance, but rather to renew them from year to year.

(*) This offense was not made felony, but was punishable by imprisonment for life, and forfeiture of goods and chattels.

CHAP. LXIV.

CONCERNING FELONIES NEWLY ENACTED IN THE TIMES OF QUEEN ELIZABETH, KING JAMES, KING CHARLES I. AND KING CHARLES II.

In the time of Q. *Elizabeth* there were several acts for making new felonies, and they be ranked into these ranks.

I. Such as were only temporary, or during the queen's life; such were the statutes of 1 *Eliz. cap. 16.* which in some cases made rebellious assemblies felony. 14 *Eliz. cap. 1.* touching withholding the queen's castles and other matters. 23 *Eliz. cap. 2.* touching seditious books, letters, prophecies, calculation of the queen's nativity, &c.

II. Such as were perpetual, or otherwise continued, but afterwards repealed, as 1 *Eliz. cap. 10.* and 14 *Eliz. cap. 4.* touching exportation of leather, repealed by the statute of 18 *Eliz. cap. 9.* 5 *Eliz. cap. 16.* concerning witchcraft, repealed by 1 *Jac. 1. cap. 12.*

III. Such as were perpetual and stand unrepealed, or [682] were temporary at first, and made perpetual, and of these I shall here give a brief account.

By the statute of 5 *Eliz. cap. 14.* It is enacted, "That if any person or persons upon his or their own head or imagination, or by false conspiracy or fraud with others, shall wittingly, subtilly and falsly forge or make, or subtilly cause, or wittingly assent to be forged or made any false deed, charter, or writing sealed, court-roll, or the will of any person in writing, to the intent, that the state of freehold or inheritance of any person or persons, of in or to any lands, tenements or hereditaments, freehold or copyhold, or the right, title, or interest of any person or persons in or to the same, or any of them shall or may be molested, troubled, defeated, recovered or charged; or shall pronounce, publish, or shew forth in evidence any such false or forged deed, charter, writing, court-roll or will as true, knowing the same to be false and forged, as is aforesaid, to the intent above remembered, and shall thereof be convicted, either by action or actions, of *forger of false deeds* to be founded upon this statute, or otherwise according to the order and course of the common law, &c. shall pay the party grieved his double costs and damages, to be set upon the pillory, both his ears cut off, and also his nostrils slit and seared with an hot iron, be imprisoned during life, and forfeit the profits of his lands during life.(a)

"Or if any person, as before, shall forge, or assent to be forged, &c. any charter, deed, or writing, to the intent that any person may have a term of years in any lands, not copyhold, or any annuity for life, years, or in tail, or fee-simple, or shall forge any obligation, bill

(a) Upon this clause of the statute, *Japhet Croke*, alias *Sir Peter Stranger*, was convicted, *Pasc. 4 Geo. 2. B. R.* and suffered the penalties of the act.

obligatory, acquittance, release, or discharge of any debt, account, suit, demand, or other thing personal; or shall pronounce, &c. *ut supra*, that then he shall pay the party grieved double costs and damages, be set upon the pillory, and lose one of his ears, &c.

“And if any person or persons, being hereafter convict of any of the offenses aforesaid by any of the ways above [682] limited, shall after his or their conviction or condemnation afterwards commit or perpetrate any of the offenses aforesaid, that then every such second offense shall be adjudged felony; and the parties convicted or attaint thereof according to law shall suffer death, and forfeit their goods and lands, as in case of felony, without having advantage of sanctuary or clergy; but the wife not to lose her dower, nor blood to be corrupted, nor heirs disinherited.

“Justices of *oyer and terminer* and of assize to hear and determine the offenses against this act.

“Not to extend to any attorney or lawyer pleading a forged deed, not being party or privy to the forging, nor to the exemplification of a forged deed, nor to any judge, that shall cause the seal to be set to such exemplification.”

Upon this statute, so far as it relates to felony, these things considerable shall be set down in order.

1. What is a making, forging, or assenting.

If *A.* makes a deed of feofment to *B.* and after makes a deed of feofment to *C.* with an ante date before the other feofment, this was a forging within the statute 1 *H. 5. cap. 3.* and also within this statute. *Co. P. C. cap. 75. 27 H. 6. 3. a.*

But *note*, that it is not the bare antedating of a deed, that makes a forgery, for then most assurances, especially bargains and sales for recoveries, leases for years to enable a release would be forgeries; but that which makes it forgery in the former case, is the intent to avoid his own feofment; and the words of this statute are, *to the intent that the estate of another person should be disturbed*; so the intent is to be joined in case of forgery.

Again, if *A.* make a true deed of feofment to *B.* of the manor of *Dale*, and after *B.* rase out *D.* and put in *S.* whereby the feofment imports the manor of *Sale*; or if *A.* grants a rent-charge to *B.* for life, and after sealing and delivery *P.* rases the deed, and enlarges the sum or estate, this is a subtle making of a false deed within this statute; *vide 1 Anders. Rep. Puckering's case, [684] Case 151. p. 100.*

An assent after the fact committed, makes not the party assenting guilty, or principal in the forging; but it must be a precedent or concomitant assent.

2. What is a writing sealed, deed, will, or court-rool?

The forging of a false customary of a manor put under seal, whereby the interest of the lord is molested, is a writing under seal within this statute. *Dy. 322. b. Taverner's case.*

The inserting of a clause in a will purporting a devise of lands without warrant or direction of the devisor is the forging of a will within this statute, tho the whole will be not forged, and altho done in the testator's life by the clerk that writes the will. *Co. P. C. cap. 75.* against the report of *Dy. 288. a. Marvin's case*,

But *note*, this was when the testator was speechless, but if he had his understanding, and assented to it, or published it afterwards, it is no forgery, tho at first written without his direction.

Forging surrenders, admittances, court-rolls of copyhold lands are within this statute.

If the deed or will forged purport only a lease for years, whereby the freehold is charged, or of a rent-charge for years, it is within this first branch.

A. makes a lease for years to *B.* a forging of an assignment of that lease from *B.* to *C.* is a forging of a deed within the second clause, *Co. P. C. ubi supra*, against the opinion in *Noy's Rep. in Markam's case.*(*b*)

But an assignment made here of a term for years of land in *Ireland* is said not to be within this statute, but punishable as a misdemeanor in common law. *29 Eliz. Newman's case, Hughes 3 Part, N. 221.*

3. What is a pronouncing or publishing, knowing the same to be forged?

If *A.* forges a deed, and *B.* tells *C.* that the deed is forged, [685] and yet *C.* publisheth it, it was resolved to be within the statute in *Gresham's case. P. 38 Eliz. Cam. Stellata.*(*c*)

But it seems to me, tho such a relation may be an evidence of fact to prove his knowledge, yet it is not conclusive, tho perchance *de facto* the deed be forged; for possibly there might be circumstances of fact, that might make the person relating it, or his relation, not credible; so that the *knowing* must upon the whole matter be left to the jury upon the circumstances of the case, and therefore the case of *Gresham* being in the star-chamber, where the lords are judges of the fact upon the evidence, is no authority in this case.

4. What is a writing, bill, bond, acquittance?

A will in writing concerning goods only, is within this clause.(*d*)

The forging of a statute staple, or recognizance in nature of a statute staple, is within this statute, because the party's hand and seal are to it; but not to the forgery of a statute merchant or recogni-

(*b*) *Noy, p. 42.*

(*c*) This is the same with *Markham's case*, and is cited by lord *Coke* for this purpose. *Co. P. C. p. 170. in margine.*

(*d*) This seems to be grounded on a mistake of lord *Coke*, who in his comment on this statute supposes the word *writing* to be inserted in the latter part of this clause, after the words *any obligation or bill obligatory*; whereas it is not so, for the statute makes no mention of *writings*, but only with respect to an interest in lands or annuities, and consequently does not extend to a will of goods only; and so was the case cited by lord *Coke* in *Dyer 302 b.* which was of a will of a lease for years, and not of personal goods only; but this case is expressly included in a later statute, *viz. 2 Geo. 2. cap. 25.* which makes such a forgery felony without benefit of clergy.

zance, because they have not the conusor's seal. *Co. P. C. p. 171. 15 H. 7. 16. a. (e)*

A. writes and seals a letter to *B.* and subscribes it, *B.* cuts off the lower part of the letter with the hand of *A.* and puts to it the seal of his letter, and over it writes an acquittance, this is the forging an acquittance. *Co. P. C. ubi supra.*

I come to the point of felony, having before stated what is a first offense within this statute.

There must be a conviction of a first offense before the second offense be committed, otherwise the second offense is not felony; and therefore if before conviction of forgery, *A.* commits a first and a second offense, the second offense is not felony [686] within this statute.

And by conviction, I conceive, is intended not barely a conviction by verdict, where no judgment is given, but it must be a conviction by judgment.

And the indictment for a second offense must recite the record of the first conviction, that it may appear to be a conviction of such a forgery as is within the statute; for if it be not the indictment of felony for the second offense fails.

And upon the evidence, tho the record of the first conviction ought to be proved, yet the matter of the first conviction shall never be re-examined, but must stand for granted, and the party is concluded touching the truth of the matter of the first conviction by the record of that conviction.

If *A.* publish a false deed knowingly, and be convict upon this statute for this offense, and after such conviction forges a deed, this is a second offense, and felony within this statute, tho the publishing be prohibited by one clause, and the forging by another, adjudged *P. 7. Jac. B. R. Booth's case, (f) Co. P. C. p. 172.* for the words are, *if he commit any of the said offenses the second time*; and so, if he be convict of forgery, the publication of a forged deed afterwards knowingly is felony, or if he be first convict of the forgery of a court-roll, and after that forges an obligation or acquittance; for the second offense in any of the forgeries or publications is felony, tho it be of a different kind, if the first or second offense be within the statute. *(g)*

The hearing and determining of the offense against this statute are limited to the justices of assize, or *oyer and terminer*.

(e) According to this case it should be quite the reverse; for it is there said, that the statute merchant has the seal of the party which, the book says, is not requisite in the statute staple.

(f) 13 Co. Rep. 34.

(g) But by 2 Geo. 2. cap. 25. the first offense is made felony without benefit of clergy, and extends to all deeds, wills, bonds, writings obligatory, bills of exchange, promissory notes, indorsements, or assignments of bills of exchange, or promissory notes, or acquittances, or receipts for money or goods, if done with an intention to defraud any person; this act was made to continue for five years, and to the end of the next sessions of parliament, and so expired the 15th of May, 1735, but was revived and made perpetual by 9 Geo. 2. ch. 18.

This extends not to the justices of peace, for tho in the commission of the peace there is a clause, *nec non ad audiendum & [687] terminandum*, yet they being commissions of a several nature, they are not comprised under the name of justices of *oyer* and *terminer*.(h)

But the court of king's bench may hear and determine these offenses, for they are justices of *oyer* and *terminer* and more. *Co. P. C. cap. 41. p. 103.*

The offenders as to felony in this statute are excluded from clergy and sanctuary.

The statute of 5 *Eliz. cap. 20.* concerning *Egyptians*. *Vide quæ supra super stat. 1 & 2 P. & M.*

By the statute of 8 *Eliz. cap. 3.* "No man shall bring, deliver, send, receive, or take, or procure to be brought, delivered, sent, received, or taken into any ship or bottom any manner of sheep alive, to be carried or conveyed out of this realm, or out of *Wales*, or out of *Ireland*, or any of the queen's dominions, upon pain of forfeiture of all his goods, the moiety to the queen, the other moiety to the informer, imprisonment, and loss of his left hand; and the second offense to be felony.

"But no corruption of blood or loss of dower."

Justices of *oyer* and *terminer*, gaol-delivery, or of the peace, have power to hear and determine offenses.

The offender hath benefit of clergy, as well in case of felony, as of cutting off the hand. *Co. P. C. cap. 42.*

The statute of 14 *Eliz. cap. 5.* concerning rogues and vagabonds, is repealed by the statute of 35 *Eliz. cap. 7.* and settled in another way by 39 *Eliz. cap. 4.* and therefore I shall refer it thither.

By the statute of 27 *Eliz. cap. 2.* "It shall not be lawful for any jesuit, seminary priest, or other such priest, deacon, or other religious or ecclesiastical person whatsoever, born within this realm, or any of the queen's dominions, hereafter to be made, ordained or professed by any authority or jurisdiction, derived, challenged, or pretended from the see of *Rome*, to come into this realm or any of the queen's dominions, (except as in that act is excepted,) under pain of high treason.

"And any person, that after the end of forty days shall [688] wittingly and willingly receive, comfort, aid, or maintain such jesuit, &c. being at liberty and out of hold, knowing him to be a jesuit, seminary priest, &c. shall be adjudged a felon without benefit of clergy."

By the statute of 31 *Eliz. cap. 4.* "If any having the charge or custody of any armour, ordinance, munition, powder, shot, or of habiliments of war of the queen, her heirs or successors, or of any victuals provided for the victualling of any soldiers, gunners, mariners, or pioners, shall for lucre, or gain, or wittingly, advisedly, and of purpose to hinder or impeach her majesty's service, embezzle,

purlain, or convey away the same, to the value of twenty shillings at one or several times, it shall be felony.

“The prosecution to be within a year after the offense: no corruption of blood, loss of dower, nor loss of lands, but during the life of the offender.

“The prisoner allowed to make any lawful proof for his discharge, Clergy not taken away.”

By the statute of 35 *Eliz. cap. 1*. It is enacted, “That if any person above the age of sixteen years, who shall obstinately refuse to repair to some church or chapel, or usual place of common prayer to hear divine service established by her majesty’s laws or statutes, and shall forbear to do the same by the space of a month next after without any lawful cause, shall at any time after forty days next after the end of this session of parliament, by printing, writing, words or speeches, advisedly and purposely, go about to persuade others to impugn her majesty’s power in causes ecclesiastical, or persuade others to forbear coming to church to hear divine service, or receive the communion according to law, or to be present at any unlawful conventicle or meeting, under pretense of exercise of religion, contrary to her majesty’s laws; or shall after the forty days willingly join in, or be present at, such assemblies or meetings under colour of exercise of religion, contrary to the laws of this realm, then such person being thereof lawfully convicted shall be committed to prison, there to remain without bail or mainprise, till he shall conform and yield to come to some [689] church or chapel, and hear divine service according to the queen’s laws, and make open submission and declaration of his conformity, as by the act is prescribed.

“And if such person shall not within three months, being required by the bishop of the diocese or justice of peace of the county, where he is convicted, come to some parish church to hear divine service, he shall abjure the realm, as by that act is appointed.

“And if he shall refuse to abjure, or having abjured shall not go, or else shall return without the queen’s license, it is felony without benefit of clergy.

“No loss of dower, corruption of blood, nor forfeiture of lands longer than the life of the offender.

“Special punishment by forfeiture of 10*l. per mensem*, for such as relieve them, except father, mother, &c.

“Not to extend to women or popish recusants.”

The it were formerly doubted, yet upon great consideration by all the judges it hath been resolved, that this statute is in force.

But to make up the offense to be felony there are so many circumstances required, that it is difficult to have any legal conviction according to this statute.

1. The party must be above sixteen years old. 2. He must obstinately refuse to come to church, which obstinate refusal cannot be without a request or monition to repair to church. 3. He must forbear to come to church for a month after such refusal without a rea-

sonable cause of absence. 4. He must do some of those acts limited by the statute, as to dissuade coming to church, &c. or after that month's absence be at an unlawful conventicle.

And all these things must be precisely charged in the indictment and proved upon evidence, or otherwise no such commitment, or abjuration, or felony can follow.

And therefore, altho many have been hastily convicted upon this statute upon general indictments of not coming to church, and being at an unlawful conventicle, yet never was any convict before [690] me upon this offense, because these circumstances were either not laid in the indictment, or not effectually proved.

Besides, it is difficult to say, what conventicle upon pretense of exercise of religion was in those times contrary to the laws of the realm, unless mass, or by mass-priests, tho of late time it hath been settled by special acts of this parliament, viz. (i)

The reason why popish recusants are exempted out of this act is, because there is provision touching them in the next following, viz.

By the statute of 35 *Eliz. cap. 2.* "If any popish recusant not having an estate in lands of twenty marks *per annum*, or goods to the value of twenty marks, (other than *feme-coverts*) shall not repair to his dwelling-house, &c. according to the act, and present himself and his name to the minister and church-wardens of that parish; or after their coming shall go five miles from their dwelling, and being therefore taken shall not within three months after taking come to church and make their confession of conformity, as in that act is exprest, being thereunto required by a justice of peace, or by the minister or curate of the parish, then such recusant being thereunto required by two justices or coroner of the county shall abjure the realm for ever; and if he refuse to abjure, or having abjured refuse to go out of the realm, or being gone shall return without license, it shall be felony without clergy."

By the statute of 39 *Eliz. cap. 4.* All former statutes against rogues and vagabonds are repealed, and among other things it is enacted, "That if any rogues shall appear dangerous, or will not be reformed from their roguish life by the provisions of that act, it shall be lawful for two justices of the limit, whereof one of the *Quorum*, to commit him to the house of correction till the next quarter sessions, and then the major part of the justices may banish him out of [691] the realm and dominions thereof, to such place as shall be assigned by six of the privy council, whereof the lord chancellor or treasurer to be one, or condemn him to the galleys of this realm; and if any such rogue so banished shall return again without lawful warrant, it shall be felony, to be heard and determined in that county of *England* or *Wales* where he shall be apprehended.

(i) There is a blank here in the *M.S.* but the acts here meant are 16 *Car. 2. cap. 4.* and 22 *Car. 2. cap. 1.* by which statute every assembly for religious worship of five or more besides the family, in other manner than is allowed by the liturgy of the church of *England*, is declared to be a conventicle contrary to law; but these acts are now of no force against protestant dissenters, by reason of the toleration act. 1 *W. & M. cap. 18.*

“But in this case, the offender hath clergy.”

This act is continued by the statute of 1 *Jac. cap. 25.* 3 *Car. 1. cap. 4.* and 16 *Car. 1. cap. 4.*

By the statute of 1 *Jac. cap. 7.* It is further added, “That such dangerous and incorrigible rogues shall by judgment of the same justices in the sessions be branded in the shoulder with the letter *R.* and be sent to the place of his last dwelling; and if it cannot be known, then to the place of his birth; and if such rogue be after found offending in begging or wandering contrary to this statute, it shall be felony without clergy, and tried in the county where he shall be taken.”

This act is likewise continued by 3 *Car. 1.* and 16 *Car. 1. cap. 4.*

This act doth not take away the punishment by the statute of 39 *Eliz. cap. 4.* but gives election to the justices in the sessions to inflict either.

By the statute of 39 *Eliz. cap. 17.* “1. Idle and wandering soldiers or mariners, or idle persons wandering as soldiers or mariners. 2. Idle or wandering soldiers coming from sea, not having a testimonial under the hand of a justice of peace, setting down the time and place of his landing, place of his dwelling and birth, and limiting a time for his passage thither. 3. Or exceeding the time limited by his testimonial fourteen days, unless he falls sick, if he be in truth a soldier or mariner. 4. Every wandering soldier or mariner, or every person wandering as a soldier or mariner counterfeiting his testimonial, or having the same forged testimonial about him, knowing the same to be forged, is a felon without benefit of clergy.”

This offense may be heard and determined before justices of assize, gaol-delivery, or of the peace, having power to [692] hear and determine felony. No corruption of blood.

If a freeholder will take him into service for a year, and he becomes bound by recognizance, *ut per statute*, no farther proceeding to be against him; but if within the year he depart without license, it is felony without benefit of clergy.

Continued by 3 *Car. 1. cap. 4.* and 16 *Car. 1. cap. 4.*

And thus far, for felonies enacted in the time of queen *Elizabeth.*

In the time of king *James* these ensuing felonies were *de novo* enacted.

By the statute of 1 *Jac. cap. 11.* “If any person within his majesty’s dominions of *England* and *Wales*, being married, do at any time after marry any person or persons, the former husband or wife being alive, every such offense shall be felony, and the party offending shall receive such proceeding, trial and execution in such county where he or she is taken.”

This act hath five exceptions. 1. It shall not extend to such persons, whose husband or wife shall be continually remaining beyond the seas, for the space of seven years together. 2. Or whose husband or wife shall absent him or herself in any place within the king’s dominions, the one not knowing the other to be living within that time. 3. Nor to any person divorced by any sentence had or to be had in

the ecclesiastical court. 4. Nor to any person whose marriage hath been or shall be declared void by sentence in the ecclesiastical court. 5. Nor to any person or persons for or by reason of any marriage had or to be had within the age of consent.

This felony not to make corruption of blood, or loss of dower, or disherison of the heir.

1. Observables upon the body of the act.

Altho the second marriage be simply void, yet the parliament thought it just to make it felony.

A. takes *B.* to husband in *England*, and after takes *C.* to husband in *Ireland*, she is not indictable in *England*, because the offense was committed out of this kingdom. But if *A.* marries a husband [693] in *Ireland*, and comes into *England*, and marries a second husband, here it is felony. The former case was accordingly ruled at *Newgate* sessions. (k)

A. takes *B.* to husband in *Holland*, and then in *Holland* takes *C.* to husband, living *B.* and then *B.* dies, and living *C.* she marries *D.* this is not marrying a second husband, the former being alive, for the marriage to *C.* living *B.* was simply void, and so she was not her husband; but if *B.* had been living, this had been felony to marry *D.* in *England*: ruled at *Newgate* sessions about 1648. the lady *Madison's* case.

The first and true wife is not to be allowed as a witness against the husband; but I think it clear the second wife may be admitted to prove the second marriage; for she is not his wife, contrary to a sudden opinion delivered in *July*, 1664. at the assizes in *Surrey*, in *Arthur Armstrong's* case; for she is not so much as his wife *de facto*. *Vide quæ dixi supra super statut. 3 H. 7. cap. 2. p. 661.*

2. Observables touching the exceptions.

As to the *first*, If the husband or wife be beyond the seas seven years, tho the party in *England* hath notice that he or she is living, yet it is no felony, which appears by the second exception, where the party is commorant in the king's dominions, if the party hath notice, it is felony; notice there makes the offense, but not when the husband or wife is beyond sea; and yet in the former case as well as the latter the second marriage is void. *Vide 22 E. 4. Consultation 5.*

As to the *second* exception: Suppose the first wife or husband be absent in *New-England* or *Ireland* seven years, this is beyond the seas, and so within the words of the first exception, and yet within the king's dominions, and so not aided by the words of the second exception, unless without notice; it seems *in favorem vitæ* the words *within the king's dominions* must be intended within *England*, *Wales*, or *Scotland*, to make both clauses consistent; but however the isle of *Wight* is not beyond the sea within the first clause, because *infra corpus comitatûs Southampton*: so for *Scilly*, *Lundy*. *Quære* of *Guernsey*, *Jersey*.

(k) 1 Sid. 171. Kel. 79.

As to the *third* exception: certainly the divorce intended is not à *vinculo matrimonii*, for then without the aid of any proviso either may freely marry; but it must be intended of divorces à *mensâ & thoro*. *P. 12. Car. 1. B. R. Porter's case*, it was doubted, whether a divorce *causâ sævitæ*, were such a divorce as was within this exception, because it seemed rather to be a provisional separation for the wife's safety and maintenance, than a divorce; but it was never resolved. *Cro. Car. 461. (l)*

If there be a divorce à *vinculo*, and one of the parties appeals, tho this suspend the sentence, and possibly may repeal it, yet a marriage pending that appeal is held to be aided by this exception. *Co. P. C. cap. 27. p. 89.* But if the sentence of divorce be repealed, a marriage after is not aided by this exception, tho there was once a divorce.

As to the *fifth* exception: If either party be within the age of consent, the exception extends to both: *A.* of the age of twenty years marries *B.* of the age of nine years, *A.* marries a second wife, this is aided by the exception, as well as if *B.* had married a second husband before agreement at her age of consent to the first marriage, for either of them may *resilire* before they have both consented, *T. 42 Eliz. B. R. Babington's case, Co. P. C. cap. 27. p. 89.*

But if a woman of twelve years marry a man of fourteen years, a second marriage by either is felony, tho they are infants, because as to matters of this kind, especially the business of marriage, they are at this age adjudged of discretion. *Sed vide supra, cap. 3. plenius de hac materia.*

3. Observables touching the trial.

The trial to be in the county where the offender is apprehended, is added *cumulativè*; for he may be indicted where the second marriage was, tho he be never apprehended, and so may proceed to outlawry, as likewise it may be done upon the statute of 7 *H. 7. cap. 1.* of soldiers. *Co. P. C. cap. 26. p. 87.*

By the statute of 1 *Jac. cap. 12.* All former acts against conjuration, enchantments, &c. are repealed, and it is enacted,

“1. That if any person shall use, practise, or exercise any invocation or conjuration of any evil or wicked spirit. [695]

“2. Or shall consult, covenant with, entertain, employ, feed, or reward any wicked or evil spirit, to or for any intent or purpose.

“3. Or take up any dead man, woman, or child, out of his or their grave, or any other place, or the skin, bone, or any other part of any dead person, to be employed in any manner of witchcraft, sorcery, charm, or enchantment.

“4. Or shall use, practise, or exercise any witchcraft, sorcery, charm, or enchantment, whereby any person shall be kild, destroyed, wasted, consumed, pined, or lamed in his or her body, or any part thereof.

“Every such person or persons, their aiders, abettors, and counsellors, being thereof convict and attaint, shall suffer death as a felon without clergy.

“1. If any person shall take upon him by witchcraft, inchantment, charm, or sorcery, to tell where any treasure of gold or silver may be found in the earth or other secret places.

“2. Or where goods or things lost or stolen should be found or be come at.

“3. Or shall use any sorcery, to the intent to provoke any person to unlawful love.

“4. Or whereby any cattle or goods of any person shall be destroyed, waisted, or impaired.

“5. Or to hurt or destroy any person in his or her body, tho the same be not effected or done.

“First conviction one year’s imprisonment without bail, and once a quarter to stand two hours in the pillory, and confess his or her fault.

“If after conviction he commit the like offense, and be convict and attaint of such second offense, he shall suffer death as a felon without clergy: but no loss of dower, corruption of blood, nor heir disherited.”

By the statute of 1 *Jac. cap. 31.* persons going abroad with a plague-sore, felony. But this act is discontinued, as my lord *Coke* saith, *Co. P. C. p. 90.* but 3 *Car. 1 cap. 4.* hath revived [696] or continued it to the end of the first session of the next parliament; and by 16 *Car. 1. cap. 4.* it is continued till repealed.

But it gives no forfeiture of lands, goods, or chattels.

By the statute of 3 *Jac. cap. 4.* “If any subject pass out of this realm, to the intent to serve any foreign prince, state, or potentate, or shall pass over the seas, and there shall voluntarily serve any such foreign prince, &c. not having before his or their passing taken the oath prescribed in that act before the customer, comptroller of the port, haven, or creek, or their deputy or deputies, or being a gentleman, or of higher rank, or hath born office of a captain, lieutenant, or other place in the camp shall pass, &c. before he hath taken the oath, and given bond, &c. it is felony.

“The trial shall be in the county where the offense is committed, viz. the place of his departure, tho that be but part of the offense, and there they shall inquire of the rest of the offense committed beyond sea, viz. his service there.(m)

“The offender hath his clergy.

“No corruption of blood nor loss of dower.”

By the statute of 21 *Jac. cap. 26.* “All persons who acknowledge or procure to be acknowledged any fine or fines, recovery or recoveries, deed or deeds enrolled; statutes or recognizances, bail or judgment, in the name of any person or persons not privy or con-

(m) *Co. P. C. p. 80. cap. 4.*

sending to the same, and being thereof lawfully convicted or attaint, shall incur the penalties of felons without benefit of clergy.

“No corruption of blood nor loss of dower.”

A bail taken before a judge, is not a bail within this statute till it be filed of record; and if it be not filed, the acknowledging thereof in another's name makes not felony, but a misdemeanor only. (*)

The statute of 21 *Jac. cap. 27.* for murdering bastard children: this I shall reserve to the title of evidence, *Part II. cap. 39. quod vide ibidem.*

And thus far of felonies in the time of king *James.*

In the time of king *Charles I.* I find not any any new [697] enacted felony.

I therefore come to the time of king *Charles II.*(†)

(*) But this is since made felony by 4 & 5 *W. & M.*

(†) Here the manuscript breaks off, our author having proceeded no farther; but to render the work more complete, it is thought proper to subjoin an account of the several felonies which have been enacted since that time; by which it will appear, that latter times have been no less fruitful in multiplying capital punishments, than former ones were.

FELONIES ENACTED IN THE TIME OF KING CHARLES II.

I. Transporting wool.

By 13 & 14 *Car. 2. cap. 18.* it is made felony to transport wool out of *England, Wales, or Ireland;* but by 7 & 8 *W. 3. cap. 28,* the making it felony is repealed, and it is reduced to a misdemeanor, which by that and later statutes is subjected to severe penalties.

II. *Coventry's* act concerning dismembring or disfiguring.

By 22 & 23 *Car. 2. cap. 1.* if any shall of malice forethought, and by lying in wait, unlawfully cut out or disable the tongue,

Put out an eye,

Slit the nose,

Cut off a nose or lip,

Or cut off or disable any limb or member of any other person, with intention to maim or disfigure, they, their counsellors, aiders, and abettors, shall be guilty of felony without benefit of clergy.

Attainder on this statute shall not work any corruption of blood or forfeiture.

Sir *John Coventry*, a member of the house of commons, had a little before been assaulted in the street, and his nose slit, which gave occasion to the making this act, which from him was called *Coventry's* act.

Upon this statute, *Coks* and *Woodburns* were condemned and executed at *Suffolk* assizes, 8 *Geo. I.* for slitting the nose of Mr. *Crispe.* See *State Tr. Vol. VI. p. 212.*

III. Maliciously burning stacks of corn, or killing cattle in the night.

By 22 & 23 *Car. 2. cap. 7.* Whoever shall in the night-time maliciously, unlawfully, and willingly, burn any stacks of corn, hay, or grain, barns or other houses, or buildings, or kilns.

Or shall in the night-time maliciously, unlawfully, and willingly, kill or destroy

horses, sheep, or other cattle, shall be guilty of felony; but liberty is given the offender to chuse transportation for seven years.

Attainder on this act shall not work corruption of blood, loss of dower, or disinheritance of the heir.

During the short reign of king JAMES II. I do not find any new enacted felony.

FELONIES ENACTED IN THE TIME OF KING WILLIAM III.

I. Personating bail.

By 4 W. & M. cap. 4. Personating another before those who have authority by that act to take bail, so as to make him liable to the payment of any sum of money in that suit or action, is made felony.

[698] II. Counterfeiting lottery tickets.

By 5 & 6 W. & M. cap. 7. 8 Ann. cap. 4. 12 Ann. sess. 1. cap. 2. sess. 2. cap. 9. 5 Geo. 1. cap. 3 & 9. 7 Geo. 1. cap. 20. The forging or counterfeiting the tickets in the several lotteries appointed by the said acts,

Or standing orders or receipts given out in pursuance of the said acts,

Or altering the number or principal sum thereof,

Or counterfeiting the hand of any person to such order,

Or the bringing any such forged ticket, &c. (knowing it to be so) to the managers, &c. with intent to defraud his majesty or any contributor, is made felony without benefit of clergy.

III. Counterfeiting the stamps.

By 5 & 6 W. & M. cap. 21. 9 & 10 W. cap. 25. 8 Ann. cap. 9. 9 Ann. cap. 11 & cap. 23. 10 Ann. cap. 19. 12 Ann. sess. 2. cap. 9. 5 Geo. 1. cap. 2. Forging any of the stamps appointed by the said acts,

Or counterfeiting or resembling the impression of the same upon any vellum, parchment, or paper,

Or uttering, vending, or selling any vellum, &c. with such counterfeit impression, knowing the same to be so,

Or using any stamps or marks with intent to defraud the crown of the stamp duty, is made felony without benefit of clergy.

IV. Counterfeiting the seal of the Bank, bank-notes, &c.

By 7 & 8 W. cap. 31. § 36. 8 & 9 W. cap. 19. § 36. and 11 Geo. 1. cap. 9. The forging the common seal of the bank,

Or any bank-bill or bank-note,

Or erasing or altering any such bill or note,

Or altering or erasing any indorsement, or any bank-bill or note,

Or tendering the same in payment, knowing the same to be forged, erased, or altered is made felony.

V. Counterfeiting exchequer-bills.

By 7 & 8 W. cap. 31. § 78. 9 W. cap. 2. § 3. 5 Ann. cap. 13. 7 Ann. cap. 7. 9 Ann. cap. 7. 11 Geo. 1. cap. 17. § 12. The counterfeiting exchequer bills,

Or any indorsement thereon,

Or tendering such counterfeit bills or indorsement, knowing the same to be counterfeit, with intention to defraud his majesty, or any other person, is felony without benefit of clergy.

VI. Blanching copper, &c.

By 8 & 9 W. cap. 25. Blanching copper for sale, or mixing blanching copper with silver,

Or knowingly buying or selling, or offering to sale such, or any other malleable mixture of metals or minerals heavier than silver, and wearing like gold,

Or receiving, paying, or putting off any counterfeit, or unlawfully diminished milled money (not cut in pieces) at a lower rate than it imports, or was coined or counterfeited for, is made felony.

FELONIES ENACTED IN THE TIME OF QUEEN ANNE.

I. Wilfully destroying any ship.

By 1 Ann. sess. 2. cap. 9. and 4 Geo. 1. cap. 12. It is felony for any captain, master, mariner, or other officer belonging to any ship wilfully to cast away, burn, or destroy the said ship, or procure the same to be done to the prejudice of the owner.

Or for the owner, captain, &c. to do the like, to the prejudice of any underwriter of the policy of insurance, or of any merchant, who shall load goods therein.

II. Receiving stolen goods.

By 5 Ann. cap. 31. Receivers of stolen goods, knowing them to be stolen, are declared guilty of felony, as accessaries.

III. Assaulting a privy counsellor in the execution of his [699] office.

By 19 Ann. cap. 6. It is felony without benefit of clergy to assault, wound, or attempt to kill a privy counsellor in the execution of his office.

The occasion of making this act see *supra* p. 230. in notis.

IV. Counterfeiting the seal of the *South-Sea* company, *South-Sea* bonds, &c.

By 9 Ann. cap. 21. It is felony without benefit of clergy to forge or counterfeit the common seal of the *South-Sea* company,

Or to forge, counterfeit, or alter any of their bonds,

Or knowingly to tender, or offer to dispose of the same, with intent to defraud any person, see 6 Geo. 1. cap. 11.

V. Making an hole in a ship, or stealing any pump from a ship.

By 12 Ann. cap. 18. made perpetual by 4 Geo. 1. cap. 12. The making any hole in a ship in distress,

Or stealing any pump belonging to such ship, or aiding or abetting thereto,

Or wilfully doing any thing tending to the immediate loss of such ship, is made felony without benefit of clergy.

FELONIES ENACTED IN THE TIME OF KING GEORGE I.

I. Concerning riotous assemblies.

By 1 Geo. 1. cap. 5. (which is for the most part copied from an expired act of 1 Mar. cap. 12.) if twelve persons or more, being unlawfully and riotously assembled, shall so continue together to the number of twelve for the space of one hour after proclamation made to depart, such continuance is made felony without benefit of clergy;

As also to oppose or hinder the reading the proclamation,

Or to continue to the number of twelve for one hour after such hinderance so made, having knowledge thereof.

By the same act it is felony without benefit of clergy for any persons, unlawfully and riotously assembled, with force to pull down, or begin to pull down any church, or chapel, or building for religious worship allow'd by the toleration act, or any dwelling-house, barn, stable, or other out-house.

II. Maliciously burning any wood or coppice.

By 1 Geo. 1. cap. 48. and 6 Geo. 1. cap. 16. It is felony for any person maliciously to set on fire or burn any wood, underwood, or coppice, or any part thereof.

III. Returning from transportation, taking a reward for helping to stolen goods, &c.

By 4 Geo. 1. cap. 11. If any offender ordered for transportation beyond sea shall return to, or (by 6 Geo. 1. cap. 23.) be found at large in *Great Britain* or *Ireland*, without some lawful cause before the expiration of his term, without licence from his majesty, he shall be guilty of felony without benefit of clergy.

By the same statute, whoever shall take any money or reward under pretence of helping any person to stolen goods, unless he apprehend the felon, and give evidence against

him at his trial, shall be guilty of felony, and shall suffer in the same manner as if he had stolen them himself, with such circumstances, as the same were stolen.

Upon this clause, *Jonathan Wild* was executed, 10 Geo. 1.

IV. Counterfeiting army debentures.

By 5 Geo. 1. cap. 14. 6 Geo. 1. cap. 17. 9 Geo. 1. cap. 5. It is felony without benefit of clergy for any person to alter or counterfeit any army debentures,

Or fraudulently to issue out any other than for the sums certified by the commissioners.

[700] V. Counterfeiting *South-Sea* receipts or warrants, &c.

By 6 Geo. 1. cap. 11. It is made felony without benefit of clergy for any one to alter, forge, or counterfeit any *South-Sea* receipt for a subscription to the stock,

Or warrant for a dividend,

Or any indorsement or writing thereon,

Or knowingly to tender or offer to dispose of the same with intent to defraud any one.

VI. Counterfeiting the seal of the two assurance companies.

By 6 Geo. 1. cap. 18. The counterfeiting the corporation seal of either of the assurance companies, now known by the names of the *Royal Exchange* and the *London Assurance*,

Or altering any policy, bill, bond, or other obligation under their common seal,

Or knowingly paying away such policy, &c. or demanding the money thereon, is felony without benefit of clergy.

VII. Maliciously spoiling the garments of any persons in the streets.

By 6 Geo. 1. cap. 23. The wilful and malicious tearing, spoiling, cutting, burning, or defacing the garments or clothes of any person in the streets or highways is felony.

VIII. Smuggling.

By 8 Geo. 1. cap. 18. If any persons above the number of five carrying offensive arms, or being in disguise, shall be found passing with foreign goods from any ship without due entry and payment of the duties,

Or shall forcibly resist any officer of the customs or excise in the seizing run goods, they shall be guilty of felony.

IX. Counterfeiting the name of, or personating a proprietor for transferring stock, or receiving dividends.

By 8 Geo. 1. cap. 22. To counterfeit the name of any proprietor,

To forge or procure to be forged, or wilfully to act and assist in forging a letter of attorney, or other instrument to transfer any share in the capital stock of any corporation established by act of parliament,

Or to receive any annuity, or dividend attending such share,

Or falsely to personate any proprietor for the purposes aforesaid, is felony without benefit of clergy.

X. The like as to annuity orders.

By 9 Geo. 1. cap. 12. To do the like with relation to any annuity order, is made felony without benefit of clergy.

XI. The *Waltham-black* act against appearing in disguise in any forest, &c. unlawfully hunting deer, robbing any warren, destroying fish, maiming cattle, destroying trees in any avenue, &c. firing houses, stacks of corn, &c. maliciously shooting at any person, sending threatening letters, &c.

By 9 Geo. 1. cap. 22. continued by 12 Geo. 1. cap. 30. and 6 Geo. 2. cap. 37. till Sept. 1. 1736, and from thence to the end of the next session of parliament, it is made felony without benefit of clergy, for any person armed with offensive weapons, and having his face blacked, or otherwise disguised, to appear in any forest, chase, park, &c. or in any high road, open heath, common, or down,

Or unlawfully and wilfully to hunt, wound, kill, or steal any red or fallow deer,

Or unlawfully to rob any warren, &c.

Or to steal any fish out of any river or pond,

Or unlawfully to break down the head or mound of any fish-pond, whereby the fish shall be lost or destroyed,

Or unlawfully and maliciously to kill, maim, or wound any cattle,

Or to cut down, or otherwise destroy any trees planted in any avenue, or growing in any garden, orchard, or plantation for ornament, shelter, or profit,

Or to set fire to any house, barn, or out-house, hovel, cock, mow, or stack of corn, straw, hay, or wood,

Or maliciously to shoot at any person in any dwelling-house or other place.

(Upon this clause Edward Arnold was convicted at Surrey Lent-assizes, 1723-4, for shooting at lord Onslow.)

Or knowingly to send any letter without any name, or signed with a fictitious name, demanding money, venison, or other valuable thing,

[701]

Or forcibly to rescue any person being lawfully in custody for any of the offenses before-mentioned,

Or to procure any person by gift or promise of money, or other reward, to join in any such unlawful act.

No attainder on this act shall work corruption of blood, loss of dower or forfeiture.

This act was occasioned by the devastations and injuries then lately committed in a violent manner by several persons near *Waltham*, who had appeared blacked and disguised in the chases, forests, &c. and was from thence called the *Waltham-black* act.

XII. Concerning the pretended privilege of the *Mint* in *Southwark*.

By 9 Geo. 1. cap. 28. If any person shall within the place commonly called the *Mint*, or the pretended limits thereof, wilfully obstruct any person serving or endeavouring to serve or execute, any will, warrant, or legal process, &c.

Or shall assault, or abuse any person for having so done, whereby he shall receive any damage or bodily hurt;

Or shall oppose any officer of justice, or person aiding such officer in the execution of any writ, warrant, or process, &c. or shall be abetting thereto;

Or shall rescue, or knowingly harbour or conceal any prisoner taken upon such process;

Or shall presume to exercise any unlawful jurisdiction for supporting the pretended privilege within the said place, such offender shall be adjudged guilty of felony, and be transported for seven years.

And if any person wearing any vizard, &c. or having his face or body disguised, shall join or abet any riot, or oppose the execution of any legal process, &c. within the limits aforesaid, such offender shall be adjudged guilty of felony without benefit of clergy.

And every person aiding or abetting, concealing or harbouring such disguised person, shall be adjudged guilty of felony, and be transported.

XIII. The like with respect to *Wapping*, *Stepney*, &c.

By 11 Geo. 1. cap. 22. The same provision is made against most of the said offenses, if committed within the hamlet of *Wapping*, *Stepney*, or any other place within the bills of mortality, whereof presentment shall have been made by the grand jury at a general or quarter-sessions.

XIV. Counterfeiting *East-India* bonds, or indorsements thereon, or on *South-Sea* bonds, &c.

By 12 Geo. 1. cap. 32. Whoever shall forge or counterfeit, or wilfully assist in forging or counterfeiting the name or hand of the accountant-general of the court of chancery, the register, clerk of the court, report-office, or any of the cashiers of the bank of *England*, to any certificate, report, &c.

Or any *East-India* bond or indorsement thereon;

Or any indorsement on any *South-Sea* bond, shall be adjudged guilty of felony without benefit of clergy.

XV. Assaulting any master wool-comber, weaver, maliciously breaking tools, &c.

By 12 Geo. 1. cap. 34. If any person shall assault any master wool-comber, or master weaver, or other person concerned in the woollen manufacture, whereby he shall receive

any bodily hurt; for not complying with any such illegal by-laws, &c. as in the act mentioned,

Or shall write or send any threatening letter to such person for not complying with such illegal by-laws, or with any demands or pretences of his workmen, or others employed by him in the woollen manufacture, he shall be deemed guilty of felony, and be transported for seven years.

If any person shall maliciously cut or destroy any woollen goods in the loom or on the rack;

Or shall destroy any rack on which such goods are hanged in order to dry;

Or shall wilfully break any tools used in the making such woollen goods, not having the consent of the owner so to do;

Or shall break or enter by force into any house or shop by night or by day for any of the purposes aforesaid, such offender shall be adjudged guilty of felony without benefit of clergy.

[702] FELONIES ENACTED IN THE TIME OF KING GEORGE II.

I. Maliciously breaking down turnpikes.

By 1 Geo. 2. cap. 19. 5 Geo. 2. cap. 33. 8 Geo. 2. cap. 20. It is made felony without benefit of clergy for any person maliciously to break down or destroy any turnpike-gate or other fence belonging to such turnpike erected to prevent passengers from passing by without paying the toll, or forceably to rescue any person lawfully in custody for such offense.

Attainder by this act not to work corruption of blood, loss of dower, or forfeiture.

II. Forging of deeds, stealing bonds, &c.

By 2 Geo. 2. cap. 25. The forging or counterfeiting, or procuring to be forged or counterfeited any deed, will, bond, writing obligatory, bill of exchange, promissory note for payment of money, the indorsement or assignment of any bill of exchange, or promissory note for payment of money, or any acquittance or receipt for money or goods, or knowingly to utter or publish as true any forged deed, &c. with intention to defraud any person, is felony without benefit of clergy.

By the same statute to steal or take by robbery any bonds, notes, orders, tallies, &c. is felony of the same nature, and in the same degree, as if the money secured by such bonds, &c. and remaining unsatisfied, had been stolen or taken by robbery.

This act was made to continue only for five years from 29 June 1729, and from thence to the end of the then next sessions of parliament.

III. Stealing lead, iron, &c. fixt to any house or building.

By 4 Geo. 2. cap. 32. To steal, rip, cut, or break with intent to steal any lead, iron bar, iron gate, iron palisade, or iron rail fixed to any dwelling-house or other building used with such dwelling-house, or fixed in any garden, orchard, court-yard, fence or outlet belonging to any dwelling-house or other building is felony, and so it is in the aiders and abettors; and such as shall buy or receive such lead or iron, knowing the same to be stolen.

IV. Assaulting with an intent to rob.

By 7 Geo. 2. cap. 21. It is made felony with any offensive weapon or instrument unlawfully and maliciously to assault, or by menaces, or by any forceable or violent manner to demand any money, goods or chattels of any person, with a felonious intent to commit robbery on such person.

V. Counterfeiting the acceptance of a bill of exchange, or any accountable receipt.

By 7 Geo. 2. cap. 22. If any person shall falsely make, alter, forge, or counterfeit, or cause or procure to be counterfeited, &c. any acceptance of any bill of exchange, or the number, or principal sum of any accountable receipt, for any note, bill, or other security for payment of money, or any warrant or order for payment of money, or delivery of goods, with intent to defraud any person, or shall with such intent knowingly utter or publish the same as true, he shall be deemed guilty of felony.

[For the continuation of felonies enacted since the 7 Geo. 2. see p. 711, &c.]

CHAPTER LXV.

CERTAIN GENERAL OBSERVATIONS CONCERNING FELONIES BY ACT
OF PARLIAMENT.

1. GENERALLY, if an act of parliament be, that if a man commit such an act, he shall have judgment of life and member, this makes the offense felony, and this was ordinarily the clause used in antient statutes, as *Westm. 2 cap. 34.*, (a) *14 E. 3. cap. 10.* *28 E. 3. cap. 3.* *13 R. 2. cap. 3. &c. Co. P. C. cap. 29. p. 91.*

2. And consequently there ensued thereupon corruption of blood, eschete to the lord, and the wife's loss of dower.

3. But yet there may be and frequently are in acts of parliament, making new felonies, provisions, that there shall be no corruption of blood, disherison of the heir, or loss of dower; and this is done sometimes by enacting words, as in *1 Jac. cap. 31.* for going abroad with a plague-sore, sometimes by a proviso, that it shall not extend to corruption of blood, loss of dower, &c. as *8 Eliz. cap. 3.* *5 Eliz. cap. 14.* and sometimes by the words *saving to the wife her dower, and to the heir his inheritance*, as upon the statute of *1 Jac. cap. 12.* for witchcraft.

4. But notwithstanding such a clause, the king shall have the forfeiture of his lands during his life, and also his goods, for no eschete can come to the lord, where the inheritance is saved to the heir.

5. But by a special clause, forfeiture of goods as well as of lands may be provided against, as in the act of *1 Jac. cap. 31.* of going out with a plague-sore. *Co. P. C. cap. 6. p. 47.* and *cap. 28. p. 90.*

6. A saving or exclusion of corruption of blood doth virtually make the heir inheritable, and saves also the [704] woman's dower. *Co. P. C. cap. 28. super statut. 1 Jac. cap. 31.*

7. By an act making a new felony, clergy is not excluded from the offender, without special words. *Co. P. C. cap. 19. p. 73. super statut. 8 H. 6. cap. 12.* against stealing records.

8. In all acts making a new treason, felony, or misprision of treason, peers are to have their trial by their peers, tho no special clause enacting it. *Co. P. C. cap. 27. p. 89. super statut. 1 Jac. 6. cap. 11.* for marrying two husbands.

9. An act making any offense to be a felony, tho it speaks not of accessaries *before* or *after*, yet they are impliedly contained. (b)

10. Nay, altho the statute makes an offense to be felony in them that commit it, their counsellors, procurers, and abettors, to be felons, and speaks nothing of accessaries *after*; yet by the opinion of my

(a) See 2 *Co. Instit. p. 434.*

(b) *Co. P. C. p. 59.*

lord *Coke*, receivers and accessories *after* are also virtually implied, as in the statute of *Westm. 2.* in rape, *Co. P. C. cap. 19. p. 72.* upon the statute of *3 H. 7. cap. 2.* for carrying away women, *Co. P. C. cap. 12. p. 61.* upon the statute of *5 H. 4. cap. 4.* against multiplication, *Co. P. C. cap. 20. p. 74.* upon the statute of *1 Jac. cap. 12.* of witchcraft, *Co. P. C. cap. 6. p. 45.* in *fine*, tho *Stamford* be of another opinion.(c)

11. An act, that makes an offense by name, as rape, &c. to be felony, virtually makes all that are present, aiding, and assisting principals, tho one only doth the fact, tho as to point of clergy in some cases it differs; *de quo postea.*

12. An act, which makes the offender, his counsellors and abettors, guilty of felony, yet regularly makes not the counsellors, procurers or abettors principals, unless present, but, if they be absent, leaves them in the condition of accessories *before*, as upon the statute of *1 Jac. cap. 12.* of witchcraft, and other statutes of that kind, unless in express words it makes them all principals, as is done by the statute of *3 H. 7. cap. 2. Co. P. C. cap. 12. p. 61.* the only instance of that kind.

13. In an act limiting a second offense to be felony, but [705] the first only a misdemeanor, there must be two things to make the second offense felony, *viz.* 1. A judgment given for the first offense. 2. The second offense must be committed after the judgment for the first, otherwise it makes not felony, as in case of forgery upon the statute of *5 Eliz. cap. 14. Co. P. C. cap. 75. p. 172.,(d)* and upon the statute of *1 Jac. cap. 12.* of witchcraft. *Co. P. C. cap. 6. p. 46. 2 Co. Instit. p. 468.*

14. Therefore where those and some other statutes speak of a second offense after a conviction of a former, it is not intended barely of a conviction by verdict, unless judgment be given upon it. *Co. P. C. p. 46.*

15. An act making a felony, and limiting it to be tried in the county where the party is apprehended, unless there be negative words, *and not elsewhere*, is but cumulative, and he may be indicted where the offense was committed, as upon the statute of *1 Jac. cap. 11.* marrying a second husband or wife, *Co. P. C. cap. 27. p. 88.* and upon the statute of *7 H. 7. cap. 1.* and *3 H. 8. cap. 5.* soldiers departing. *Co. P. C. cap. 26. p. 86, 87.*

16. A second statute enacting the same offense to be felony, that was so enacted before, with some alterations is but cumulative, and no repeal of the former act; as the statute of *3 H. 8. cap. 5.* of soldiers making their departure without the licence of the king's lieutenant felony (where the act of *7 H. 7. cap. 1.* makes it felony, if without the captain's licence,) yet repeals not the former, because it is but an affirmative act; so *39 Eliz. cap. 4.* for banishing incorrigible rogues is not taken away by *1 Jac. cap. 7.* which adds burning in the shoulder, and sending them to their last habitation.

(c) *Stamf. P. C. fol. 44. b.*

(d) *Vide supra, p. 685.*

17. If one statute be grafted upon another statute relative to it in order to the better execution of a former statute, if the former be repealed, the latter is thereby virtually repealed, as the statutes of *Labourers*(*e*) being repealed by 5 *Eliz. cap. 4.* the statute of 3 *H. 6. cap. 1.* making congregations of masons felons is [706] thereby repealed.(*f*) *Co. P. C. cap. 35. p. 49.*

18. If a statute be but temporary and discontinued, and then revived by a new act of parliament; or if a statute be made touching a new felony, and repealed and re-enacted, the conclusion of the indictment *contra formam statutorum* is good; but the best way is to conclude *contra formam statut. in hujusmodi casu edit. & provis.* with an abbreviation, because in construction of law it shall be taken either *statuti* or *statutorum*, which may best maintain the indictment in point of law.(*g*)

19. A statute making a new felony of an offense, that consists of an act partly in the kingdom, and partly out of the kingdom, and limiting it to be tried where the offense is committed, shall be construed to be where that part of the offense is committed, that is within the kingdom, as upon the statute of 1 *Jac. cap. 2.* passing the sea, and serving a foreign prince, without taking the oath of obedience, shall be tried in that county where the part was that he passed the sea. *Co. P. C. cap. 23. p. 80.*

20. An act making a new felony extends not to an infant under the age of discretion, *viz.* fourteen years old; but if he be of that age, it binds him. *Plowd. Com. 465. a. Eyston and Stud's case.*

21. Whether the word *king* is personal to the then king, or extends to his successors in acts of parliament? It is true in grants of judicial or ministerial offices that concern administration of justice, as judges or sheriffs, a grant of such an office, *durante beneplacito regis*, is simply determined by the king's death. 12 *Co. Rep. p. 48.* Nay the grant of a judicial office by the king *quam diu se bene gesserit*, tho it be a freehold, determines by the king's death; for it is personal to the king that grants them; but it is held, that the grant of offices of another nature, or of lands *durante beneplacito nostro* doth not determine by the death of the king without some [707] act or declaration by the successor to determine it. 12 *Co. Rep. p. 48, 49.*

But as touching acts of parliament, regularly the word *king* extends to his successors,(*h*) and therefore the statutes of 11 *H. 7. cap. 18.* for service in the king's wars, 7 *H. 7. cap. 1.* for departing of soldiers, tho the preamble seems personal to that king, yet (it hath been ruled) to include successors, *Co. P. C. cap. 26. p. 86. Dy. 211. a.* so the statute of 23 *H. 8. cap. 4.* for brewers, *Noy's Rep. p. 118.*

(*e*) 23 *E. 3. cap. 1.* and 25 *E. 3. cap. 1.*

(*f*) For this last mentioned statute recites as the ground thereof, that the congregations of masons had violated the good effects of the statutes of *Labourers*.

(*g*) But this piece of our author's advice cannot now be observed, because by the late acts of 4 *Geo. 2. cap. 26.* & 6 *Geo. 2. cap. 6.* all indictments, informations, &c. are required to be in words at length, and not abbreviated.

(*h*) *Vide supra, p. 100.*

Chalchman and Wright. So *Poyning's law*, 10 *H. 7.* in *Ireland* for the manner of passing acts of parliament, tho that act speaks only of the *king*, without *successors*, yet it extends to his successors, and so declared 3 & 4 *P. & M. cap. 4.* in *Hibernia*, 12 *Co. Rep.* 109. b. 110. a.

And altho the power of altering the laws of *Wales* was a great trust reposed in *H. 8.* by the statute of 34 *H. 8. cap. 26.* for *Wales*, and was thought by some to cease by his death, 12 *Co. Rep. p. 46.* yet they durst not rest upon that, but it was specially repealed by the statute of 21 *Jac. cap. 10.*

A statute made to continue during the king's pleasure, doth not determine by his death, unless it be specially relative to the person of the king, as *during the pleasure of the king that now is*, or according to some *dicti domini regis*, *M. 24 Eliz. Moor's Rep. n. 311. p. 176. per Mede*; and therefore it seems that in such case the successor must make some proclamation or declaration of record to determine it, before it be determined; as upon the statute of 8 *H. 6. cap. 11.* for the manner of taking apprentices in *London*, which was in truth the case in *Moor, n. 311.* but the statute of 5 *Eliz. cap. 4.* repealing all acts touching apprentices and labourers, and making a special provision to save the customs of *London*, hath quieted that question.

By the statute of 8 *H. 6. cap. 24.* it is enacted, "That no *Englishman* sell to any merchant alien any merchandize, but for ready payment." By the statute of 9 *H. 6. cap. 2.* it is enacted, "That notwithstanding the former statute they may sell for six months time, and this ordinance shall endure so long as shall please the king." It is

held 10 *H. 7. 7. b.* that this statute remains as a suspension [708] of the former act of 8 *H. 6.* notwithstanding the death of *Henry VI.* till repealed by proclamation by his successor.

And yet in case of capital offenses limited, and *de novo* enacted by act of parliament to continue during the king's pleasure, it is not safe to proceed upon them after the king's death; and tho in matters of misdemeanors such continuance is limited by acts of parliament, yet I do not remember any such kind of limitation in acts enacting capital offenses, but they are either perpetual, or limited to continue for a time certain, as seven years, &c. or till the end of the next session of parliament, &c.

22. An act of parliament, that makes an offense felony, doth consequently introduce the punishment of concealing, that is, misprision of felony; and every offense made felony by act of parliament, includeth misprision, and the party may be indicted of misprision of felony, and thereupon fined and imprisoned; 2 *R. 3.* 10, 11. And yet in *Co. P. C. p. 133.* upon the statute of 33 *H. 8. cap. 1.* of false tokens, it is said, *where a corporal punishment only is inflicted by act of parliament, the party cannot be fined and imprisoned*, which is to be understood with two cautions, viz. 1. Where the indictment, &c. is grounded for the same offense contained in the statute, and therefore it crosseth not the case of 2 *R. 3.* for there he was indicted

for *misprision*, and not for *felony*. 2. Where it was an offense at common law, there if the indictment be grounded barely at common law, he may be fined and imprisoned, tho the statute limit a corporal punishment, as in case of false tokens he may be indicted as a cheat. (*)

(*) Here our author had wrote the title of another chapter *Touching Piracy*, but did not proceed in it, perhaps because he had referred what he thought needful to be said on that head to the chapter of *Clergy*, *Part II. cap. 50*.

ADDENDA IN NOTIS.

Ad. p. 270. l. 19. Rot. Parl. 11. H. 6. n. 43. A Roy nostre Sovereigne Seigneur Be- sechen humbly your communes of this present parlement, that where one *John Carpenter* of *Bridham* in the shire of *Sussex* husbandman, the vii of *Feuerer* the yere of youre noble reigne the viii, saying to *Isabell* his wyff, that was of the age of xvi yere, and hadde be married to hym but xx dayes, that they wold goo togedre on pilgremage, and made to arraye hir in hir best arraie, and toke hir with hym fro the said toune of *Bridham* to the toune of *Stoughton* in the said shire, and there with woode he smote the said *Isabell* his wiff on the hede that the brayne wende oute, and with his knyff gaf hir many other dedly woundes, and streped hir naked out of hir clothes, and toke his knyff and slytte hir belly from the brest doune, and toke hir bowels oute of hir body, and loked if she were with child. And thus the said *John* murdrid horribly his wiff, of the which horribly murdre the *Thursday* next after the fest of *Seint Ambrose* the bishop, the yere of youre reigne by foresaid, the said *John* was endited byfore Sir *John Bohun* Kt. Sir *Henry Husse* Kt. and *Wil. Sydney* your commissioners of your pees withinne the shire foresaid, and processe made out upon the same enditement according to your lawes till the same *John Carpenter* was outlawed of the said mourdure, and now gratusly for the same cause arreste, and in your prisone called the king's bench: Please hit to youre his right wise- nesse to considere the horrible mardure foresaid, and by auctorite of this your his court of parliament to ordeine, that the said *John Carpenter* may be juged as a traytour, and that your jugges have power to give judgement upon him to be drawed and hanged as a traytour, in eschewyng of such horrible mourdure in tyme comyng, savyng allwayes to the lords of the see eschetes of his lands after yere, day and wast.

Pur ceo qil semble encountre la libertee de Seint Eglise, le Roy s' advisera.

Ad. p. 384. l. 6. after electa r. scripturæ sacra contraria, for so *Grosted* exprest him- self, altho these words are omitted in our author's M.S. See *Mat. Paris*, p. 874.

Ad. p. 396. not. (n) in fine. The truth is, the writ for burning *Savotrs* was indeed a special act of parliament made for that purpose, for so is a writ *teste'd per regem & con- cilium in parlamento* to be intended. See the prince's case. 8 *Co. Rep. fol. 19. a.* Nor do I find any footsteps of heresy being punished capitally before this statute and that of 2 *H. 4.* The notion that the writ *de hæretico comburendo* lay at common law seems to be a mistake, for tho that writ be in the printed register, yet it is not in the antient manu- script registers; see *State Tr. Vol. II. p. [275]*. That this was not the antient punishment of heretics in *England*; see *Mat. Paris*, p. 105. for *Bracton* [*Lib. III. de coronâ cap. 9.*] *Britton* [*cap. 9.*] *Fleta* [*Lib. I. cap. 29 & 37.*] speak not of heretics, but of apostates and infidels: And tho by the imperial law some particular hereasies were punishable with death: see *Cod. Lib. I. tit. 5. l. 11, 12, &c.* yet it does not appear, that even in the empire he- resy in general was punished capitally, till the constitution of *Frederic II.* about the year 1234, which indistinctly adjudges all heretics to the flames: but in *England* the usual punishment seems to have been imprisonment, and even this was not allowable, tho he were *hæreticus contumax*, before the pretended statute of 5 *R. 2.* without the king's spe- cial license, an instance whereof is in *Rymer's Fœdera*, Tom. VI. p. 651. *Rex venerabili episcopo Londoniæ salutem. Quia accepimus per inquisitionem vestram, quod Nicholus de Drayton* — coram vobis congruè convictus & pro hæretico adjudicatus existit, quoddam in suo errore nephando animo indurato nequiter perseverans, ad fidei catholicæ unitatem redire non curavit nec curat in præsentî, licet sæpius ad hoc excitatus & in- ductus, sententiam majoris excommunicationis in hac parte incurrendo. Cum igitur sancta mater ecclesia ita tales hæreticos persequitur, nè suo veneno alios inficiant, ut in carceribus custodiri præcipiat. Super quo nobis supplicastis, &c. Nos supplicationi vestræ prædictæ gratanter concedentes, ad ipsum Nicholam hæreticum carcerali custo-

diæ vestræ mancipare, & ipsum in carcere vestro custodire faciendum, quousque dictum errorem suum revocaverit, & ad fidei catholicæ unitatem redire voluerit, quantum in nobis est, licentiam concedimus specialem. *Rot. Pat. 44. E. 3. p. 1. m.* [710] 23. dorso.

Ad. p. 490. in fine. Placita coram justiciariis itinerantibus apud crucem lapideam in com. Midd. anno 2 E. 1. incipiente 3. Rot. 13. in dorso. Seyton' Alice de Covale was arraigned *pro morte Johannes Lipertung*, and pleaded, that she killed him *se defendendo*, "ed quodd burgavit domum suam; & de bono & malo ponit se super patriam; & xii juratores dicunt, quodd prædicta Alicia occidit prædictum Johannem *se defendendo*, ed quodd voluit domum suam burgasse, & ipsam occidisse, si posset. Ided inde quieta. Et catalla prædicti Johannis confiscantur." *Placita coram eisdem justic' ibidem. Rot. 12. in dorso.* Thomas le Chapeleyn *nequitè & in feloniam, fregit ostium domus* Isabelles Lucas de Bottewell. Hue and cry was raised, and he was pursued, and killed *in fugiendo* by one William Javene. Javene brought the king's pardon *pro morte illa*, "Ided conceditur ei firma pax, & quia prædictus Thomas le Chapeleyn occisus fuit *in fugiendo*, catalla ejus confiscantur."

Ad. p. 508. l. 15. comes into the dwelling-house, but as the case is reported in *Kel. 31.* he was indicted *for breking into the house. Vide infra Part II. p. 358.*

Add. p. 556. l. ult. H. 7 E. 2. Rot. 88. This was the case of Thomas de Hedersete and John de Upstone, who being convicted *ed quodd incendium & combustionem domorum villæ de Lenne ex præcogitatâ malitiâ felonice perpetrârunt*, had judgment *quodd suspendantur.*

Ad. p. 602. M. 28 E. 3. Rot. 32. "The abbot of *St. Albans* was impleaded *coram rege*, *pro evasione prisonum à gaolâ de Sancto Albans*, *cujus custodiam idem Abbas habet, ut de jure abbathie sue;*" amongst whom was John de Heremyngford a clerk convict; but upon the jury's finding, "quodd idem Johannes de Heremyngford tempore evasioneis prædictæ, seu aliquo momento ante recaptionem ejusdem, non fuit extra visum custodis dictæ gaolæ sub prædicto Abbate, consideratum est, quodd prædictus Abbas eat inde quietus."

M. 45 E. 3. Rot. 17. This was the case of William Bakere, who was taken *cum bonis & catallis furatis* by the constables of Danbury, and set in the stocks, from whence he escaped; upon which the said constables were brought *coram rege ad respondendum, &c.* and pleaded, "quodd postquam latro ceppos fregit, ipsi eam recentè insecuti fuerunt, visum super ipsum semper habentes," till they retook him, and committed him to the gaol of the said town; "et quodd prædictus latro adhuc in eadem gaolâ existit, &c." The king's attorney replied, and joined issue with them, as to their keeping constant view of him till he was retaken. "Et juratores dicunt, quodd prædictus latro arrestatus & captus fuit per eosdem constabularios, & in ceppis positus, & quodd iidem constabularii prædictum latronem postea permiserunt evadere, absque hoc quodd ipsi habuerunt visum super præfatum latronem in evadendo, prout ipsi superitis allegârunt, Ided consideratum est, quodd prædicti constabularii erga dominum regem de centum solidis pro evasione prædicta onerentur."

Ad. p. 621. Mich. 7 R. 2. Rot. 3. This was the case of John, Vicar of Round Church in Cambridge, who was indicted, that whereas one William Gore an approver, prisoner in the castle of Cambridge, "laicus erat tempore captionis corporis sui, jam per assensum, & licentiam gaolarii, & janitoris ibidem, irruditus [eruditus] est, & informatus de letururâ [literaturâ] per eundem vicarium, &c." Upon this indictment the vicar surrendered himself *coram rege*, and was arraigned *de feloniam prædictâ*, and pleaded not guilty. The court bailed him till his trial, which was before the judges of *nisi prius* in Cambridge, where the jury found, "Quodd prædictus Johannes vicarius in nullo est culpabilis de feloniam, nec de aliquibus articulis sibi impositis, nec unquam se ea occasione retraxit. Ided consideratum est, quodd eat inde quietus."

Ad. p. 677. The reason why I say *prest* must now be understood in the active sense, is because, tho it be vulgarly used in a passive signification for being taken away by compulsion, yet in legal understanding it cannot now be applied to any to make him a listed soldier, and subject to penalties as such, unless he actively do somewhat, as taking earnest, or the like, whereby he voluntarily consents to his being listed, and so amounts to the same as *taking prest*.

Ad. p. 695. The statute of 1 Jac. cap. 12. against conjuration, witchcraft, &c. is lately repealed by an act of this present parliament, viz. 9 Geo. 2. cap. 5.

FELONIES ENACTED SINCE THE LAST EDITION OF THIS BOOK, WHICH WAS IN THE YEAR 1736.

VI. Wilfully destroying or damaging *Westminster-Bridge*.

By 9 *Geo. 2. cap. 29*. If any person or persons shall wilfully and maliciously blow up, pull down, or destroy the bridge or any part thereof, or attempt so to do, or unlawfully, without authority from the Commissioners, remove or take any works thereto belonging, or direct or procure the same to be done, whereby the bridge or the works thereof may be damaged, or the lives of the passengers endangered, such offender or offenders being lawfully convicted, shall be adjudged guilty of felony, and shall suffer death without benefit of clergy.

[712] VII. Subjects inlisting, and persons procuring any subject to inlist, to go abroad and serve any foreign prince, &c.

By 9 *Geo. 2. cap. 30. sect. 1.* and 29 *Geo. 2. cap. 17. sect. 4.* If any subject shall inlist or enter himself, or shall engage to go beyond the seas, or embark with intent to inlist and enter himself, tho no inlisting money be actually paid to him; or if any person shall procure any subject to inlist or enter himself, or hire, or retain, any subject with intent to cause him to inlist or enter himself, or retain, engage, or procure any subject (tho no inlisting money be paid) to go beyond the seas, or embark with intent and in order to be inlisted to serve any foreign prince, state, or potentate, as a soldier, without his majesty's leave, he shall be guilty of felony without benefit of clergy; and offenses committed out of the realm may be tried in any county in *England*, by 9 *Geo. 2. cap. 30. sect. 2.*

VIII. An act for indemnifying persons who have been guilty of offenses against the laws made for securing the revenues of customs and excise, and for enforcing those laws for the future.

By 9 *Geo. 2. cap. 35. sect. 7.* Persons then liable to be transported for any of the offenses touching the said revenues mentioned in this act, committing the like offenses after claiming the benefit of this act, shall be adjudged guilty of felony, and suffer death without benefit of clergy. See this statute at large, which contains many other pains and penalties concerning the revenues, and is too voluminous to be all inserted here.

IX. An act of 10 *Geo. 2. cap. 32.* for continuing an act for the more effectual punishing wicked and evil disposed persons going armed in disguise, and doing injuries and violences to the persons and properties of the king's subjects, and for the more speedy bringing the offenders to justice, &c.

By 10 *Geo. 2. cap. 32.* and 24 *Geo. 2. cap. 5.* the act of 9 *Geo. 1. cap. 22.* called the *Waltham Black Act*, was continued for some time; and by 31 *Geo. 2. cap. 32.* it was made perpetual.—And by this present act. *sect. 6.* if any person or persons shall wilfully and maliciously set on fire, or cause to be set on fire, any mine, pit, or delph of coal, or cannel coal, every person so offending being thereof lawfully convicted, shall be adjudged guilty of felony, and suffer death without benefit of clergy. And this section the 6th is made perpetual by 31 *Geo. 2. cap. 42.*

By *sect. 7.* Persons convicted a second time of hunting and taking away deer out of uninclosed forests or chases, are to be transported for 7 years; and if such person or persons return from transportation within that time, to be adjudged guilty of felony, and suffer death without benefit of clergy.

By *sect. 9.* Persons armed coming into a forest, chace, or park, with an intent to steal deer, and beating and wounding the keeper or keepers, their servants or assistants, to suffer the like pains and penalties, as in *sect. 7.* and made perpetual by 31 *Geo. 2. cap. 42.*

X. An act of 11 *Geo. 2. cap. 22.* for punishing such persons as shall do injuries and violences to the persons or properties of the king's subjects with intent to hinder the exportation of corn.

By *sect. 1.* Persons using violence to hinder the purchase or carriage of corn, to be imprisoned and publickly whipt.

By *sect. 2.* Persons committing the like offenses a second time, or destroying granaries, or corn therein, or in ships, or vessels, shall be adjudged guilty of felony, and be transported; and if they return from transportation, to suffer death without benefit of clergy.

XI. An act of 11 *Geo. 2. cap. 26.* for enforcing the execution of an act of the 9th of this king, intituled an act for laying a duty upon the retailers of spirituous liquors, and for licensing the retailers thereof.

By *sect. 2.* Rescuing offenders against this act, or assaulting informers, is made felony, and transportation for seven years.

XII. An act of 12 *Geo. 2. cap. 26.* for the more effectual preventing the exportation of wool from *Great-Britain*; and of wool and wool manufactured from *Ireland* to foreign parts.

By *sect. 26.* Persons opposing officers in the execution of their duty according to this act, are to be transported for seven years, and if they return within that time to suffer death as felons, without benefit of clergy.

XIII. Stealing sheep and other cattle.

By the 14 *Geo. 2. cap. 6.* Stealing sheep or other cattle is made felony, and the felon, his aider or assistant, to suffer death without benefit of clergy.—But it becoming doubtful to what sorts of cattle the said act was meant to extend, it is enacted by the 15 *Geo. 2. cap. 34.* that the said act was meant and intended, and shall be deemed and taken to extend to any bull, cow, ox, steer, bullock, heifer, calf, and lamb, as well as sheep, and to no other cattle whatsoever.

XIV. Forging, counterfeiting, or altering bank notes, &c. and servants of the bank breaking their trust to the company.

By 15 *Geo. 2. cap. 13. sect. 11.* If any person or persons shall forge, counterfeit, or alter any bank note, bank bill of exchange, dividend warrant, or any bond or obligation, under the common seal of the said company, or any indorsement thereon, or shall offer or dispose of, or put away any such forged, counterfeit, or altered note, bill, dividend warrant, bond, or obligation, or the indorsement thereon, or demand the money therein contained, or pretended to be due thereon, or any part thereof, of the said company, or any their officers or servants, knowing such note, bill, dividend warrant, bond or obligation, or the indorsement thereon, to be forged, counterfeited, or altered, with intent to defraud the said company, or their successors, or any other person or persons whatsoever; every person or persons so offending, and being thereof convicted in due form of law, shall be deemed guilty of felony, and shall suffer death as a felon without benefit of clergy.

Sect. 12. If any officer or servant of the said company, being intrusted with any note, bill, dividend warrant, bond, deed, or any security, money, or other effects belonging to the said company, or having any bill, dividend warrant, bond, deed, or any security or effects of any other person or persons, lodged or deposited with the said company, or with him as an officer or servant of the said company, shall secrete, embezzle, or run away with any such note, bill, dividend warrant, bond, deed, security, money, or effects, or any part of them; every officer or servant so offending, and being thereof convicted in due form of law, shall be deemed guilty of felony, and shall suffer death as a felon, without benefit of clergy.

XV. For preventing cloth or woollen goods remaining on the rack or tenters, or any woollen yarn or wool left out to dry, from being stolen or taken away in the night.

By 15 *Geo. 2. cap. 27.* If any cloth or woollen goods on the tenters, or woollen yarn, or wool left out to dry, shall be stolen in the night, any justice, on complaint made in ten days by the owner, may issue his warrant to any peace officer in the day-time to enter into, and search the houses, out-houses, yards, gardens, or other places belonging to the houses of every person whom such owner shall, upon his oath, declare to such justice he suspects to have stolen, taken away, or received the same; and if the officer shall find any such goods, which from the oath of such person he shall have reason to suspect to have been stolen, he shall apprehend the person in whose custody or possession the same shall be found, and carry him before a justice; and if he shall not give a satisfactory account how he came by the same, or in a convenient time, to be set by the justice, produce the party of whom he had the same, or a credible witness to depose on oath his property therein, he shall be convicted of stealing such goods; and shall for the first offence forfeit to the owner treble value; and in default of payment thereof in the time appointed by such justice, he shall issue his warrant to levy the same by distress and sale; and in default of distress shall commit him to the common gaol where he shall be apprehended, for three months, or till paid; for the second offence treble value, and six months imprisonment; for the third offence such justice shall commit him till the assizes; and if he shall be there convicted in like manner, he shall be guilty of felony, and transported for seven years. But persons aggrieved (except on the third conviction) may appeal to the next general quarter sessions, whose order therein shall be final. But nevertheless, this shall not alter any former law in force, for stealing or receiving such cloth or goods, except where the proof is laid on the offender as aforesaid.

XVI. For preventing the counterfeiting of the current coin of this kingdom, and uttering and paying false or counterfeit coin.

By 15 *Geo. 2. cap. 28.* If any person shall wash, gild, or colour any lawful or counterfeit silver coin, called a shilling or sixpence, or add to or alter the impression, or any part thereof, on either side, with intent to make such shilling or sixpence resemble [715] a guinea, or half a guinea; or shall any way alter or colour halfpennies or farthings, with intent to make them resemble a shilling or sixpence, he, his counsellors, aiders and abettors, shall be guilty of high treason.

Sect. 2. If any person shall tender in payment any counterfeit coin, knowing it to be so, he shall for the first offence suffer six months imprisonment, and find sureties for his good behaviour for six months longer: for the second offence, shall suffer two years imprisonment, and find sureties for two years more; and for the third offence, shall be guilty of felony without benefit of clergy.

Sect. 3. If any person shall tender in payment any counterfeit money (knowing it to be so,) and shall either the same day, or within ten days after, knowingly tender other false money in payment, or at the time of such tendering have more in his custody, he shall, for the first offence, suffer a year's imprisonment, and find sureties for his good behaviour for two years more; and for the second offence, shall be guilty of felony without benefit of clergy.

Sect. 5. 9. Persons guilty of the said crimes shall be tried and convicted in such manner as is used against offenders for counterfeiting the coin; and the clerk of assize, or clerk of the peace where the first conviction was had, shall certify the same by a transcript in few words, containing the tenor of such conviction (for which he shall have 2s. 6d. and no more,) and such certificate being produced in court, shall be sufficient proof of the former conviction. Prosecution to be in six months.

Note. By this it should seem, that the justices of the peace in sessions have power to try such offenders, otherwise this direction to the clerk of the peace to certify the conviction is incongruous; for he is not the proper person to certify what is done in another court, where he is not necessarily supposed to be present; albeit no power is given to the sessions by any express words in this statute to hear and determine such offenses.

XVII. For the more easy conviction of offenders found at large in Great Britain, after they have been ordered for transportation.

By 16 *Geo. 2. cap. 15.* If any felon or other offender, ordered for transportation, or having agreed to transport himself on certain conditions, either for life or any number

of years, shall be afterwards at large in any part of Great Britain, without some lawful cause, before the expiration of the term, he shall be guilty of felony without benefit of clergy. And by *sect. 2. of 16 Geo. 2. cap. 15.* the manner of trying convicts returning from transportation is to be according to *6 Geo. 1. cap. 23.*

XVIII. For punishment of persons who shall aid or assist prisoners to attempt to escape out of lawful custody.

By *16 Geo. 2. cap. 31.* If any person shall assist any prisoner to attempt his escape from any gaol, tho no escape be actually made, if such prisoner was then attainted, or convicted of treason or felony (except petty larceny,) or lawfully committed or detained in any gaol for treason or felony (except petty larceny,) expressed in the warrant of commitment; he shall be guilty of felony, and be transported for seven years; and if such prisoner was then convicted of, or detained in gaol for petty larceny, or any other crime not being treason or felony expressed in the warrant of commitment, or was then in gaol for debt amounting to 100*l.* he shall be guilty of a misdemeanour, and be liable to fine and imprisonment. [716]

And if any person shall convey, or cause to be conveyed, any disguise, instrument or arms, to any prisoner in gaol, or to any other person therefor his use, without consent of the keeper; such person, altho no escape or attempt be actually made, shall be deemed to have delivered such disguise, instrument, or arms, with an intent to assist such prisoner to escape, or attempt to escape; and if such prisoner was then attainted or convicted of treason or felony (except petty larceny,) or lawfully detained in gaol for treason or felony (except petty larceny) expressed in the warrant of commitment—he shall be guilty of felony, and transported for seven years;—but if the prisoner was then convicted or detained for petty larceny, or any other crime not being treason or felony, expressed in the warrant of commitment, or for debt amounting to 100*l.* he shall be guilty of a misdemeanour, and liable to fine and imprisonment.

And if any person shall assist any prisoner to attempt to escape from any constable, or other person who shall have the lawful charge of him in order to carry him to gaol, by virtue of a warrant of commitment for treason or felony (except petty larceny;) or if any person shall assist any felon to attempt to escape from on board any boat or vessel carrying felons for transportation, or from the contractor for the transportation of such felons, or his agents, he shall be guilty of felony, and be transported for seven years.—All prosecutions on this act to be commenced within a year after the offence committed.

XIX. Holding correspondence with the sons of the pretender.

By *17 Geo. 2. cap. 39.* Holding correspondence in any manner with any of the pretender's sons, or with any person employed by them, or remitting any money for their, or any of their use, knowing the said money to be for such use or service, such person so offending shall be guilty of high treason, and shall suffer and forfeit as in cases of high treason. And any of the pretender's sons attempting to land in Great Britain or Ireland, to stand and be adjudged to be attainted of high treason.

XX. Stealing of linen, fustian, and cotton goods and wares, in buildings, fields, grounds, and other places used for printing, whitening, bleaching, or drying the same.

By *18 Geo. 2. cap. 27.* Every person who shall by day or night feloniously steal any linen, fustian, callico, or cotton cloth; or cloth worked, woven, or made of any cotton or linen yarn mixed; or any thread, linen, or cotton yarn; linen or cotton tape, inkle, filleting, laces, or any other linen, fustian or cotton goods, laid to be printed, whitened, bowked, bleached, or dried, to the value of ten shillings, or shall knowingly buy or receive any such wares stolen, or who shall assist, aid, or hire another to commit such offence, shall be guilty of felony without benefit of clergy.—The court may order such offenders to be transported for fourteen years.—And such offenders breaking gaol, or returning from transportation, to suffer death without benefit of clergy.

XXI. An act to indemnify persons who have been guilty [717] of the unlawful importing, landing, or running of prohibited, uncustomed, or other goods and merchandize.

By *18 Geo. 2. cap. 28.* Offenders guilty of the offences against the revenue mentioned in this act, and liable to be transported for the same before this act was made, and taking

the benefit of the indemnification therein, and afterwards repeating such offences, shall be guilty of felony, and suffer death without benefit of clergy.

XXII. Riotous exportation of wool, and other goods prohibited to be exported.

By 19 *Geo. 2. cap. 34.* which by the 11 *Geo. 3. cap. 51.* hath continuance to *Sept. 29, 1778, &c.* If any persons armed, to the number of three or more, shall be assembled to assist in the illegal exportation of wool, or other goods prohibited to be exported, or in carrying of wool, or other such goods, in order to exportation; or in rescuing the same after seizure; or in rescuing an offender herein; or preventing his being apprehended; or shall be aiding in any of the premises; or if any person shall have his face disguised when passing with such goods; or shall forcibly hinder or assault any officer in seizing the same, or dangerously wound any such, in attempting to go on board any vessel; or shoot at, or wound him when on board in execution of his office, he shall be guilty of felony without benefit of clergy.—There are several other felonies in this act against smugglers, too long to be inserted here; so see the act, which is very long.

XXIII. To prevent the return of such rebels concerned in rebellion in 1745, as were or should be pardoned on condition of transportation; and to hinder their going into the enemy's country.

By 20 *Geo. 2. cap. 46.* Rebels returning from transportation without licence, or voluntarily going into France or Spain to suffer death without benefit of clergy; and aiders of such persons returning, to suffer death without benefit of clergy.—And subjects holding correspondence with rebels going into France or Spain, or persons employed by them, to suffer death without benefit of clergy.

XXIV. Quakers oaths.

By 27 *Geo. 2. cap. 46. sect. 38.* In all cases wherein by any act of parliament an oath shall be allowed or required, the solemn affirmation of Quakers shall be allowed instead of such oath, and that altho no express provision be made for that purpose in such act; and if any person shall be lawfully convicted of wilful, false, and corrupt affirming, or declaring any matter or thing, which, if sworn in the usual form, would have amounted to wilful and corrupt perjury, he shall suffer as in cases of perjury.

XXV. For preventing robberies and thefts upon any navigable rivers, ports of entry or discharge, wharfs and keys adjacent.

By the 24 *Geo. 2. cap. 45.* All persons who shall feloniously steal any goods of the value of forty shillings in any ship, boat, or vessel, on any navigable
[718] river, or in any port of entry or discharge, or from any wharf or key, or shall be present and aiding therein, shall be excluded from the benefit of clergy.

XXVI. For securing mines of black lead from theft and robbery.

By 25 *Geo. 2. cap. 10.* Every person who shall unlawfully break, or by force enter into, any mine or wad-hole of wad, or black cawke, commonly called black lead; or into any pit, shaft, or vein thereof; or shall unlawfully take and carry away from thence any wad, black cawke, or black lead; or shall aid, hire or command any person to commit any the said offences, shall be guilty of felony, and the court or judge may order him to be committed to prison, or the house of correction not exceeding one year, to be kept to hard labour, and to be publicly whipt by the common hangman, or by the master of such house of correction, at the times and places, and in such manner as the court shall think proper; or he may be transported for a term not exceeding seven years; and if he shall voluntarily escape, or break prison, or return from transportation before the time, he shall be guilty of felony without benefit of clergy: and if any person shall buy or receive any such wad, knowing the same to be unlawfully taken and carried away as aforesaid, he shall be guilty of felony, and be liable to all the penalties inflicted by the laws on persons knowingly buying or receiving stolen goods.

XXVII. For better preventing the horrid crime of murder.

By 25 *Geo. 2. cap. 37. sect. 9.* If any person, shall, by force, set at liberty or rescue

or attempt to set at liberty or rescue any person out of prison, committed for, or found guilty of murder: or rescue, or attempt to rescue any such person going to, or during execution; he shall be guilty of felony without benefit of clergy.—And by *sec. 10.* If, after execution, any person shall by force rescue, or attempt to rescue the body, he shall be guilty of felony, and transported for seven years.

XXVIII. For enforcing the laws against persons who shall steal, or detain ship-wrecked goods, &c.

By 26 *Geo. 2. cap. 19.* Persons convicted of plundering, stealing, taking away or destroying any goods or merchandizes, &c. ship-wrecked, or of obstructing the escape of any person from a wreck, or of putting out false lights, shall be deemed guilty of felony without benefit of clergy.—*sec. 2.* Provided, where goods of small value shall be stolen without any circumstances of cruelty, the offender may be indicted for petit larceny, and shall suffer such punishment as the laws, in cases of petit larceny, do enjoin or require.

XXIX. For the better preventing clandestine marriages.

By 26 *Geo. 2. cap. 33. sect. 8 & 9.* If any person shall solemnize matrimony in any other place than a church, or public chapel, (unless by special licence from the *Archbishop of Canterbury*) or without publication of bans, or licence in a church or chapel; he shall (on prosecution in *five* years) be adjudged guilty of felony, and transported for fourteen years; and the marriage shall be void.—But by *sec. [719] 18.* not to extend to *Scotland*, nor to the marriages of Quakers, or Jews.

By *Sec. 16.* If any person shall knowingly and wilfully insert, or cause to be inserted in the register book, any false entry, or any matter or thing relating to any marriage, or falsely make, alter, forge, or counterfeit any such entry in the register or any marriage licence, or cause the same to be done, or assent thereunto, or utter as true any such falsified register, or copy thereof, or any such forged licence, he shall be guilty of felony without benefit of clergy.

XXX. Threatening letters.

By 27 *Geo. 2. cap. 15.* If any person shall knowingly send any letter, without any name subscribed thereto, or signed with a fictitious name, demanding money or other valuable thing; or threatening to kill or murder any of his Majesty's subjects, or to burn their out-houses, barns, stacks of corn or grain, hay or straw; though no money, or venison, or other valuable thing be demanded by such letter; or shall rescue any person in custody for such offence, he shall be guilty of felony without benefit of clergy.

XXXI. For preventing the stealing, buying and receiving stolen lead, iron, copper, brass, bell-metal and solder.

By 29 *Geo. 2. cap. 30.* Every person who shall buy or receive any of the said materials, knowing the same to be unlawfully come by, or shall privately buy or receive any of the said materials (stolen) by suffering any door, window, or shutter, to be left opened and unfastened, between sun-setting and sun-rising, for that purpose; or shall buy or receive the same, or any of them, at any time, in any clandestine manner, from any person or persons whatsoever, shall, being convicted thereof by due course of law, although the principal felon or felons has not nor have been convicted of stealing the same, be transported for fourteen years.

XXXII. For punishment of persons who shall attain, or attempt to attain, possession of goods or money by false or untrue pretences.

By 30 *Geo. 2. cap. 24.* All persons who knowingly and designedly, by false pretence or pretences, shall obtain from any person money, goods, wares or merchandizes, with intent to cheat or defraud any person of the same; or shall knowingly send or deliver any letter or writing with, or without a name subscribed thereto, or signed with a fictitious name, letter or letters, threatening to accuse any person of any crime punishable by law with death, transportation, pillory, or any other infamous punishment, with intent to extort from him any money, or other goods, shall be deemed offenders against law and the public peace; and the court, before whom any such offender shall be tried, shall, on con-

viction, order him to be fined and imprisoned, or to be put in the pillory, or publicly whipped, or to be transported for seven years.

XXXIII. For preventing frauds and abuses attending payments of seamen's wages, &c.

By 31 Geo. 2. cap. 10. Whosoever willingly and knowingly shall personate or falsely assume, or procure any other to personate or falsely assume, the name or
 [720] character of any officer, seaman, or other person intitled, or supposed to be intitled to any wages, pay, or other allowances of money, or prize-money, for the service done on board of any of his Majesty's ships or vessels; or willingly or knowingly shall personate or falsely assume the name or character of the executor or administrator, wife, relation, or creditor of any such officer, or seaman, or other person, in order to receive any wages, pay, or other allowances of money, or prize-money as aforesaid, or shall forge or counterfeit, or procure to be forged, or counterfeited (or utter or publish as true, knowing the same to be false, forged or counterfeited, 9 Geo. 3. cap. 30. sec. 6.) any letter of attorney, bill, ticket, certificate, assignment, last will, or any other power of authority, in order to receive any such wages, pay, or other allowances of money, or prize-money as aforesaid; or shall willingly and knowingly take a false oath, or procure any other person to take a false oath to obtain the probate of any will, or letter of administration, in order to receive the payment of any wages, pay, or other allowances of money, or prize-money due, or that were supposed to be due to any such officer, seaman, or other persons as aforesaid, who has really served, or was supposed to have served on board of any of his Majesty's ships or vessels; every such person so offending shall be guilty of felony without benefit of clergy.

XXXIV. For preventing frauds and abuses in marking or stamping gold or silver plate.

By 31 Geo. 2. cap. 32. sect. 15. If any person shall cast, forge or counterfeit, or cause or procure to be cast, forged or counterfeited, the mark or stamp used for making plate in pursuance of the act of 12 Geo. 2. cap. 26 &c. by the goldsmith's company, &c. or mark plate, &c. with a forged or counterfeit mark or stamp, or shall transpose the mark impressed from one piece of wrought plate to another; or shall sell or export plate with a forged, counterfeit, or transposed mark, or shall wilfully and knowingly have any such mark or stamp in his possession; he shall be guilty of felony without benefit of clergy. But this is repealed, and made transportation for fourteen years by 13 Geo. 3. cap. 59.

FELONIES ENACTED IN THE TIME OF KING GEORGE III.

I. To prevent the committing of thefts and frauds by persons navigating bum-boats and other boats upon the river *Thames*.

By 2 Geo. 3. cap. 28. Persons convicted of knowingly buying, or receiving stolen goods from vessels in the river *Thames*, or of privately buying or receiving, at any time, any such goods clandestinely, or by suffering any door, window, or shutter at night, to be left open or unfastened for that purpose, shall be transported for fourteen years; and persons convicted of cutting or spoiling any cordage, cables, buoys, buoy-rope, headfast, or other fasts, or ropes of vessels at anchor or moorings in the river; and per-
 [721] sons who shall be aiding or assisting therein, with an intent to steal the same, shall be transported for seven years.

II. For preventing frauds in relation to the postage of letters.

By 4 Geo. 3. cap. 24. sect. 8. If any person shall counterfeit the hand-writing of any person whatsoever in the superscription of any letter, or packet, to be sent by the post, in order to avoid payment of the duty of postage; every person so offending shall be deemed guilty of felony, and shall be transported for seven years.

III. For establishing a manufactory of cambricks and lawns, &c.

By 4 Geo. 3. cap. 37. sect. 15. If any person shall counterfeit the common seal of the corporation, established by this act, or shall forge, counterfeit, or alter any deed, bill,

bond, or obligation under the common seal of the said corporation, or shall offer to dispose of, or pay away any such forged, counterfeited, or altered bill, bond, or obligation, knowing the same to be such; or shall demand any money therein mentioned, or pretended to be due thereon, or on any part thereof, of and from the said corporation, or any members, officers, or servants thereof, knowing such bill, bond, or obligation to be forged, counterfeited or altered, with intent to defraud the same corporation, or their successors, or any other person or persons whomsoever, every person so offending, and being convicted thereof, shall be judged guilty of felony, and shall suffer as in cases of felony, without benefit of clergy.

And by sect. 16. If any person shall, by day or night, break into any house, shop, cellar, vault, or other place or building, or by force enter into any house, shop, cellar, or vault, or other place or building with intent to steal, cut, or destroy any linen yarn belonging to any linen manufactory, or the looms, tools, or implements used therein; or shall wilfully or maliciously cut in pieces or destroy any such goods, when exposed either to bleach or dry, he shall be guilty of felony without benefit of clergy.

IV. For preservation of fish in fish-ponds, and conies in warrens, &c.

By 5 Geo. 3. cap. 14. sect. 1. In case any person or persons shall enter into any park or paddock fenced in and inclosed, or into any garden, orchard, or yard adjoining, or belonging to any dwelling-house, in or through which park or other premises any river or stream shall run or be, or wherein shall be any river, stream, pond, pool, moat, stew, or other water, and by any ways or means, or device, whatsoever, shall steal, take, kill, or destroy any fish, bred, kept, or preserved, in any such river or stream, pond, pools moat, stew, or other water aforesaid, without the consent of the owner or owners thereof; or shall be aiding and assisting in stealing, taking, killing, or destroying any such fish as aforesaid; or shall receive or buy any such fish, knowing the same to be so stolen or taken as aforesaid; and being thereof indicted within six calendar months next after such offense or offenses shall have been committed, before any judge or justices of gaol-delivery for the county wherein such park or paddock, garden, orchard, [722] or yard shall be, and shall on such indictment be by verdict, or his or their own confession or confessions, convicted of any such offense or offenses as aforesaid; the person or persons so convicted shall be transported for seven years.

And by sect. 6. If any person or persons shall wilfully and wrongfully, in the night-time, enter into any warren or ground, lawfully used or kept for the breeding or keeping of conies, altho the same be not inclosed, and shall then and there wilfully and wrongfully take or kill, in the night-time, any coney or conies, against the will of the owner or occupier thereof, or shall be aiding and assisting therein, and shall be convicted of the same before any of his majesty's justices of oyer and terminer or gaol-delivery, for the county whereof such offense or offenses shall be committed, every such person and persons so offending, and being thereof lawfully convicted in manner aforesaid shall and may be transported for seven years, or suffer such other punishment, by whipping, fine, or imprisonment, as the court, before whom such person or persons shall be tried, shall in their discretion award and direct.

By sect. 7. No person who shall be convicted of any offense against this act, shall be liable to be convicted for any such offense under any former act or acts, law or laws, now in force.

V. For preventing unlawful combinations of workmen employed in the silk manufacture.

By 6 Geo. 3. cap. 28. sect. 15. If any person or persons shall, by day or by night, break into any house or shop, or enter by force into any house or shop, with intent to cut or destroy any velvet, wrought silk, or silk mixed with any other materials, or other silk manufacture, in the loom, or any warp, or shute, tools, tackle, or utensils; or shall wilfully and maliciously cut or destroy any velvet, wrought silk, or silk mixed with any other materials, or other silk manufacture in the loom, or any warp or shute, tools, tackle, or utensils, prepared or employed in, or for the making thereof; or shall wilfully and maliciously break or destroy any tools, tackle, or utensils, used in or for the weaving or making any such velvet, wrought silks, or silks mixed with any other materials, or other silk goods, or silk manufactures, not having the consent of the owners so to do; every such offender, being thereof lawfully convicted, shall be adjudged guilty of felony, and shall suffer death without benefit of clergy.

VI. For the encouraging the cultivation, and for the better preservation of trees, roots, plants, and shrubs.

By 6 Geo. 3. cap. 36. All and every person and persons who shall, in the night-time, lop, top, cut down, break, throw down, bark, burn, or otherwise spoil or destroy, or carry away any oak, beech, ash, elm, fir, chesnut, or asp timber-tree, or other tree or trees standing for timber, or likely to become timber, without the consent of the owner or owners thereof first had and obtained; or shall, in the night-time, pluck up, [723] dig up, break, spoil, or destroy, or carry away, any root, shrub, or plant, roots, shrubs, or plants of the value of five shillings, and which shall be growing, standing, or being in the garden, or under nursery-ground, or other inclosed ground, of any person or persons whomsoever, shall be deemed and construed to be guilty of felony; and every such person or persons shall be subject and liable to the like pains and penalties as in cases of felony; and the court by and before whom such person or persons shall be tried, shall, and hereby have authority to transport such person or persons for the space of seven years: and all and every person and persons who shall be wilfully aiding, abetting, or assisting in such cutting down, breaking, throwing down, barking, burning, or otherwise spoiling or destroying, or carrying away any such oak, beech, ash, elm, fir, chesnut, or asp timber-tree, or other tree or trees standing for timber, or likely to become timber, as aforesaid; or in such plucking up, digging up, cutting, breaking, spoiling, or destroying, or carrying away such root, shrub or plant, roots, shrubs or plants as aforesaid, of the value aforesaid; or who shall buy or receive such root, shrub or plant, roots, shrubs or plants, of the value aforesaid, knowing the same to be stolen, shall be subject and liable to the same punishment, as if he, she, or they had stolen the same; any law to the contrary in anywise notwithstanding.

VII. For the better preservation of timber-trees, and of woods and under-woods; and for the further preservation of roots, shrubs, and plants.

By 6 Geo. 3. cap. 48. Every person who shall wilfully cut or break down, bark, burn, pluck up, lop, top, crop, or otherwise deface, damage, spoil, or destroy, or carry away any timber-tree or trees, or trees likely to become timber, or any part thereof, or the lops or tops thereof, without the consent of the owner (or in any of his majesty's forests or chases, without the consent of the surveyor, or his deputy, or persons intrusted with the care thereof,) and shall be thereof convicted on the oath of one witness, before one justice, shall, for the first offense, forfeit not exceeding 20*l.* together with the charges previous to and attending such conviction, to be ascertained by such justice; and on non-payment thereof, to be committed by such justice to the common gaol, for any time not exceeding twelve months, nor less than six, or until the penalty and charges shall be paid: for the second offense to forfeit not exceeding 30*l.* together with the charges as aforesaid; and for non-payment, to be committed as aforesaid, for any time not exceeding eighteen months, nor less than twelve, or until the penalty and charges shall be paid; and if any person shall be guilty of a like offence, a third time, and shall thereof be convicted in like manner,* he shall be deemed guilty of felony, and the court [724] before whom he shall be tried, shall have authority to transport him for seven years. And all oak, beech, chesnut, walnut, ash, elm, cedar, fir, asp, lime, sycamore, and birch trees, [and also poplar, alder, larch, maple, and hornbeam, by 13 Geo. 3. cap. 33.] shall be deemed timber trees.

And by sect. 3. Every person who shall pluck up, spoil or destroy, or take or carry away any root, shrub or plant, roots, shrubs or plants, out of the fields, nurseries, gardens, or garden-ground, or other cultivated lands, of any person, without the consent of the owner, and shall be thereof convicted upon the oath of one witness before one justice,† shall, for the first offense, forfeit not exceeding 40*s.* together with the charges pre-

* Here seems to be a mistake. Being convicted in *like manner*, implies a summary conviction, as before directed, before one justice; but it cannot be intended, that a justice shall, in this manner, have power to transport a man. But the word *court* afterwards, before which he shall be convicted (that is court of *assize*, or *sessions*, as it seemeth by the following words of the act,) implies a legal trial by a jury; and therefore these words [in *like manner*] ought to be omitted.

† The words in the printed act are [and shall be thereof convicted upon the oath of one or more credible witness or witnesses, before any one or more justice or justices of the peace]. It is probable by mistake of the printer of this act.

vicious to, and attending such conviction, to be ascertained by such justice; and if not paid immediately, the said justice shall commit him to the house of correction for one month, to be kept to hard labour, and once whipped there: for the second offense, shall forfeit not exceeding 5*l.* together with the charges as aforesaid; and if not paid immediately, then to be committed to the house of correction for three months, and to be kept to hard labour, and whipped there once in every of the said months; and if any person shall a third time commit the like offense, and shall be thereof convicted, he shall be deemed guilty of felony, and the court before whom he shall be tried, shall have authority to transport him for seven years.

VIII. Stealing bills or other securities for money out of letters.

By 7 *Geo. 3. cap. 50. sect. 1.* If any person employed in the business of the post-office, shall secrete, imbezzle, or destroy any letter or packet, containing any bank note, bank post bill, bill of exchange, exchequer bill, South-Sea or East India bond, dividend warrant of the bank, or other company, navy, or victualling, or transport bill, ordnance debenture, seaman's ticket, state lottery ticket, bank receipt for payment on any loan, note or assignment of stock in the funds, letter of attorney for receiving annuities or dividends, or for selling stock in the funds, or belonging to any company, American provincial bill of credit, goldsmith's or banker's note for payment of money, or other bond or warrant, draught, bill, or promissory note for payment of money, or shall steal and take the same out of any letter or packet, he shall be guilty of felony, and suffer death without benefit of clergy. [And see for the like the act of 5 *Geo. 3. cap. 25. sect. 17.*]

By *sect. 2.* If any person shall rob any mail of any letter, packet or bag, or shall steal and take any letter or packet from out of any mail or bag or out of any post-office, or house, or place, for the receipt or delivery of letters, altho the same shall not appear to be a taking from the person, or on the highway, or in a dwelling-house, or out-house belonging to a dwelling-house; and altho it shall not appear that any person was put in fear, he shall nevertheless be guilty of felony, and shall suffer death [725] without benefit of clergy.

By *sect. 3.* If any person employed in any business of the post-office, who shall take any letter or packet to be forwarded by the post, and receive any money therewith for the postage, shall burn or destroy any such letter or packet; or shall advance the rate of postage upon any letter or packet, and not duly account for the money by him received for such advanced postage, he shall be deemed guilty of felony.

IX. For the more speedy and effectual transportation of offenders.

By 8 *Geo. 3. cap. 15.* Where his majesty's mercy shall be extended to any offender upon condition of transportation, and the same be signified to the judge, by one of the principal secretaries of state, such judge may make order for the immediate transportation of such offender; who shall thereupon be transferred and made over to the contractor, &c. and if such offender be afterwards seen at large in *Great Britain*, without lawful cause, before the expiration of the term for which he was transported, he shall suffer death without benefit of clergy.

X. For punishment of persons destroying mills, mines, &c.

By 9 *Geo. 3. cap. 29. sect. 1.* If any person or persons riotously and tumultuously assembled, to the disturbance of the public peace, shall unlawfully and with force demolish or pull down; or begin to demolish or pull down any wind saw-mill, or other wind-mill, or any water-mill, or other mill, or any of the works thereto belonging, every such person shall be guilty of felony without benefit of clergy.

And by *sect. 2.* If any person shall wilfully or maliciously burn, or set fire to any such mill; he shall in like manner be guilty of felony without benefit of clergy.

And by *sect. 3.* If any person shall wilfully or maliciously set fire to, burn, demolish, pull down, or otherwise destroy or damage any fire engine, or other engine erected for draining water from collieries, or coal mines, or for drawing coals out of the same; or for draining water from any mine of lead, tin, copper, or other mineral; or any bridge, waggon-way or trunk, erected for conveying coals from any colliery or coal-mine, or staith for depositing the same; or any bridge or waggon-way erected for conveying lead, tin, copper, or other mineral from any such mine, or shall cause or procure the same to be done, he shall be guilty of felony, and transported for seven years.

XI. Forgery in relation to seaman's wages.

By 9 Geo. 3. cap. 30. sect. 6. If any person shall utter or publish as true, any false, forged or counterfeited letter of attorney, bill, ticket, certificate, assignment, last will, or any other power or authority whatsoever, in order to receive any wages, pay, or other allowances of money, for prize-money, due, or supposed to be due to any officer or seaman, or other person, who has really served, or was supposed to have served, or who shall hereafter serve, or be supposed to have served, on board of any ship or vessel of his Majesty, his heirs or successors, with intent to defraud any person, knowing the same to be false, forged or counterfeited; then every such person, being thereof
 [726] lawfully convicted, shall be deemed guilty of felony, and shall suffer death without benefit of clergy.

XII. For making the receiving of stolen jewels, and gold and silver plate, in the case of burglary and highway robbery, more penal.

By 10 Geo. 3. cap. 48. Every person who shall buy or receive any stolen jewel or jewels, or any stolen gold or silver plate, watch or watches, knowing the same to have been stolen, shall, in all cases where such jewel or jewels, or gold or silver plate shall have been feloniously stolen, accompanied with a burglary actually committed in the stealing the same, or shall have been feloniously taken by a robbery on the highway, shall be triable as well before conviction of the principal felon in such felony and burglary or robbery, whether he shall be in or out of custody, as after his conviction. And if any person so buying or receiving such jewel or jewels, or gold or silver plate, shall be convicted thereof, he shall be guilty of felony, and transported for fourteen years.

XIII. For preventing the counterfeiting the copper coin of this realm.

By 11 Geo. 3. cap. 40. sect. 1. If any person or persons shall make, coin, or counterfeit, any of the copper monies of this realm, commonly called an *half-penny*, or a *farthing*, such person or persons offending therein, and his, her, or their counsellors, aiders, or abettors and procurers, shall be adjudged guilty of felony [but within clergy.]

By sect. 2. If any person or persons shall buy, sell, take, receive pay, or put off any counterfeit copper money, not melted down, or cut in pieces, at, or for a less rate or value than the same, by its denomination, doth or shall import, or was counterfeited for, every such person and persons shall be adjudged guilty of felony [but within clergy.]

XIV. For proceeding against persons standing mute on their arraignment for felony or piracy.

By 12 Geo. 3. cap. 20. If any person being arraigned on any indictment or appeal for felony, or on any indictment for piracy, shall, upon such arraignment stand mute, or will not answer directly to the felony or piracy, such person so standing mute, as aforesaid, shall be convicted of the felony or piracy charged in such indictment or appeal; and the court, before whom he shall be arraigned, shall thereupon award judgment and execution against such person, in the same manner as if such person had been convicted by verdict, or confession of the felony, or piracy charged in such indictment or appeal; and such judgment shall have all the same consequences in every respect, as if such person had been convicted by verdict or confession of such felony or piracy, and judgment had been thereupon awarded.

XV. For preserving his Majesty's dock-yards, magazines, ships, ammunition, and stores.

By 12 Geo. 3. cap. 24. If any person shall, either within this realm, or any of the islands, countries, forts or places thereunto belonging, wilfully and maliciously set on fire, or burn, or otherwise destroy, any of his Majesty's ships or vessels of war, whether the same be on float, or building in any of his Majesty's dock-yards, or building, or repairing by contract in any private yard; or any of his Majesty's
 [727] arsenals, magazines, dock-yards, rope-yards, victualling-offices, or any of the buildings erected therein, or belonging thereto; or any timber or materials there placed, for building, repairing, or fitting out of ships or vessels; or any of his Majesty's military, naval, or victualling stores, or other ammunition of war; or any place where any such military, naval, or victualling stores, or other ammunition of war shall be kept; he, and also his aiders and abettors, shall be guilty of felony, without benefit of clergy.

XVI. For the preventing of frauds in the stamp duties upon vellum, parchment, paper and cards.

By 12 Geo. 3. cap. 48. If any person shall write or engross, or cause to be written or engrossed, either the whole, or any part of any writ, mandate, bond, affidavit, or other writing, matter, or thing whatsoever, in respect whereof any duty is, or shall be payable by any act or acts made, or to be made in that behalf, on the whole, or any part of any piece of vellum, parchment or paper, whereon there shall have been before written any other writ, bond, mandate, affidavit, or other matter or thing, in respect whereof any duty was or shall be payable, as aforesaid, before such vellum, parchment, or paper, shall have been again marked or stamped according to the said acts; or shall fraudulently erase or scrape out, or cause to be erased or scraped out, the name or names of any person or persons, or any sum, date, or other thing, written in such writ, mandate, affidavit, bond, or other writing, matter or thing, as aforesaid; or fraudulently cut, tear, or get off, any mark or stamp, in respect whereof or whereby, any duties are or shall be payable, or, denoted to be paid or payable as aforesaid, from any piece of vellum, parchment, paper, playing cards, outside paper of any parcel or pack of playing cards, or any part thereof, with intent to use such stamp or mark for any other writing, matter or thing, in respect whereof any duty is, or shall be payable, or denoted to be paid or payable, as aforesaid, then, and so often, and in every such case, every person so offending in any of the particulars before mentioned, and every person knowingly and wilfully aiding, abetting or assisting any person or persons, to commit any such offense or offenses, as aforesaid, shall be deemed guilty of felony, and shall be transported for a term not exceeding seven years; and if such offender shall voluntarily escape, or break prison, or return from transportation within the limited time, he shall suffer death without benefit of clergy.

XVII. For the more effectual execution of criminal laws in the two parts of the united kingdom.

By 13 Geo. 3. cap. 31. sec. 4. If any person having feloniously taken money, cattle, goods, or other effects, in either part of the united kingdom, and shall afterwards have the same, or any part thereof, in his possession in the other part of the united kingdom; it shall be lawful to indict, try and punish him for theft or larciny, in that part of the united kingdom where he shall so have such money, cattle, goods or other effects in his possession, as if the same had been stolen there.

And by sect. 5. If any person, in either part of the united kingdom, shall knowingly receive or have any money, cattle, goods, or other effects, stolen, [728] or otherwise feloniously taken in the other part of the united kingdom, he shall be liable to be indicted, tried, and punished for the same, in that part of the united kingdom where he shall so receive and have the same, as if they had been originally stolen there.

XVIII. For the preventing the forging or counterfeiting any stamp or seal used for marking calicoes, linens and stuffs to be printed, painted, stained or dyed.

By 13 Geo. 3. cap. 56. If any person shall counterfeit or forge any stamp or seal already provided by the commissioners in the said act mentioned, or which shall hereafter be provided, renewed, or altered; or shall counterfeit, or resemble the impression of the same, upon any of the said commodities chargeable with duties, thereby to defraud his Majesty thereof, such person shall be guilty of felony without benefit of clergy.

XIX. For preventing the forging of the notes or bills of the *Bank of England, &c.*

By 13 Geo. 3. cap. 79. sec. 1. If any person or persons (other than the officers, workmen, servants, or agents for the time being of the governor, &c. of the bank, to be authorised for that purpose by them, and for their use) shall make or use, or cause or procure to be made or used, or knowingly aid or assist in the making or using, or (without being authorised as aforesaid) shall knowingly have in his, her, or their custody or possession (without lawful excuse, the proof whereof shall lie upon the person accused) any frame, mould, or instrument for the making of paper, with the words *Bank of England*, visible in the substance of such paper; or shall make, or cause or procure to be made, or knowingly aid or assist in the making any paper, in the substance of which the said words, *Bank of England*, shall be visible; or if any person (except as before excepted) shall by

any art, mystery, or contrivance, cause or procure the said words, *Bank of England*, to appear visible in the substance of any paper whatsoever; or knowingly aid or assist in causing the said words, *Bank of England*, to appear in the substance of any paper whatsoever; every person so offending in any of the cases aforesaid, shall, for such offense, be deemed a felon, and shall suffer death without benefit of clergy.*

XX. To prevent the stealing of deer.

By 16 *Geo. 3. cap. 30. sect. 1.* The penalty on persons who shall hunt, kill, wound or shoot at, &c. any fallow-deer in any forest, park, &c. without being duly authorised, is, for the second offense, felony and transportation for seven years.

And by *sect. 9.* The penalty on persons carrying fire arms into any forest, park, &c. with intent to destroy deer, is also felony, and transportation for seven years.

XXI. To authorize, for a limited time, the punishment by hard labour of offenders, who, for certain crimes, are, or shall become liable to be transported.

By 16 *Geo. 3. cap. 43. sect. 1.* Any male person convicted in *England* of any crime punishable by transportation, may, instead thereof, be kept to hard labour in [729] cleansing the river *Thames*, &c. for any term not less than three, nor more than ten years.

And by *sect. 15.* If any person so ordered to hard labour, shall at any time during the term, for which he shall be ordered to hard labour, break prison, or escape; for the first escape, he shall be punished by doubling the term of the service and hard labour; and on conviction for a second escape, he shall be adjudged a felon, and suffer death without benefit of clergy.†

STATUTES RELATING TO FELONY ENACTED SINCE THE LAST EDITION OF THIS WORK, WHICH WAS IN THE YEAR 1778.

XXII. For granting to his *Majesty* certain duties on licences, to be taken out by all persons acting as auctioneers, and certain rates and duties on all lands, houses, goods, and other things, sold by *auction*; (a) and upon indentures, leases, bonds, deeds, and other instruments.

By 17 *Geo. 3. ch. 50. § 25.* If any person shall counterfeit or forge, or procure to be counterfeited or forged, any seal, stamp, or mark, to resemble any seal, stamp, or mark, directed, or allowed to be used by this or any other act of parliament, for the purpose of denoting the duties by this or any other act of parliament granted, or shall counterfeit or resemble the impression of the same with an intent to defraud his *Majesty*, his heirs and successors, of any of the said duties; or shall privately or fraudulently use any seal, stamp, or mark, directed or allowed to be used by this or any other act of parliament, relating to the stamp-duties, with intent to defraud his *Majesty*, his heirs and successors of any of the said duties; every person so offending, and being thereof lawfully convicted, shall be adjudged a felon, and shall suffer death as in cases of felony, without benefit of clergy.

XXIII. For preventing the forging of acceptances of bills of exchange, &c. with intent to defraud corporations. *Vide stat. 7. Geo. 2. ch. 22.*

By 18 *Geo. 3. ch. 18.* If any person shall falsely make, alter, forge, or counterfeit, or cause or procure, &c. or willingly act, &c. any acceptance of any bill of exchange, or the

* By 13 *Geo. 3. ch. 84. § 42*, the malicious destruction of *turnpike-gates, houses, or engines, &c.* is a felonious and transportable offence; (and so as to rescuers, &c.) *Vide* indictment hereon, and said § of *stat.* at large. *Cr. Cir. Com.* 7th edit. 740-1.

† By 16 *Geo. 3. ch. 34. § 15.* If any person shall counterfeit, &c. or utter, sell, &c. knowing, &c. any seal, stamp, or mark, used for indentures, leases, bonds, or other deeds, cards, dice, or newspapers, he shall be adjudged a felon, and suffer death without benefit of clergy. *Vide* also abstract of 29 *Geo. 3. ch. 50. § 13.* being No. LXI. post.

(a) Partly repealed as to auctions, by 19 *Geo. 3. ch. 56. § 1.*

number, or principal sum of any accountable receipt for any note, bill, or other security for payment of money, or any warrant or order for payment of money, or delivery of goods, with intention to defraud any corporation whatsoever; or shall utter, &c. with like intention, he shall be deemed guilty of felony, and shall suffer death as a felon without benefit of clergy.

XXIV. For the payment of costs to parties on complaints determined before *Justices* of the peace, out of sessions; for the payment of the charges of Constables in certain cases; and for the more effectual payment of charges to witnesses and prosecutors of any larceny, or other felony.

By 18 *Geo. 3. cā. 19. § 7.* On trials for grand or petit larceny, or other felony, the court may order the treasurer of the county, &c. to pay the prosecutor his reasonable expences, and also an allowance for his trouble and loss of time, if he shall appear to the court to be in poor circumstances. And also by the same statute, § 8. the court may order the payment of the reasonable expences of persons appearing on their recognizances, or subpoenas, to give evidence, whether any bill of indiotment be preferred or not to the grand jury, and also reasonable allowances for their trouble and loss of time, if they shall appear to the court to be in poor circumstances.^(b)

Vide stat. 25 Geo. 2. cā. 36. § 11. and 27 Geo. 2. cā. 3. § 3. cited in 6 T. R. 238. Easter Term, 35 Geo. 3. K. B.

XXV. For granting to his *Majesty* several additional duties on stamped vellum, parchment, and paper: and for better securing the stamp duties upon indentures, leases, deeds, and other instruments.

By 19 *Geo. 3. cā. 66. § 8.* If any person shall counterfeit or forge, or procure to be counterfeited or forged, any seal, stamp, or mark, directed or allowed to be used by this or any other act of parliament, for the purpose of denoting the duties by this or any other act of parliament granted, or shall counterfeit or resemble the impression of the same, with an intent, &c. or shall privately or fraudulently use, &c. he shall be adjudged a felon, and shall suffer death as in cases of felony, without benefit of clergy.

XXVI. To explain and amend the laws relating to the *Transportation*, imprisonment, and other punishment of certain offenders.

Vide No. XL. post.

By 19 *Geo. 3. cā. 74. § 3.* When any person is convicted of felony for which he shall be liable to be burnt in the hand,^(c) the court may, instead thereof, impose on him a moderate fine, or (except in the case of manslaughter) order him to be either publicly or privately whipped. But by § 4. this act shall not abridge the power vested in the court of imprisoning offenders.

XXVII. For granting to his *Majesty* several additional duties on advertisements; and certain duties on receipts for legacies, or for any share of a personal estate divided by force of the statute of distributions, or the custom of any province or place.*

By 20 *Geo. 3. cā. 28. § 6.* If any person shall counterfeit or forge, or procure, &c. any seal, stamp, or mark, directed or allowed to be used by this act, or shall counterfeit or resemble the impression of the same, with intent, &c. or shall [730] privately or fraudulently use, &c. he shall, upon conviction, suffer death as in cases of felony, without benefit of clergy.

XXVIII. For granting to his *Majesty* an additional duty upon almanacks printed on one side of any one sheet or piece of paper, &c.

By 21 *Geo. 3. cā. 56. § 9.* If any person shall counterfeit, or forge, or procure to be

^(b) These expences extend to inferior districts having jurisdiction to try felons, and raising their own rates similar to the county rates. *Rex v. Myers*, 6 T. R. 237.

^(c) *Vide Stat. 4. Geo. 1. cā. 11; 6 Geo. 1. cā. 23.*

* Repealed as to receipts for legacies, and new duties granted, by 36 *Geo. 3. cā. 52. abstracted post.*

counterfeited or forged, any stamp or mark, to resemble any stamp or mark, directed to be used by this or any other act of parliament; or shall counterfeit or resemble the impression of the same; or shall utter, &c. or shall privately or fraudulently use, &c. with intent to defraud, &c. he shall, upon conviction, suffer death as in cases of felony, without benefit of clergy.

XXIX. To explain and amend an act, made in the *fourth* year of the reign of his late *Majesty* King *George* the *Second*, intituled, *An Act for the more effectual punishing stealers of lead, and iron bars, fixed to houses, (d)* or any fences belonging thereunto.

By 21 *Geo.* 3. *ch.* 68. All and every person and persons who shall steal, rip, cut, break, or remove with intent to steal, any *copper, brass, bell-metal, utensil, or fixture*, being fixed to any dwelling-house, out-house, coach-house, stable, or other building, used or occupied with such dwelling-house, or thereunto belonging, or to any other building whatsoever, or fixed in any garden, orchard, court-yard, fence, or outlet, belonging to any dwelling-house, or other building, or any iron rails, or fencing set or fixed in any square, court, or other place (such person having no title or claim to title thereto,) shall be deemed and construed to be guilty of felony; and the court may order him to be transported for seven years, or kept to hard labour in prison for any time not exceeding three years, nor less than one, subject also to the punishment of public whipping (if the court shall think fit,) not exceeding three times: And all persons assisting therein, or who shall buy or receive, &c. knowing, &c. are subject to the same punishments, although the principal felon or felons has not, or have not, been convicted of stealing the same.

XXX. To explain and amend an act, made in the twenty-ninth year of the reign of his late *Majesty* King *George* the *Second*, intituled, *An Act for more effectually discouraging and preventing the stealing, and the buying and receiving of stolen lead, iron, copper, brass, bell-metal, and solder, and for more effectually bringing the offenders to justice.*

By 21 *Geo.* 2. *ch.* 69. Every person who shall buy or receive any *pewter-pot*, or other vessel, or any *pewter* in any form or shape whatever, knowing the same to be stolen, if unlawfully come by; or shall privately, buy or receive any stolen pewter, by suffering any door, window, or shutter, to be left open or unfastened, between sun-setting and sun-rising, for that purpose; or shall buy or receive the same at any time, in any clandestine manner, from any person or persons whatsoever, shall, being thereof convicted by due course of law, although the principal felon or felons has not, or have not, been convicted of stealing the same, be transported for any time not exceeding seven years, or be kept and detained in prison and therein kept to hard labour for any time not exceeding three years, nor less than one year; and within that time (if the court shall think fitting) such offender or offenders shall be once, or oftener, but not more than three times, publicly whipped.

XXXI. For punishing persons wilfully and maliciously destroying any *woollen, silk, linen, or cotton goods*, or any *implements* prepared for or used in the manufacture thereof; and for repealing so much of two acts, made in the *twelfth* year of King *George* the *First*, and the sixth year of his present *Majesty*, as relates to the punishment of persons destroying any woollen or silk manufactures, or any implements prepared for, or used therein. *(e)*

By 22 *Geo.* 3. *ch.* 40. § 1. If any person or persons shall, by day or by night, break into any house or shop, or enter by force into any house or shop, with intent to cut or

(d) See the indictments against *Principal* and *Aider*. *Cr. Cir. Com.* 7th edit. 459. Against the *Receiver*. *Ibid.* 460. *Vide Hickman's* case and references, noted in the same book, touching the manner of laying an indictment for stealing lead from a church. Page 461.

(e) *Vide* 28 *Geo.* 3. *ch.* 55. and 29 *Geo.* 3. *ch.* 46. abstracted hereafter, being No. LVIII. and LX.

destroy any serge or other woollen goods in the loom, or any tools employed in making thereof; or shall wilfully and maliciously cut or destroy any such serges or woollen goods in the loom, or on the rack; or shall burn, cut, or destroy any rack on which any such serges or other woollen goods are hanged in order to dry; or shall wilfully and maliciously break or destroy any tools used in the making any such serges or other woollen goods, not having the consent of the owner so to do; every such offender, being thereof lawfully convicted, shall be guilty of felony, without benefit of clergy.

§ 2. To the same effect as to silk goods, or tools used in the manufacturing thereof.

§ 3. The like as to linen and cotton manufactures, &c.

§ 4. Repeals part of 12 Geo. 1. ch. 34; and,

§ 5. Repeals part of 6 Geo. 3. ch. 28.(f)

XXXII. For the more easy discovery and effectual punishment of buyers and receivers of stolen goods.

By 22 Geo. 3. ch. 58. § 1. Buyers or receivers of stolen goods (except lead, iron, copper, brass, bell-metal, and solder,) although the offence of the principal amounts to *petit larceny*(g) only, knowing, &c. may be prosecuted for a misdemeanor, and punished by fine, imprisonment, or whipping, although the principal felon or felons be not before convicted of the said felony, and whether he, she, or they, is or are amenable to justice or not. But where the felony actually committed shall amount to *grand larceny*, and the party actually committing thereof shall not be before convicted, such offender or offenders shall be exempted from being punished as accessory or accessories, if such principal felon or felons shall be afterwards convicted.

By § 2. justices may grant search-warrants and commit, &c.

§ 3. Constables, &c. may apprehend persons suspected, &c.

§ 4. Persons offering stolen goods to be pawned or sold may (upon reasonable cause) be taken before a justice, &c.

§ 5. Persons under fifteen years of age, charged with felony, within benefit of clergy, pardoned upon discovering two or more receivers, &c.

§ 6. Not to repeal any former law, &c. nor shall an offender convicted under this act be punished for the same offence by any such former law.

XXXIII. For repealing an act made in the twenty-second year of his present Majesty, intituled, *An act for charging a stamp duty upon inland bills of exchange, promissory notes, or other notes payable otherwise than upon demand*; and for granting new stamp duties on bills of exchange, promissory and other notes; and also stamp duties upon receipts.*

By 23 Geo. 3. ch. 49. § 20. If any person shall counterfeit or forge, or procure to be counterfeited or forged any stamp or mark directed or allowed to be used by this act, or shall fraudulently use, &c. with intent, &c. or shall utter, vend, sell, or expose to sale, any vellum, parchment, or paper, liable to the said duties, with any counterfeit mark or impression thereupon, knowing, &c. he shall, upon conviction, suffer death as in cases of felony, without benefit of clergy.

XXXIV. For granting to his Majesty several additional and new duties upon stamped vellum, parchment, and paper; and also for repealing certain exemptions from the stamp duties.†

By 23 Geo. 3. ch. 58. § 11. If any person shall counterfeit or forge, or procure to be counterfeited or forged, any seal, stamp, or mark, directed or allowed to be used by this, or any other act, or shall utter, &c. or privately or fraudulently use any seal, &c. he shall, upon conviction, suffer death as in cases of felony without benefit of clergy.

(f) For an indictment on the stat. in question, viz. 22 Geo. 3. ch. 40. vide *Cr. Cir. Com.* 7th Edit. 692.

(g) At common law there can be no accessories in *petit larceny*. Vide *ante*, p. 616.

* Duties under this act to cease, and new ones granted, by 31 Geo. 3. ch. 25. abstracted post.

† Partly repealed by 36 Geo. 3. ch. 52. abstracted post.

XXXV. For the more effectual preventing the illegal importation of foreign spirits, and for putting a stop to the private distillation of *British-made* spirituous liquors, &c.

By 23 Geo. 3. ch. 70. § 9. Persons making frames, moulds, plates, &c. for excise-*per-*mits, or paper for that purpose, &c. and their aiders, unless appointed by the commissioners of excise, &c. shall, upon conviction, suffer death as in cases of felony, without benefit of clergy.

XXXVI. To extend the provisions of an act (intituled an act to amend and make more effectual the laws relating to *rogues, vagabonds*, and other *idle and disorderly persons*, and to houses of correction,) to certain cases not therein mentioned.

By 23 Geo. 3. ch. 88. If any person or persons be apprehended having any implement for house-breaking, or any offensive weapon, with a *felonious* intent, &c. or shall be found in or upon any dwelling-house, warehouse, coach-house, stable, or out-house, or in any inclosed yard or garden, or area belonging to any house, with an intent to steal any goods or chattels; every such person shall be deemed a rogue and vagabond, within the intent and meaning of *stat. 17 Geo. 2. ch. 5.(h)*

XXXVII. For granting to his *Majesty* certain additional rates of postage for conveyance of letters and packets, by the post, within the kingdom of *Great Britain*; and for preventing frauds, &c.

By 24 Geo. 3. Sess. 2. ch. 37. § 9. If any person shall forge or counterfeit the handwriting of any person whatsoever, in the subscription of any letter or packet to be sent by the post in order to avoid the postage, or the date, &c. or shall send by the post any forged or counterfeited subscription on any letter or packet, knowing, &c. he shall be deemed guilty of felony, and transported for seven years.

XXXVIII. For the more effectual prevention of smuggling in this kingdom.

Vide No. LVI. and LXXI. post.

By 24 Geo. 3. sess. 2. ch. 47. § 11. If any person shall maliciously shoot at any ship, vessel, or boat, belonging to his *Majesty's* navy, or in the service of the customs or excise, within four leagues of the limits of any port, &c. or the coast thereof, &c. or at any officer, &c. when in the execution of their duty, he shall, being thereof lawfully convicted, be adjudged guilty of felony, and shall suffer death as a felon, without benefit of clergy, and so as to the aiders and abettors therein.

XXXIX. For granting to his *Majesty* certain duties on licenses for vending hats by retail; &c.*

By 24 Geo. 3. sess. 2. ch. 51. § 15. If any person shall counterfeit, &c. or privately or fraudulently use, &c. any seal, stamp, or mark, directed or allowed by this act, he shall be adjudged a felon, and suffer death, without benefit of clergy.

XL. For the *transportation* of felons and other offenders, &c.

By 24 Geo. 3. sess. 2. ch. 56. § 1. His *Majesty* in council may direct to what place the felons shall be conveyed, &c. By § 6. they may be sent to the *River Thames*, &c. There are many regulations respecting this subject in the statute: and there are also other subsequent *statutes*, such as 27 Geo. 3. ch. 2. touching the *transportation* of felons to *New South Wales*, &c. See also 28 Geo. 3. ch. 24. and 37 Geo. 3. ch. 140.

XLI. To empower the *justices of oyer and terminer* and gaol-delivery of *Newgate* for the county of *Middlesex*, to continue, &c.

By 25 Geo. 3. ch. 18. If a session of *oyer and terminer* and gaol-delivery of *Newgate* for the county of *Middlesex* shall have been begun, before the *essoign* day of any term, it shall not be discontinued by the sitting of the court of *King's Bench*, &c.

(h) *Vide* 27 Geo. 3. ch. 11.

* Partly repealed by 36 Geo. 3. ch. 125. abstracted *post*.

XLII. For granting to his *Majesty* certain stamp-duties on licences to be taken out by pawnbrokers.

By 25 *Geo. 3. ch. 48. § 10.* If any person shall counterfeit, &c. any seal, stamp, or mark, directed by this act, or shall counterfeit or resemble the impression of the same upon any vellum, &c. or shall utter, or use, &c. knowing, &c. he shall be adjudged a felon, and shall suffer death, without benefit of clergy.

XLIII. For repealing an act made in the twenty-fourth year of the reign of his present Majesty, intituled, *An act for granting to his Majesty certain duties on certificates, issued with respect to the killing of game*; and for granting other duties in lieu thereof.

Vide No. LXIV. post.

By 25 *Geo. 3. ch. 50. § 19.* If any person shall counterfeit, &c. any seal, stamp, or mark, directed by this act, or shall counterfeit or resemble the impression of the same, or shall utter, or use, &c. knowing, &c. he shall be adjudged a felon, and shall suffer death, without benefit of clergy.

XLIV. For granting to his *Majesty* certain duties on licences to be taken out for vending gloves or mittens, by retail.

By 25 *Geo. 3. ch. 55. § 15.* If any person shall counterfeit, &c. any seal, stamp, or mark, directed by this act, or shall utter or use, &c. knowing, &c. he shall be adjudged a felon, and shall suffer death, without benefit of clergy.

XLV. For repealing an act made in the twenty-third year of the reign of his present Majesty, intituled, *An act for granting to his Majesty a stamp duty on licences to be taken out by certain persons uttering or vending medicines, &c.* and for granting other duties in lieu thereof.

By 25 *Geo. 3. ch. 79. § 17.* If any person shall counterfeit, &c. any seal, stamp, or mark, directed by this act, or shall counterfeit or resemble the impression of the same upon any vellum, &c. or shall utter, or use, &c. knowing, &c. he shall be adjudged a felon, and shall suffer death, without benefit of clergy.

XLVI. For granting to his *Majesty* certain duties on certificates to be taken out by solicitors, attornies, &c. and other duties with respect to warrants, mandates, and authorities, to be entered or filed of record.

By 25 *Geo. 3. ch. 80. § 30.* If any person shall counterfeit or forge any seal, stamp, or mark, directed or allowed by this act, or shall counterfeit or resemble the impression of the same, or shall utter, or use, &c. knowing, &c. he shall be adjudged a felon, and shall suffer death, without benefit of clergy.

XLVII. For granting to his *Majesty* certain duties on stamped vellum, parchment, and paper, within that part of *Great Britain* called *Scotland*, to replace to the revenue the *salaries* granted to judges there, &c.

By 26 *Geo. 3. ch. 48. § 9.* If any person shall counterfeit, &c. any seal, stamp, or mark, directed by this act, or shall counterfeit or resemble, or cause, &c. the impression of the same upon any vellum, &c. or shall utter, or use, &c. knowing, &c. he shall be adjudged a felon, and shall suffer death, without benefit of clergy.

XLVIII. For granting to his *Majesty* certain stamp-duties on *perfumery*, hair powder, and other articles therein mentioned; and on licences to be taken out by persons uttering or vending the same.

By 26 *Geo. 3. ch. 49. § 24.* If any person shall counterfeit, &c. any seal, stamp, or mark, directed by this act, or shall counterfeit or resemble the impression of the same upon any vellum, &c. or shall utter, or use, &c. he shall be adjudged a felon, and shall suffer death, without benefit of clergy.

XLIX. For better securing the duties on *starch*, and for preventing frauds on the said duties.

[734] By 26 *Geo. 3. ch. 51. § 14.* If any person shall forge or counterfeit any stamp or seal, to resemble any stamp or seal which shall be provided in pursuance of this act, or shall counterfeit or resemble the impression of the same upon the papers containing starch, thereby to defraud, &c. he shall be adjudged a felon, and shall suffer death, without benefit of clergy.

L. For regulating houses, and other places, kept for the purpose of *slaughtering horses*.

By 26 *Geo. 3. ch. 71. § 8.* If any person shall slaughter any horse, mare, or gelding, foal or filly, ass or mule, or any bull, cow, heifer, ox, calf, sheep, hog, goat, or other cattle, for any other purpose than for butcher's meat; or shall slay any horse, &c. brought dead to such slaughter-house, or other place, without taking out a licence, or without giving notice, &c. or shall slaughter, &c. at any time, other than and except certain hours in this act limited, &c. he shall upon conviction, be adjudged, deemed, and taken to be guilty of *felony*, and shall be punished by fine and imprisonment, and such corporal punishment, by public or private whipping, or shall be transported beyond the seas for any time not exceeding seven years, as the court shall direct.

By § 9. Persons destroying, limeing, or burying hides, &c. shall, upon conviction, be adjudged guilty of a misdemeanor, and punished by fine and imprisonment, and such corporal punishment by public or private whipping, as the court shall direct.

LI. For better securing the duties on paper printed, painted, or stained in *Great Britain*.

By 26 *Geo. 3. ch. 78. § 13.* If any person shall counterfeit or forge any stamp or seal, to resemble any stamp or seal provided by this act, or shall counterfeit or resemble the impression, &c. he shall be adjudged a felon, and shall suffer death, without benefit of clergy.

LII. For the more effectually carrying into execution the laws relating to the duties on stamped vellum, parchment, and paper, &c.
[Touching general evidence, &c.]

By 26 *Geo. 3. ch. 82. § 6.* Reciting that "great difficulties have frequently arisen upon the trial of divers informations, indictments, and other prosecutions for offences committed against his Majesty's revenue on stamped vellum, parchment, and paper, by requiring strict proof of the commissions, deputations, or other authorities under which the said commissioners, and the officers, and other persons appointed and employed by them to carry the same into execution, have acted," it is enacted, that upon the trial of any information, indictment, or other prosecution, for any offence committed against any act or acts of parliament touching or concerning the said duties, or any of them, whereby any person shall or may be deemed or construed to be guilty of *felony*, it shall be sufficient to prove that such officer, &c. acted under the commissioners, without producing or proving the particular commission, deputation, or other authority by which he was constituted, appointed, or employed.

LIII. For incorporating certain persons therein named, by the name and stile of the *British Society for extending the fisheries, and improving the Sea-coasts of this kingdom*; and to enable them to subscribe a joint stock, and therewith to purchase lands, and build thereon, in *Scotland, &c.*

By 26 Geo. 3. ch. 106. § 26. If any person shall forge or counterfeit the seal of the society, or any deed or writing under the common seal, or shall demand any money in pursuance of any such forged or counterfeited deed or writing, either from the society or any members or servants thereof, knowing, &c. he shall be adjudged guilty of felony, and shall be transported in manner as by law directed, for a term not exceeding seven years.

LIV. For repealing the several duties of customs and excise, and granting other duties in lieu thereof, and for applying the said duties, with others, composing the revenue, &c. and for applying certain unclaimed monies, remaining in the *Exchequer* for the payment of *annuities* on lives, to the reduction of the *national debt*.

By 27 Geo. 3. ch. 13. § 46. If any person shall counterfeit, &c. any seal, stamp, or mark, directed by this, or any former act or acts, relating to the duties under the management of the commissioners, &c. or shall counterfeit or resemble the impression of the same; or shall utter, or use, &c. knowing, &c. he shall be [735] adjudged a felon, and shall suffer death, without benefit of clergy.*

LV. For making allowances to the dealers in *foreign wines*, for the stock of certain *foreign wines* in their possession, at a certain time, upon which the duties on importation have been paid; and for amending several laws relative to the *revenue of excise*.

By 27 Geo. 3. ch. 31. § 13. If any person shall counterfeit or forge any stamp or seal to resemble any stamp or seal which shall be provided or made in pursuance of this act, or shall counterfeit or resemble the impression of the same, upon any printed, stained, painted, or dyed calico, muslin, linen, stuff, fustian, velvet, velveret, dimity, or other figured stuff, with intent, &c. he shall be adjudged guilty of felony, and shall suffer death, without benefit of clergy.

LVI. For making further provisions in regard to such *vessels* as are particularly described in an act made in the twenty-fourth year of the reign of his present Majesty, *for the more effectual prevention of smuggling in this kingdom*,⁽ⁱ⁾ and for extending, &c. &c.

By 27 Geo. 3. ch. 32. § 14. If any person shall forge, &c. any stamp or seal, or the impression, &c. to resemble, &c. those provided by this act, he shall be adjudged a felon, and shall suffer death, without benefit of clergy.

LVII. For taking and swearing *affidavits*, to be made use of in the *court of session* of the county palatine of *Chester*, and for *taking of special bail* in actions and suits depending in the same *court*.

By 27 Geo. 3. ch. 43. § 4. Any person who shall before any person or persons empowered by this act to take special bail, represent or personate any other person or

* Repealed as to duties on goat and sheep skins, by 31 Geo. 3. ch. 27. Vide No. XCVIII. post.

(i) Vide No. XXXVIII. ante; No. LXVII. and LXXI. post.

persons, whereby the person or persons so represented or personated may be liable to the payment of any sum or sums of money for debt or damages, to be recovered in the same suit or action wherein such person or persons is or are represented or personated, as if he, she, or they, had really acknowledged and entered into the same, he shall be adjudged a felon, and shall suffer and incur the same pains, penalties, and forfeitures, as persons convicted of the like offences are liable to by virtue of an act past in the fourth year of the reign of king William and queen Mary, intituled *An act for taking special bails in the country, upon actions and suits depending in the courts of King's Bench, Common Pleas, and Exchequer at Westminster.*(k)

Vide stat. 34 Geo. 3. ch. 46. § 5, as to personating bail, &c. in the county palatine of Lancaster.

LVIII. For the better and more effectual protection of *stocking frames*, and the machines or engines annexed thereto, or used therewith; and for the punishment of persons destroying or injuring of such stocking frames, machines, or engines, and the *frame-work knitted pieces, &c.*

Vide No. XXXI. ante, and No. LX. post.

By 28 Geo. 3. ch. 55. § 4. If any person shall by day or by night, enter by force into any house, shop, or place, with an intent to cut or destroy any frame-work knitted pieces, stockings, or other articles, &c. or shall wilfully and maliciously cut or destroy any frame-work knitted pieces, &c. or shall wilfully and maliciously break, destroy, or damage any frame, machine, engine, tool, instrument, or utensil, used in and for the working and making of any such frame-work knitted pieces, &c. not having the consent of the owner so to do, &c. he shall be adjudged guilty of felony, and shall be transported to some of his Majesty's dominions beyond the seas, for any space or term of years not exceeding fourteen years nor less than seven years.

LIX. For raising a certain sum of money, by way of *annuities*, to be attended with the benefit of survivorship, in *classes*.
[736]

By 29 Geo. 3. ch. 41. § 36. Persons forging, &c. or altering registers, &c. or personating the proprietor of any order, &c. or nominee, &c. shall be adjudged guilty of felony, and shall suffer death, as in cases of felony, without benefit of clergy.

LX. For preventing the wilfully burning or destroying *ships*, and the wilfully and maliciously destroying any *woollen, silk, linen, or cotton goods*, or any *implements* prepared for or used in the manufacture thereof, in that part of *Great Britain* called *Scotland*.

By 29 Geo. 3. ch. 46. Any owner, &c. destroying any vessel with intent to defraud underwriters, &c. shall, upon conviction in *Scotland*, suffer death, as in other cases of capital crimes: so as to persons entering forcibly into any house, &c. with intent to destroy any goods in the loom, &c. or tools, &c. upon conviction in *Scotland*.

LXI. For granting to his *Majesty* several additional stamp duties on newspapers, advertisements, and on cards and dice.

By 29 Geo. 3. ch. 50. § 13. If any person shall counterfeit, &c. any seal, stamp, or mark, directed by this or any former act of parliament, or shall counterfeit or resemble the impression of the same, or shall utter, or use, &c. with intent to defraud his Majesty, &c. he shall be adjudged a felon, and shall suffer death as in cases of felony, without benefit of clergy.

(k) See an indictment for personating bail on this statute, viz. 4 W. & M. ch. 4. Cr. Cir. Com. 7th Edit. 185. It does not take away the benefit of clergy, but that of 21 Jac. 1. ch. 26, in certain cases, does. *Vide observations on both these statutes same book, p. 188. Vide also ante, 696.*

LXII. For granting to his *Majesty* several additional stamp duties on probates of wills, letters of administration, and on receipts for legacies, or for any share of a personal estate divided by force of the statute of distributions.*

By 29 *Geo. 3. ch. 51. § 8.* If any person shall counterfeit, &c. any seal, stamp, or mark, directed or allowed to be used by this or any former act of parliament, or shall counterfeit or resemble the impression of the same, or shall utter, or use, &c. with intent, &c. he shall be adjudged a felon, and shall suffer death as in cases of felony, without benefit of clergy.

LXIII. For giving relief to such persons as have suffered in their rights and properties, during the late unhappy dissensions in *America*, &c. and also for making compensation to such persons as have suffered in their properties in consequence of the cession of the province of *East Florida* to the King of *Spain*.

By 30 *Geo. 3. ch. 34. § 11.* If any person shall forge or counterfeit any order, which shall have been made forth, or renewed, by virtue of this act, before the same shall have been paid off and cancelled, or any indorsement, &c. or tender in payment, &c. with intent to defraud his *Majesty*, or the person to be appointed to pay off the same, or to pay any interest thereupon, he shall be adjudged a felon, and shall suffer death as in cases of felony, without benefit of clergy.

LXIV. For granting to his *Majesty* an additional duty on certificates issued with respect to the killing game.(l)

By 31 *Geo. 3. ch. 21. § 5.* If any person shall counterfeit, &c. any seal, stamp, or mark, to resemble any seal, stamp, or mark, directed by this act, or shall counterfeit or resemble the impression of the same, or shall utter, or use, &c. he shall suffer death as in cases of felony, without benefit of clergy.

LXV. For repealing the duties now charged on bills of exchange, promissory notes, and other notes, drafts, and orders, and on receipts; and for granting other duties in lieu thereof.(m)

By 31 *Geo. 3. ch. 25. § 29.* If any person shall counterfeit, &c. any stamp or mark, directed by this act, or resemble the impression of the same, or shall utter, or use, &c. he shall suffer death as in cases of felony, without benefit of clergy. [737]

LXVI. To render persons convicted of petty larceny competent witnesses.

By 31 *Geo. 3. ch. 35,* Reciting that "Whereas persons convicted of *grand larceny* are by their punishment restored to their credit as witnesses, but persons convicted of *petty larceny* are rendered and remain wholly incompetent to be examined as witnesses, it is enacted, that from and after the 24th day of June, one thousand seven hundred and ninety one no person shall be an incompetent witness by reason of a conviction for *petty larceny*.

LXVII. For explaining and amending an act, passed in the thirty-first year of the reign of his late *Majesty* King *George* the Second, intituled, *An Act for the encouragement of seamen employed in the Royal Navy*, &c. and for further extending the benefits thereof

* Repealed as to receipts for legacies, and new duties granted, by 36 *Geo. 3. ch. 52,* abstracted post.

(l) Vide No. XLIII. ante.

(m) Vide No. LXXVII. and No. XC. post.

to petty officers and seamen, non-commissioned officers of marines, and marines, serving, or who may have served, on board any of his *Majesty's* ships.

Vide No. LXXIV. *post.*

By 32 *Geo. 3. ch. 33. § 23.* If any person shall falsely make, forge, or counterfeit, &c. or utter, &c. any ticket for the wages or pay due to any petty officer or seaman, non-commissioned officer of marines, or marine, for his services on board any ship or vessel of his Majesty, or any duplicate thereof, &c. with intention to receive any wages, &c. shall suffer death as a felon, without benefit of clergy.

LXVIII. For explaining and amending an act passed in the twenty-sixth year of the reign of his present *Majesty*, intituled *An act for the further preventing frauds and abuses attending the payment of wages, prize-money, &c.* and for further extending the benefits thereof to petty-officers, &c.

Vide No. LXXIV. *post.*

By 32 *Geo. 3. ch. 34. § 29.* If any person shall falsely make, forge, or counterfeit, &c. or utter, &c. any petition for a certificate to enable any person or persons, to obtain letters of administration to any petty officer, &c. or shall falsely make, forge, or counterfeit, &c. or utter, &c. any certificate for enabling him to obtain probate or letters of administration, with the will annexed, &c. he shall suffer death as a felon, without benefit of clergy.

LXIX. For enabling his Majesty to direct the issue of exchequer bills to a limited amount, for the purposes and in the manner therein mentioned.

By 33 *Geo. 3. ch. 29. § 48.* If any person shall forge, &c. any certificate or certificates of the commissioners by this act appointed, or any receipt to be given by the cashier or cashiers of the bank of *England*, in pursuance of this act; or shall wilfully deliver to the auditor of the receipt of his Majesty's exchequer for the time being, &c. or shall utter, &c. with intent to defraud his Majesty, or any body or bodies politic or corporate, or any person whomsoever, he shall suffer death as in cases of felony without benefit of clergy.

LXX. For the better preventing forgeries and frauds in the transfers of the several funds transferable at the bank of *England*.

By 33 *Geo. 3. ch. 30. § 1, 2, 3.* Persons making, or assisting in making, transfers of stock in any other names than the owners; or forging or assisting in forging transfers, &c. or making, or assisting in making, false entries in the books of the bank, &c. shall be deemed guilty of felony, and shall suffer death without benefit of clergy.

And by § 4. If any clerk, &c. employed or entrusted by the governor and company, shall knowingly or wilfully make out or deliver, &c. any *dividend warrant* for a greater or less amount than the person or persons, on whose behalf, or pretended behalf, such *dividend warrants* shall be made out, is or are entitled to, with intent, &c. he shall, upon conviction, be transported for seven years.

LXXI. For better preventing offences in obstructing, destroying, or damaging ships or other vessels, and in obstructing seamen, keelmen, casters, and ship-carpenters, from pursuing their lawful occupations. (n)

By 33. *Geo. 3. ch. 67. § 5.* If any seaman, keel-man, caster, ship-carpenter, or other person, shall wilfully and maliciously burn or set fire to any ship, keel, or other vessel, he shall suffer death as in cases of felony, without benefit of clergy. By § 4. seamen, keel-men, &c. wilfully and maliciously destroying or damaging any ship, keel, or other vessel (otherwise than by fire,) shall be adjudged guilty of felony, and shall be transported for any time not exceeding fourteen years, nor less than seven years. And by

(n) *Vide* No. XXXVIII. LVI. and LX. *ante.*

§ 8. it is provided, that no person or persons shall be prosecuted by virtue of this act, for any of the offences aforesaid, unless such prosecution be commenced *twelve calendar months* after the offence committed.

LXXII. For granting to his *Majesty* certain stamp duties on indentures of clerkships to solicitors and attorneys in any of the courts in *England* therein mentioned.

By 34 Geo. 3. ch. 14. § 14. If any person shall counterfeit, &c. any seal, stamp, or mark, to resemble any seal, stamp, or mark directed by this act, or shall utter, vend, or sell any vellum, parchment, or paper liable to such stamp duty, with such counterfeit stamp or mark thereupon, knowing, &c. he shall suffer death, as in cases of felony, without benefit of clergy.

LXXIII. For taking of special bail in actions and suits depending in court of *common-pleas*, of the county palatine of *Lancaster*.

By 34 Geo. 3. ch. 46. § 5. Personating bail, &c. is made felony, upon the same principle as that for the county palatine of *Chester*, abstracted ante, No. LVII.

LXXIV. To enable petty officers in the navy, seamen, non-commissioned officers of marines, and mariners, serving in his *Majesty's* navy, to allot part of their pay for the maintenance of their wives and families.^(o)

By 35 Geo. 3. ch. 28. § 30. If any person shall falsely make, forge, or counterfeit, or cause, or procure to be falsely made, forged, or counterfeited, or willingly act, &c. any declaration or order for payment, or any certificate of receipt therein before described, or mentioned; or shall utter, &c. he shall be adjudged guilty of felony, and shall suffer death as a felon, without benefit of clergy.

LXXV. For granting to his *Majesty* several additional duties on stamped vellum, parchment, and paper; and for repealing a certain exception as far as relates to bonds given as security for the payment of one hundred pounds or under, contained in an act of the twenty-third year of his present *Majesty's* reign.

By 35 Geo. 3. ch. 30. § 4. If any person shall counterfeit, &c. any stamp to resemble any stamp directed or allowed to be used by this act, or shall counterfeit or resemble the impression of the same; or shall utter, vend, sell, use, &c. he shall suffer death as in cases of felony, without benefit of clergy.

LXXVI. For granting to his *Majesty* a duty on certificates issued for using *hair-powder*.

By 35 Geo. 3. ch. 49. § 31. If any person shall counterfeit, &c. any stamp or mark, directed or allowed to be used by this act; or shall counterfeit or resemble the impression of the same; or shall utter, vend, sell, use, &c. he shall suffer death as in cases of felony, without benefit of clergy.

LXXVII. For granting to his *Majesty* certain additional duties on *receipts*.

By 35 Geo. 3. ch. 55. § 17. If any person shall counterfeit, &c. any stamp or mark, directed or allowed to be used, or provided, made, or used in pursuance of 31 Geo. 3. ch. 35.^(p) or this act, or shall counterfeit or resemble the impression [739] of the same; or shall utter, vend, sell, expose to sale, or use, &c. he shall be adjudged a felon, and suffer death as in cases of felony without benefit of clergy.

(o) Vide No. LXVII. and LXVIII. ante.

(p) Vide No. LXV. ante.

LXXVIII. For granting to his *Majesty* certain stamp duties on *sea insurances*.

By 35 *Geo. 3. ch. 63. § 23.* If any person shall counterfeit, &c. any stamp or mark, directed or allowed to be used, in pursuance of this act, or shall counterfeit or resemble the impression of the same; or shall utter, vend, sell, expose to sale, or use, &c. he shall be adjudged a felon, and shall suffer death as in cases of felony, without benefit of clergy.

LXXIX. For making part of certain principal sums or stock and annuities raised or created, or to be raised or created by the parliament of the kingdom of *Ireland*, on loans for the use of the government of that kingdom, transferable, and the dividends on such stock and annuities payable at the *Bank of England*, &c. (q)

By 35 *Geo. 3. ch. 66. § 3, 4, 5, 6, 7, 8, 9.* Persons forging, altering, or uttering, &c. receipts or debentures, &c. or forging letters of attorney or other authority or instrument to transfer, assign, sell, or convey any stock, &c. or personating proprietors; or forging dividend warrants, &c. or (being officers of the bank) embezzling notes, &c. or making transfers in the names of any other person or persons, than the proprietor or proprietors, &c. or forging transfers, &c. or making false entries in the books of the *Bank of England*, with intent to defraud the governor and company of the *Bank of England*, or any other body politic or corporate, or any person or persons whatsoever, shall be deemed guilty of felony, and shall suffer death, without benefit of clergy.

By § 10. Clerks, &c. of the Bank making out false dividend warrants, to be transported for seven years.

LXXX. For rendering more effectual an act, passed in the first year of the reign of King *James* the First, intituled, *An act to restrain all persons from marriage until their former wives and former husbands be dead*.

By 35 *Geo. 3. ch. 67. § 1.* Persons convicted in *England* of bigamy are subject to the penalties, pains, and punishments as, by the laws now in force, persons are subject and liable to, who are convicted of grand or petit larciny: and by § 2. if they shall be at large within *Great Britain*, without some lawful cause, before the expiration of the term for which they shall be ordered to be transported, they shall be guilty of felony, and shall suffer death, without benefit of clergy.

By § 3. If found at large in *Great Britain*, after order of transportation, they may be tried either in the county where they had been convicted, or in that in which they are apprehended and taken.

LXXXI. For establishing a more easy and expeditious method for the punctual and frequent payment of the wages and pay of certain officers belonging to His Majesty's navy. (r)

By 35 *Geo. 3. ch. 94. § 34.* If any person shall falsely make, forge, &c. or willingly act and assist, &c. or shall utter and publish as true, knowing, &c. any false, forged, or counterfeited order, bill, extract, or certificate, &c. for the purpose of defrauding the public, or any commissioned officer, &c. he shall be adjudged guilty of felony, and shall suffer death as a felon, without benefit of clergy.

LXXXII. To prohibit, for a *limited* time, the making of starch, hair-powder, and blue, from wheat, and other articles of food; and for lowering the duties on the importation of starch, and of other articles made thereof.

By 36 *Geo. 3. ch. 6. § 13.* If any person shall forge, &c. any stamp or seal, to resemble, &c. or counterfeit the impression, &c. he shall be adjudged a felon, and shall suffer death as in cases of felony, without benefit of clergy.

(q) *Vide* No. LXXXVII. *post.*

(r) *Vide* No. LXVII. LXVIII. and LXXIV. *ante.*

LXXXIII. For the safety and preservation of his *Majesty's* person and government against treasonable and seditious practices and attempts.

By 36 *Geo. 3. ch. 7. § 1.* Persons who shall compass, devise, &c. the death, restraint, &c. of his *Majesty* or his heirs, or to depose them, or to levy war, or to compel a change of measures, &c. to be deemed *traitors*, and shall suffer pains of death, and also loss and forfeit as in cases of *high treason*. By § 2. Persons in *England* who shall by writing, &c. incite or stir up the people to hatred or contempt of his *Majesty*, or the government, &c. shall be guilty of high misdemeanors; and for a second offence may be punished as in the cases of high misdemeanors, or banished or transported for seven years. And by § 3. Persons banished or transported found at large within *Great Britain*, without some lawful cause, before the expiration of the term for which, &c. shall suffer death, as in cases of felony, without benefit of clergy: And such persons may be tried in any county, &c. either where apprehended and taken, or from whence they were ordered to be banished or transported; and a certificate of the conviction shall be sufficient proof, &c.

LXXXIV. For the more effectually preventing seditious meetings and assemblies.

By 36 *Geo. 3. ch. 8. § 4.* If any persons, exceeding the number of fifty, being assembled contrary to the provisions herein contained, and being required or commanded by any one or more justice or justices of the peace, or by the sheriff of the county, or his under-sheriff, or by the mayor, &c. where such assembly shall be, by proclamation to be made in the king's name, in the form in this act directed, to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, shall, to the number of twelve, or more, notwithstanding such proclamation made, remain or continue together by the space of one hour after such command or request made by proclamation, &c. they shall be adjudged felons, and shall suffer death, as in case of felony without benefit of clergy.

LXXXV. For *repealing* certain duties on legacies and shares of personal estates, and for granting other duties thereon, in certain cases.

By 36 *Geo. 3. ch. 52. § 40.* If any person shall counterfeit or forge, &c. any stamp directed or allowed to be used or provided in pursuance of this act; or shall counterfeit or resemble the impression of the same, &c. or shall utter, vend, sell, expose to sale, or use, &c. he shall be adjudged a felon, and shall suffer death as in case of felony, without benefit of clergy.

LXXXVI. For the better collection of the duty on *hats*.

[This *stat.* repeals part of 24 *Geo. 3. sess. 2. c. 51*, abtracted *ante*, p. 732.]

By 36 *Geo. 3. ch. 125. § 19.* If any person shall counterfeit or forge, &c. any stamp or mark directed to be allowed or used, or provided, made, or used, in pursuance of this act, or shall counterfeit or resemble the impression of the same; or shall utter, vend, sell, or expose to sale, &c. any piece of silk, linen, &c. with such counterfeit mark or stamp thereon, knowing, &c. or shall privately or fraudulently use any stamp, &c. he shall be adjudged a felon, and shall suffer death as in cases of felony, without benefit of clergy.

LXXXVII. For making certain annuities, created by the parliament of the kingdom of *Ireland*, transferable, and the dividends thereon payable, at the *Bank of England*; and for the better security of the proprietors of such annuities, and of the governor and company of the *Bank of England*. (s)

By 37 *Geo. 3. ch. 46. § 3, 4, 5, 6, 7, 8, 9.* Persons forging, altering, &c. receipts or debentures; or forging letters of attorney, &c. or personating proprietors; or forging or

(s) *Vide* No. LXXIX. *ante*.

uttering forged dividend warrants, &c. or officers of the bank embezzling notes, &c. or making transfers in other than proprietors names, &c. or forging or uttering forged transfers, &c. or making false entries in the books of the *Bank of England*, &c. with intent to defraud the governor and company of the said bank, or any other body politic or corporate, or any person or persons whatsoever, shall be deemed guilty of felony, and shall suffer death, without benefit of clergy. By § 10. Officers of the bank making out false dividend warrants, to be transported for seven years.

[741] LXXXVIII. For the better prevention and punishment of attempts to *seduce* persons serving in his *Majesty's forces*, by *sea* or *land*, from their duty and allegiance to his *Majesty*, or to incite them to mutiny or disobedience.

Vide No. XCIV. *post*.

By 37 Geo. 3. ch. 70. § 1. Any person attempting to seduce any sailor or soldier from his duty, or inciting him to mutiny, &c. to be adjudged guilty of felony, and to suffer death as in cases of felony, without benefit of clergy. By § 4. To continue and be in force until the expiration of one month after the commencement of the then next session of parliament. Continued for a limited time by 38 Geo. 3. ch. 6. And further continued by 39 Geo. 3. ch. 4. till six weeks after the commencement of the then next session.

LXXXIX. For more effectually restraining intercourse with the *crews* of certain of his *Majesty's ships* now in a state of *mutiny* and *rebellion*, and for the more effectual suppression of such mutiny and rebellion.

Vide No. XCIV. *post*.

By 37 Geo. 3. ch. 71. § 3. Persons communicating with the crew or assisting them shall, on conviction thereof, be adjudged guilty of felony, and shall suffer death as in cases of felony, without benefit of clergy: And by § 4. All persons voluntarily remaining on board after knowledge of the declaration therein mentioned, shall be adjudged guilty of piracy and felony, and shall suffer such pains of death and loss of lands, goods, and chattels, as any pirates or felons by virtue of an act, made in the *eleventh year(t)* of King *William* the Third, intituled, *An act for the more effectual suppression of piracy*, or any other act, ought to suffer. By § 9. To be in force until the expiration of one month after the commencement of the then next session of parliament.

XC. For granting to his *Majesty* certain stamp-duties on the several *matters(u)* therein mentioned, and for better securing the duties on certificates to be taken out by solicitors, attornies, and others, practising in certain courts of justice in *Great Britain*:

By 37 Geo. 3. ch. 90. § 5. If any person shall counterfeit, &c. any stamp directed or allowed to be used by this act, or shall counterfeit or resemble the impression of the same, with intent, &c. or shall utter, vend, or sell, any vellum, &c. with such counterfeit stamp or mark thereupon, knowing the same to be counterfeit, or shall privately or fraudulently use any stamp directed or allowed to be used by this act, with intent, &c. he shall be adjudged a felon, and shall suffer death as in cases of felony, without benefit of clergy.

(t) So in the *purview* of stat. 37 Geo. 3. ch. 71; but mentioned 11 & 12 W. 3. c. 7. in the margin, which is right, as appears by 4 *Blac. Com.* 72, and the several statute books of *Hawkins*, *Ruffhead*, and *Runnington*. If a statute be recited as of the fourth year of the reign, &c. and it appears to have been made in the fourth and fifth years, &c. the variance is fatal. *Rann v. Green*, *Corp.* 474. Vide also *Rex v. Trelawney*, 1 *T. R.* 222, and *Watson v. Shaw* and others, 2 *T. R.* 654.

(u) *Promissory Notes* are parcel of these matters. Vide No. LXV, & LXXVII, *ante*, and also No. CVI, *post*.

XCI. For granting to his *Majesty* an additional stamp duty on *deeds*.

By 37 *Geo. 3. ch. 111. § 5.* If any person shall counterfeit, &c. any stamp or mark, directed or allowed to be used by this act, or shall counterfeit or resemble the impression of the same, with intent, &c. or shall utter, vend, or sell, any vellum, parchment, or paper, with such counterfeit mark or stamp thereupon, knowing, &c. or shall fraudulently use any stamp or mark directed or allowed to be used by this act, with intent, &c. he shall be adjudged a felon, and shall suffer death as in cases of felony, without benefit of clergy.

XCII. For the better preventing the forging or counterfeiting the names of *witnesses* to letters of attorney, or other authorities or instruments, for the transfer of *stocks* or *funds* which now are, or by any act, or acts of parliament shall hereafter be made transferable at the *Bank of England*, or for the transfer [742] of any part of the capital *stock* of the governor and company of the *Bank of England* called *bank stock*; or any part of the *stocks* or *funds* under the management of the *South Sea Company*, or *East India Company*; or for the receipt of dividends, &c.

By 37 *Geo. 3. ch. 122. § 1.* If any person shall falsely make, forge, &c. the name or names, hand-writing, or hand-writings, of any witness or witnesses attesting the execution of any letter of attorney, or other authority, or instrument, to transfer, &c. or shall utter, or publish, as true, any such letter of attorney, or other authority, or instrument, &c. knowing such name or handwriting to be false, forged, or counterfeited, he shall be adjudged guilty of felony, and shall be transported for seven years, or shall be adjudged to suffer such lesser punishment as the court, before whom such offender shall be tried, shall think fit to award.

XCIII. To prevent the counterfeiting any *copper-coin* in this realm made, or to be made, current by proclamation, or any *foreign gold* or *silver coin*; and to prevent the bringing into this realm, or uttering, any counterfeit *foreign gold* or *silver coin*.

By 37 *Geo. 3. ch. 126. § 4.* If any person shall utter or tender in payment, or give in exchange, or pay or put off any such false or counterfeit coin as aforesaid, resembling or made with intent to resemble or look like, any gold or silver coin of any foreign prince, state, or country, or to pass as such foreign coin, knowing the same to be false or counterfeit, he shall suffer six months imprisonment, and find sureties for his good behaviour for six months more; and if he shall be convicted a second time for the like offence, he shall suffer two years imprisonment, and find sureties for his good behaviour for two years more: And if he shall afterwards offend a third time, in like manner, he shall be adjudged to be guilty of felony, without benefit of clergy.

XCIV. To enable his *Majesty* more easily and effectually to grant *conditional pardons* to persons under sentence by *naval courts martial*, and to regulate imprisonment under such sentences.

Vide No. LXXXVIII. and LXXXIX. *ante*, and also No. CII. *post*.

By 37 *Geo. 3. ch. 140. § 1.* If his *Majesty* shall extend his mercy to persons liable to death by the sentence of a naval court martial, a justice of the king's bench, or common pleas, or a baron of the exchequer, may, on notification from the secretary of state, allow the benefit of a conditional pardon as if it had passed under the great seal, and shall make orders accordingly: And by § 6. The laws touching the escape of felons under sentence of death shall apply to offenders under like sentence by a naval court, and to all persons aiding, abetting, or assisting in any such escape, if the offender shall have been allowed the benefit of a conditional pardon.

XCV. For granting to his *Majesty* an aid and contribution for the prosecution of the war.

By 38 *Geo. 3. ch. 16. § 95.* Persons forging or altering certificates, receipts, or duplicates, &c. or knowingly uttering or publishing them as true, with intent, &c. shall be adjudged guilty of felony, and shall suffer death, without benefit of clergy. By § 107, it is provided, that the present act may be altered, varied or repealed by any act or acts to be made in this session of parliament. *Vide income act, viz. 39 Geo. 3. ch. 13.* which, by § 1, repeals the above *stat.* in part; but § 36, extends the power of it in other respects, &c.(v)

XCVI. To continue until the first day of *August*, one thousand eight hundred, and until the end of the then next session of parliament, and amend an act made in the thirty-third year of the reign of his present *Majesty*, intituled, *An act for establishing regulations respecting aliens arriving in this kingdom, or resident therein, in certain cases.*(w)

[743] By 38 *Geo. 3. ch. 50. § 24.* In case any person ordered or adjudged to be transported in pursuance of this act, shall be found at large within this realm, after sentence of transportation pronounced, he or she shall be deemed guilty of felony, and shall suffer death as a felon without benefit of clergy.

XCVII. For granting to his *Majesty* a duty on certificates issued with respect to *armorial-bearings* or *ensigns*.

By 38 *Geo. 3. ch. 53. § 18.* If any person shall counterfeit, &c. any stamp or mark directed or allowed to be used or provided, in pursuance of this act; or shall counterfeit or resemble the impression of the same, upon any vellum, parchment, or paper, with intention to defraud, &c. or shall utter, vend, sell, or expose to sale, any vellum, parchment, or paper, liable to the said duty, with such counterfeit mark or impression thereupon, knowing, &c. or shall privately or fraudulently use any stamp directed or allowed to be used by this act, with intent, &c. he shall be adjudged a felon, and shall suffer death as in cases of felony, without benefit of clergy.

XCVIII. To amend several laws of excise relating to coach-makers, auctioneers, beer and cyder exported, certificates and debentures, stamps on *hides* and *skins*, drawbacks on wines and sweets, and ale and beer licences.

By 38 *Geo. 3. ch. 54. § 9.* If any person shall, with intent to defraud his *Majesty*, counterfeit or forge, &c. any debenture in any case in which a debenture is by any act or acts of parliament relating to the duties of excise required or directed to be given or granted, or shall knowingly or willingly utter, publish, or make use of any such counterfeited or forged debenture, he shall be adjudged guilty of felony, and shall suffer death as a felon, and have execution awarded against him, as persons attainted of felony, without benefit of clergy.

By § 10. The pains of death imposed by the 9 *Ann. ch. 11.* 10 *Ann. ch. 26.* and 5 *Geo. 1. ch. 2.* relating to duties on *hides* and *skins*, &c. declared to be in force against persons who counterfeit stamps provided by those three statutes, or in pursuance of the acts of 28 *Geo. 3. ch. 37.* and 1 *Geo. 3. ch. 27.*(x)

XCIX. For making perpetual, subject to redemption and purchase in the manner therein stated, the several sums of money now

(v) No repeal by the latter *stat.* of the felony mentioned in the above act of 38 *Geo. 3. ch. 16. § 95.*

(w) Amended, and further powers given by *stat.* 38 *Geo. 3. ch. 77.* *vide* 33 *Geo. 3. ch. 4.*

(x) *Vide* No. LIV. *ante.*

charged in *Great Britain* as a *land-tax* for one year, from the twenty-fifth day of *March* one thousand seven hundred and ninety-eight.(y)

By 38 *Geo. 3. ch. 60. § 118.* If any person shall forge, counterfeit, or alter, &c. any contract or contracts for the sale of any land-tax, or any assignment or assignments of such contract or contracts, or of any portion of land-tax therein comprised, or any certificate or certificates of the commissioners of land-tax or of supply, or any chief magistrate authorized by this act to make out the same, or of the surveyor-general of the land revenue of the crown, or of the duchy of *Cornwall*, or any certificate or receipt of the cashier or cashiers of the governor and company of the bank of *England*, or any certificate, &c. directed by this act to be made out by the proper officer to the commissioners for the affairs of taxes, &c. or shall wilfully deliver, &c. or utter, &c. he shall be adjudged guilty of felony, and shall suffer death as in cases of felony, without benefit of clergy.

C. More effectually to prevent, during the war, persons, being his Majesty's subjects, for voluntarily repairing to or remaining in *France*, or any country or place united to *France*, or occupied by the armies of *France*; and to prevent correspondence with such persons and with his Majesty's enemies.

By 38 *Geo. 3. ch. 79. § 1.* If any subject of his *Majesty* shall, during the war, go, or embark to go to *France* or any place united thereto, or occupied by its armies, he shall be adjudged guilty of felony, and shall suffer death as in cases of [744] felony, without benefit of clergy. By § 4, If any subject shall correspond with any such other subject of his *Majesty*, so going to, and remaining in *France*, he shall be deemed guilty of felony, and shall suffer death without benefit, &c. By § 5. If any subject of his *Majesty* shall, during the war, correspond with the persons exercising the powers of government in *France*, &c. or with any of their agents, knowing such agent or agents to be employed, &c. he shall be adjudged guilty of felony, and shall suffer death, without benefit, &c. By § 8. In case any person ordered or adjudged to be transported under this act, shall be found at large within this realm, after sentence of transportation pronounced, and before the time shall be expired for which such person was sentenced to be transported, he shall be deemed guilty of felony, and shall suffer death, without benefit, &c. By § 2. If any subject of his *Majesty* shall, during the war, knowingly and wilfully hire, let, engage, &c. or be concerned in the hiring, &c. any vessel, with intent that any of his *Majesty's* subjects should embark therein with intent to go to *France*, &c. he shall be transported for any time not exceeding seven years, to such place as his *Majesty* in council shall direct.

CI. To repeal the duties imposed by an act, made in the last session of parliament, for granting an aid and contribution for the prosecution of the war; and to make more effectual provision for the like purpose, by granting certain duties upon *income*, in lieu of the said duties.

Vide 39 G. 3. c. 22; ch. 72.

By 39 *Geo. 3. ch. 13. § 32.* If any person shall give false evidence on oath or affirmation, or in any affidavit or deposition, &c. before the commissioners in the said act mentioned, he shall, upon conviction, be subject and liable to such pains and penalties, as by any law now in being, persons convicted of wilful and corrupt perjury are subject and liable to. (yy)

(y) Certain duties to which this act relates, to be levied within one year from *March* 25, 1799, &c. by 39 *Geo. 3. ch. 3.* See further on this subject of taxation, 39 *Geo. 3. ch. 6; ch. 21; ch. 40; ch. 43; and ch. 108.*

(yy) By 2 *Geo. 2. ch. 25. § 2.* Persons guilty of wilful and corrupt perjury, or subornation of perjury, may be imprisoned or transported for seven years; and if they escape; break prison, or return, &c. shall suffer death as felons, without benefit of clergy. Made perpetual by 9 *Geo. 2. ch. 18.*

CII. For remedying certain defects in the law respecting offences committed upon the *high seas*.

Vide No. XCIV. ante.

By 39 *Geo. 3. ch. 37. § 1.* All offences whatever committed on the *high seas*, shall be liable to the same punishments as if committed on shore, and shall be enquired of, heard, tried, determined, and adjudged, in the *same manner* as treasons, felonies, murders and confederacies, are directed to be, by *stat. 28. Hen. 8. ch. 15.* And by § 2. Persons tried for murder or manslaughter, and found guilty of manslaughter only, shall be entitled to the benefit of clergy, and be subject to the same punishment as if committed on land.^(z)

CIII. For making perpetual so much of an act made in the nineteenth year of the reign of his *Majesty* as relates to the punishment of *burning* in the *hand* of certain persons convicted of felony, within the benefit of clergy.

By 39 *Geo. 3. ch. 45.* So much of the *stat. of 19 Geo. 3. ch. 74.* as relates to the punishment of *burning* offenders convicted of felony, within the benefit of clergy, in the *hand*, is made perpetual.

Vide No. XXVI. ante, and 39 *Geo. 3. ch. 46,* which perpetuates so much of the said *stat. of 19 Geo. 3. ch. 74,* as relates to the *lodgings* of *Judges* at county *assizes.* *Vide* also 39 *Geo. 3. ch. 51* and *52.* which continue (until 25th *March, 1802*) such parts of said *stat. 19 Geo. 3. ch. 74, &c.* as relate to the confinement of *felons* in *temporary places, &c.* or *penitentiary houses, &c.*

CIV. For the more effectual suppression of societies established for *sedition* and *treasonable* purposes; and for better preventing *treasonable* and *sedition* practices.

Vide No. LXXXVIII. and LXXXIX. ante.

[745] By 39 *Geo. 3. ch. 79. § 8.* Persons convicted, upon *indictment*, of the offences and practices mentioned in this act, shall and may be transported for the term of *seven years*, in the manner provided by law for transportation of offenders, or imprisoned for any time not exceeding *two years*, as the court shall think fit; and every such offender, who shall be ordered to be transported, shall be subject and liable to *all laws(a)* concerning offenders ordered to be transported.

CV. To protect masters against embezzlements by their clerks or servants.

By 39 *Geo. 3. ch. 85.* If any servant or clerk shall, by virtue of his employment, receive or take into his possession any money, goods, bond, bill, note, banker's draft, or other valuable security or effects, for or in the name or on the account of his master or employer, and shall fraudulently embezzle, secrete, or make away with the same, or any part thereof, he shall be deemed to have feloniously stolen the same from his master or employer, for whose use, or in whose name, or on whose account the same was or were delivered to, or taken into the possession of such servant, or clerk. &c. and every such offender, his adviser, procurer, aider, or abettor, being thereof lawfully convicted or attainted, shall be liable to be transported for any term not exceeding *fourteen years*, in the discretion of the court before whom such offender shall be convicted or adjudged.

CVI. For granting to his *Majesty* certain stamp duties on *bills of exchange* and *promissory notes* for *small* sums of money.

By 39 *Geo. 3. ch. 107. § 25.* If any person shall counterfeit or forge any stamp or mark, directed or allowed to be used by this act, with intent, &c. or shall fraudulently use any such stamp or mark, with intent, &c. or shall utter, vend, sell, or expose to sale,

^(z) The *stat. of 28 H. 8,* does not extend to offences committed in *creeks* or *ports* within the body of a county. 3 *Bac. Abr.* 4th edit. 820.

^(a) *Vide* note under No. CI. *ante.*

any vellum, &c. with any such counterfeit stamp or mark thereupon, knowing, &c. he shall be adjudged a felon, and shall suffer death, without benefit of clergy.

CVII. For rendering more commodious, and for better regulating, the port of *London*.

By 39 *Geo. 3. ch. 69.(b)* § 104. If any person shall wilfully and maliciously set on fire any of the works to be made by virtue of this act, or any ship or other vessel lying or being in any canal, dock, bason, cut, or other works to be made by virtue of this act, he shall be adjudged guilty of felony, without benefit of clergy. And persons otherwise wilfully damaging the works, or vessels, &c. shall suffer punishment by fine, imprisonment, or transportation, at the discretion of the judge, &c. before whom such offender shall be tried and convicted.

CVIII. For enabling his *Majesty* to incorporate by charter a company to be called *The Globe Insurance Company*, for insurance on lives, and against loss or damage by fire, and for other purposes therein mentioned.

By 39 *Geo. 3. ch. 83.(c)* § 22. If any person shall forge or counterfeit the common seal of the said corporation to be created and established pursuant to this act, or shall forge, counterfeit, or alter, any policy, deed, bill, bond, or obligation under the common seal of the said corporation, or shall offer to dispose of, or pay away the same, knowing the same to be such; or shall demand the money therein contained, or pretended to be due thereon, of or from the said corporation, or any of the officers thereof, knowing, &c. with intent to defraud the said corporation, or any person or persons whomsoever, he shall be deemed guilty of felony, and suffer as in cases of felony, without benefit of clergy. By § 23. To be deemed, adjudged, and taken to be a public act.

The *Charter* mentioned in this act is not yet complete, it being under the consideration of the *privy council* upon the attorney-general's report.

1

STATUTES RELATING TO FELONY SINCE THE LAST EDITION OF THE WORK.

Defacing the mark on stores, punishable by 14 years transportation. 39 & 40 *Geo. III. c. 89. § 4.*

Setting fire to works or vessels in the London canals, docks, &c. 39 *Geo. III. c. 69. § 104* & 39 & 40 *Geo. III. c. 89. § 4.*

Persons disobeying orders of quarantine. 39 & 40 *Geo. III. c. 80. § 11. 21.*

Masters of vessels concealing the plague. 39 & 40 *Geo. III. c. 80. § 16.*

Persons escaping from Lazarets. *Id. § 23.*

Forging certificate of quarantine. *Id. § 27.*

Clandestinely conveying goods, letters, &c. from vessels under quarantine. *Id. § 28.*

Returning from transportation under 39 & 40 *Geo. III. c. 89. § 6.*

Aliens returning from transportation for life. 43 *Geo. III. c. 155. § 39.*

Counterfeiting receipts for contributions under Loan acts. 41 *Geo. III. c. 3. § 24.*

Personating pensioners, &c. 43 *Geo. III. c. 119. § 17.*

Forging land tax redemption contracts. 42 *Geo. III. c. 116. § 194.*

Maliciously shooting, stabbing, &c. with intent to murder, &c. administering poison to women quick with child to procure miscarriage, &c. setting fire to any house, out-house, &c. 43 *Geo. III. c. 58. § 1, 2.*

(b) In order to facilitate the labour of others, it has been judged necessary to observe here, that there are two of these numbers in the *statute books*, and that this act will be found under a new head, intituled, "PUBLIC LOCAL AND PERSONAL ACTS," in p. 228, vol. 14. of *Runnington's* edition of the *Statutes*, and vol. 18. of *Ruffhead's*. So as to the next *ch.* which begins in those books, p. 261.

(c) *Vide note (b) supra.*

Secreting post-office letters, &c. containing any security, &c., procuring or receiving the same. 42 Geo. III. c. 81. § 1. 2.

Casting away or destroying ships. 43 Geo. III. c. 79. and c. 113.

Counterfeiting stamps, &c. in Great Britain. 41 Geo. III. c. 10. § 8; c. 86. § 16; and 43 Geo. III. c. 126. § 11; c. 127. § 8.

Counterfeiting starch stamps in Great Britain. 42 Geo. III. c. 14. § 6.

Counterfeiting stamps, marks, &c. on medicine wrappers. 42 Geo. III. c. 56. § 22.

Forging paper for bank notes or engraving bank notes without authority. 41 Geo. III.

Forging or altering foreign bills of exchange. 43 Geo. III. c. 139. § 1. 3.

Forging debentures for teas exported to Ireland. 41 Geo. III. c. 75. § 7.

Forging certificates of excise. 41 Geo. III. c. 91. § 5.

Forging post-office franks, &c. 43 Geo. III. c. 28. § 22.

Damaging, stealing or destroying works on canals, roads, railways, enclosures, &c. 41 Geo. III. c. 22. § 69, 70; c. 21. § 78; c. 33. § 71; c. 72. § 49; c. 83. § 33; c. 74. § 64; c. 116. § 42; c. 127. § 112; c. 128. § 108; c. 135. § 61; c. 136. § 21. 42 Geo. III. c. 32. § 46; c. 19. § 33; c. 22. § 49, 50; c. 24. § 46, 49; c. 58. § 45; c. 74. § 53; c. 112. § 53; c. 114. § 78. 43 Geo. III. c. 102. § 32; c. 22. § 20; c. 33. § 22; c. 35. § 82; c. 49. § 47; c. 55. § 19; c. 60. § 109; c. 88. § 13; c. 126. § 75; c. 128. § 81; c. 130. § 5; c. 72. § 121.

Casting away or destroying ships. 43 Geo. III. c. 79. and c. 113.

Shooting at officers of navy customs, &c. or firing at a vessel. 45 Geo. III. c. 121. § 11.

Counterfeiting stamps, &c. in Great Britain. 41 Geo. III. c. 10. § 8; c. 86. § 16. 43 Geo. III. c. 126. § 11; c. 127. § 8. 44 Geo. III. c. 98. § 9. 45 Geo. III. c. 28. § 8.

Stamps on paper wrappers (inaccurately worded.) 46 Geo. III. c. 112. § 2.

Forging exchequer bills. 48 Geo. III. c. 1. § 9.

Stealing from oyster beds. 48 Geo. III. c. 144. § 1.

Fraudulently obtaining letters containing bank notes. 47 Geo. III. St. 2. c. 53. § 9.

Bank notes, engraving plates, &c. impressions from which shall resemble bank notes or uttering any paper which shall resemble bank notes. 52 Geo. III. c. 138. § 5.

Counterfeiting bank tokens. 51 Geo. III. c. 110. § 1. or bringing counterfeit tokens into the kingdom, § 2.

Forging stamps or seals for stamping starch. 52 Geo. III. c. 27. § 13.

Making false copies of entries or altering &c. register books of parishes. 52 Geo. III. c. 146. § 14.

Aiding prisoners of war to escape. 52 Geo. III. c. 156. § 1.

Administering or taking unlawful oaths. 52 Geo. III. c. 104. § 1.

Aliens returning from transportation for life. 43 Geo. III. c. 155. § 39.

Forging draft on the Receiver General. 46 Geo. III. c. 150. § 10.

Forging deeds, wills, securities, receipts, orders for money, &c. or uttering the same to defraud any person or corporation. 45 Geo. III. c. 89. § 1. Altering and extending. 2 Geo. II. c. 25; 7 Geo. II. c. 22; 15 Geo. II. c. 13; 41 Geo. III. c. 39.

Forgery of drafts, &c. of public officers. 46 Geo. III. c. 45. § 9; c. 142. § 14; c. 150. § 20.

Counterfeiting receipts for contributions under loan acts. 41 Geo. III. c. 3. § 24.

Personating pensioners, &c. 43 Geo. III. c. 119. § 17.

Forging contracts for land tax redemption. 42 Geo. III. c. 116. § 194.

Forging lottery tickets. 44 Geo. III. c. 93. § 11.

Disobedience to post-office orders. 45 Geo. III. c. 10. § 23.

Personating seamen or forging wills or letters of attorney of seamen, &c. 45 Geo. III.

Forgery of drafts, &c. of commissioners of land revenue. 50 Geo. III. c. 65. § 18.

Forgery of stamps provided under 50 Geo. III. c. 35. § 6.

Forgery of certificates, &c. of commissioners for the issue of Exchequer bills. 51 Geo. III. c. 15. § 71.

Destroying stocking or lace frames. 52 Geo. III. c. 16. § 1.

Wilfully destroying or demolishing any buildings, engines, or machinery therein. 52 Geo. III. c. 130. § 1, 2.

Embezzling letters by persons employed by post-office department. 52 Geo. III. c. 143. § 2-4.

Shooting at or wounding revenue officers. 52 Geo. III. c. 143. § 12.

Forging names of register, &c. of the High Court of Admiralty. 53 Geo. III. c. 151. § 12.

Forging, &c. or altering declaration of return of premium on a policy of assurance. 54 Geo. III. c. 133. § 10.

Cutting or destroying frames and frame-work of knitting machines. 54 Geo. III. c. 42.

The 52 Geo. III. c. 44, § 47, relative to the punishment of persons convicted of felony without benefit of clergy repealed by 53 Geo. III. c. 162.

Forging certificates, receipts, bills of credit, transfers, powers, &c. made felony. 53 Geo. III. c. 41, § 26, 27; 54 Geo. III. c. 13, § 5; 54 Geo. III. c. § 70, 38; 54 Geo. III. c. 86, § 43; 54 Geo. III. c. 110, § 6; 54 Geo. III. c. 151, § 16.

Falsely representing the next of kin of seamen. 55 Geo. III. c. 60, § 30.

Forging names of ministers, &c. required under 55 Geo. III. c. 60, § 31.

Rescuing or attempting to rescue convicts from the penitentiary. 56 Geo. III. c. 63, § 44.

Aliens sentenced to transportation guilty of felony if found at large. 55 Geo. III. c. 54, § 36.

Demolishing engines, &c. belonging to collieries. 56 Geo. III. c. 125, § 1.

Felons making their escape after condemnation to transportation or being found at large before expiration of their sentence. 56 Geo. III. c. 27, § 7, 8, 16.

Forging stamps under Stamp act. 55 Geo. III. c. 184, § 7.

Forging newspaper stamps. 55 Geo. III. c. 185, § 6.

Forging gold and silver plate duty marks. 55 Geo. III. c. 185, § 7.

Forging letters of attorney or wills of seamen, or knowingly uttering the same. 55 Geo. III. c. 60, § 32.

Forging certificates, powers, &c. for half-pay of naval officers. 56 Geo. III. c. 101, § 5.

Personating seamen, &c. 55 Geo. III. c. 60, § 32.

Forging certificates, bills, &c. for pay of navy officers. 57 Geo. III. c. 20, § 10.

Forging, altering, &c. certificates, &c. of commissioners for issuing Exchequer bills for carrying public works, &c. 57 Geo. III. c. 34, § 63.

Forcibly entering any house, &c. with intent to destroy, &c. any machinery or goods therein. 57 Geo. III. c. 126, § 2.

Persons falsely assuming the names or character of those entitled to prize-money or pay in order to receive the same. 57 Geo. III. c. 127, § 4; 59 Geo. III. c. 56, § 18.

An act for more effectually preventing seditious meetings and assemblies, to continue in force until the end of the session of parliament next after five years from the passing of the act.

The act of 60 Geo. III. c. 6. § 8. 11. 14. § 8. That if any person or persons shall attend any meeting whatever holden for the pretext of deliberating upon any public grievance or upon any matter or thing relating to any trade, manufacture, business or profession, or upon any matter in church or state, or of considering, proposing, or agreeing to any petition, complaint, remonstrance, declaration, resolution, or address, upon the subject thereof, contrary to the provisions of this act it shall be lawful for any one or more justice or justices of the peace in and for any county or the sheriff or under-sheriff of any county or the mayor or head officer or any justice of the peace of any city or town corporate within which any such meeting shall be held to make or cause to be made proclamation in the king's name in the form directed in this act commanding any person so unlawfully attending any such meeting immediately and peaceably to depart therefrom: and if any person or persons so ordered to depart as aforesaid shall not upon such proclamation depart from any such meeting within the space of a quarter of an hour after such proclamation made that then and in every such case every such person so continuing and not departing as aforesaid shall upon being thereof lawfully convicted be adjudged to be guilty of felony and shall be liable to be transported for any period not exceeding seven years.

§ 11. That it shall be lawful for any one or more justice or justices of the peace in and for any county or for the sheriff or under-sheriff of any county or for the mayor or other head officer or any justice of the peace of any city or town corporate within which any meeting shall be held or persons shall assemble for the purpose of holding any meeting contrary to the provisions of this act, or where any person or persons not entitled to attend any meeting or assembly as aforesaid, shall refuse or neglect to depart therefrom for the space of a quarter of an hour after such proclamation made as aforesaid to make or cause to be made such proclamation in the king's name in the manner and form hereinafter directed to command all persons there assembled to disperse themselves and peaceably to depart to their habitations or to their lawful business and if any such persons so assembled as aforesaid shall to the number of twelve or more, notwithstanding such proclamation made, continue together by the space of half an hour after such proclamation made, that then and in every such case every person so continuing being thereof legally

convicted shall be adjudged guilty of felony and be liable to be transported for any term not exceeding seven years.

§ 14. That if any person or persons do or shall with force and arms wilfully and knowingly oppose, obstruct, or in any manner wilfully and knowingly let, hinder, or hurt any justice of the peace or other persons authorized as aforesaid, or any person acting in aid or assistance of any justice of the peace who shall attend or disperse any such meeting as aforesaid, or shall be going to attend or disperse any such meeting, or any justice of the peace or peace officer or any person or persons acting in aid or assistance of any justice of the peace or other officer who shall begin to proclaim or be going or endeavouring to make any proclamation authorized or directed to be made under the provisions of this act, whereby such proclamation shall not be made: and also, if any persons so being assembled as aforesaid to whom any such proclamation as aforesaid should or ought to have been made of the same had not been hindered as aforesaid, shall to the number of twelve or more continue together and not disperse themselves within half an hour after such let or hindrance so made having knowledge of such let or hindrance so made; and also if any person so being at any such assembly as aforesaid shall with force and arms wilfully and knowingly oppose, obstruct, or in any manner wilfully and knowingly let, hinder, or hurt any justice of the peace or other magistrate or any peace officer or other person acting in their aid or assistance in the arresting, apprehending, or taking into custody or detaining in execution of any of the provisions of this act any person or persons or endeavouring so to do that then and in every such case every person so offending being thereof legally convicted shall be adjudged guilty of felony and be liable to be transported for any term not exceeding seven years.

Cutting away or defacing buoy-ropes, &c. transportation for not exceeding 14 years. 1 & 2 Geo. IV. c. 76. § 6.

Engraving, &c. on any plate for producing an impression of all or any part or engraving on any plate any resemblance of ground-work of a bank of England note, or using such plate or having such plate in custody or possession; or uttering any impression from it: transportation for 14 years. 1 Geo. IV. c. 92. § 1. 2.

The felonies which are capitally punishable by 39 Eliz. c. 9; 4 Geo. I. c. 11; 5 Geo. II. c. 30; and 8 Geo. II. c. 20; are made punishable by transportation for life or not less than 7 years by 1 Geo. IV. c. 115.

Privately stealing to the value of 5s. and under 15l. Transportation for life, or not less than seven years. 1 Geo. IV. c. 117.

Turnpike gates, maliciously destroying, &c. Seven years transportation. 3 Geo. IV. c. 126. § 128.

Forging certificate, &c. of commissioners for issuing exchequer bills. 3 Geo. IV. c. 86. § 54.

Forging certificates under superannuation act. 3 Geo. IV. c. 113. § 23.

Forgery of handwriting, &c. of the accountant general, &c. of the court of exchequer to a certificate to receive suitor's effects in the bank, &c.; or fraudulently claiming payments. 1 Geo. IV. c. 35. § 27.

Forging &c. certificate &c. under 1 & 2 Geo. III. c. 73. § 15.

Forging &c. receipts or certificates for annuity under 3 Geo. IV. c. 51. § 15.

Procuring others to utter forged letters of attorney, &c. or to apply for pay on probates of forged wills of seamen or marines. 1 & 2 Geo. IV. c. 49. § 4.

Any person or persons pulling down plucking up or otherwise destroying or damaging turnpike gates or any chain &c. belonging thereto or any toll houses or weighing machines or rescuing persons in custody for any of these offences, to be adjudged guilty of felony and to be transported for seven years. 3 Geo. IV. c. 126. § 128.

For general enactments relating to felonies, see 6 Geo. IV. c. 25. materially altering the law in many particulars.

Assaulting custom house officer made felony and punished with transportation for seven years or imprisonment with hard labour not exceeding three years. 6 Geo. IV. c. 108. § 59.

Bankrupt not surrendering and submitting to be examined &c. or removing or embezzling to the value of 10l. to be transported for life or not less than seven years, or be imprisoned only or imprisoned with hard labour for not exceeding seven years. 6 Geo. IV. c. 80. § 143.

Entering and taking trees plants &c. out of orchards gardens and nursery grounds &c. 6 Geo. IV. c. 127.

Permitting vessels to depart out of quarantine without authority, giving false certificate &c. 6 Geo. IV. c. 78. § 21. 25.

Forgery of handwriting of receiver general or controller general of customs or of any person duly authorized to act for them. 6 Geo. IV. c. 106. § 27.

Forgery of newspaper stamps or stamping papers with forged stamps or uttering papers with forged stamps &c. 6 Geo. IV. c. 119. § 6.

Smuggling. 6 Geo. IV. c. 108. § 56.

As to felonies for malicious injuries to property, see 7 & 8 Geo. IV. c. 30. repealing the old laws and consolidating and amending the laws of England relative to malicious injuries. See 29 *Statutes at Large*, p. 98.

The act for consolidating and amending the statutes of England relative to offences against the person has repealed most of the old acts and substituted its own provisions. See 29 vol. *Statutes at Large*, p. 370.

An act to remove doubts as to the liability of lords and peers of parliament to punishment in certain cases of felony. 4 & 5 Vict. c. 22. 33 *Statutes at Large* 781.

NOTE TO PAGE 516^b.

"Silent leges inter arma"—the laws are silent in the midst of arms—said the great Roman orator. During our quarter of a century of war, the laws held on their course; but few had the courage to question the wisdom of that course, and still fewer the leisure to attend to any suggestions of improvement. The daring adventurer who then mounted the car of progress had to guide it, self-balanced, over the single rib of steel which spanned the wide gulf between the land of reality, and the land of promise. Romilly was the foremost amongst the courageous spirits who risked something for the amelioration of the lot of their fellow men. In 1516 Sir Thomas More wrote, "I think it not right nor justice that the loss of money should cause the loss of man's life: for mine opinion is, that all the goods in the world are not able to countervail man's life. But if they would thus say that the breaking of justice, and the transgression of laws is recompensed with this punishment and not the loss of the money, then why may not this extreme and rigorous justice well be called plain injury? For so cruel governance, so straight rules and unmerciful laws be not allowable, that if a small offence be committed by and bye the sword should be drawn: nor so stoical ordinances are to be borne withal, as to count all offences of such equality that the killing of a man, or the taking of his money from him were both one matter." In 1816 Sir Samuel Romilly carried a bill through the House of Commons abolishing capital punishment for shoplifting which had been rejected by that house three years before. The House of Lords however threw out this bill; and on that occasion three hundred years after Sir Thomas More had proclaimed the opinion which we have just recited, Lord Ellenborough the lord chief justice, "lamented that any attempts were made to change the established and well-known criminal law of the country which had been found so well to answer the ends of justice."

The history of the reform of our criminal law presents one of the most encouraging examples of the unconquerable success of the assertion of a right principle when it is perseveringly advocated and never suffered to sleep and when above all the reformation is attempted step by step, and the prejudices of mankind are not assailed by the bolder course which appears to contemplate destruction and not repair. The name of reform in the criminal laws had not been heard in the House of Commons for fifty-eight years when in 1808, Romilly carried his bill for the abolition of the punishment of death for privately stealing from the person to the value of five shillings: in other words for picking pockets. It is instructive to see how through the force of the circumstances around him Romilly approached the subject of this reform with a caution which now looks almost like weakness. His object was originally to raise the value according to which a theft was rendered capital. In January 1808 he gave up the intention of bringing forward even this limited measure—he was sure the judges would not approve of it. To another distinguished lawyer belongs the merit of having urged Romilly to a bolder policy. His friend Scarlett, he says, "had advised me not to content myself with merely raising the amount of the value of property, the stealing of which is to subject the offender to capital punishment, but to attempt at once to repeal all the statutes which punish with death mere thefts unaccompanied by any act of violence or other circumstance of aggravation. This suggestion was very agreeable to me. But as it appeared to me that I had no chance of being able to carry through the house a bill which was to expunge at once all these laws from the statute-book, I determined to attempt the repeal of them one by one; and to begin with the most odious of them, the act of Queen Elizabeth which makes it a capital offence to steal privately from the person of another."

Upon this prudential principle Romilly carried his first reform in 1808. But the House of Commons, which consented to pass the bill forced upon him the omission of its preamble:—"Whereas the extreme severity of penal laws hath not been found effectual for the prevention of crimes: but on the contrary by increasing the difficulty of convicting offenders in some cases affords them impunity and in most cases renders their punishment extremely uncertain." The temper with which too many persons of rank and influence received any project of amelioration at the beginning of this century is forcibly exhibited in an anecdote which Romilly has preserved for our edification: "If any person be desirous of having an adequate idea of the mischievous effects which have been produced in this country by the French revolution and all its attendant horrors, he should attempt some legislative reform, on humane and liberal principles. He will then find not only what a stupid dread of innovation but what a savage spirit it has infused into the minds of many of his countrymen. I have had several opportunities of observing this. It is but a few nights ago that while I was standing at the bar of the House of Commons a young man the brother of a peer whose name is not worth setting down, came up to me and breathing in my face the nauseous fumes of his undigested debauch, stammered out 'I am against your bill; I am for hanging all.' I was confounded: and endeavouring to find out some excuse for him I observed that I supposed he meant that the certainty of punishment affording the only prospect of suppressing crimes the laws whatever they are ought to be executed. 'No, no,' he said, 'it is not that. There is no good done by mercy. They only get worse. I would hang them all up at once.'"

In 1810 Sir Samuel Romilly brought in three bills to repeal the acts which punished with death the crimes of stealing privately in a shop goods of the value of five shillings, and of stealing to the amount of forty shillings in a dwelling-house or on board vessels in navigable rivers. The first bill passed the House of Commons but was lost in the Lords. The other two were rejected. In 1811 the rejected bills were again introduced with a fourth bill abolishing the capital punishment for stealing in bleaching-grounds. The four bills were carried through the House of Commons; but only that on the subject of bleaching-grounds was sanctioned by the Lords. The constant argument that was employed on these occasions against the alteration of the law was this, that of late years the offences which they undertook to repress were greatly increased. Justly did Romilly say, "A better reason than this for altering the law could hardly be given." On the 24th of May, 1811, when three of the bills were rejected in the House of Lords, Lord Ellenborough declared, "They went to alter those laws which a century had proved to be necessary and which were now to be overturned by speculation and modern philosophy." The lord chancellor Eldon on the same occasion stated that he had himself early in life felt a disposition to examine the principles on which our criminal code was framed, "before observation and experience had matured his judgment." Since however he had learnt to listen to these great teachers in this important science his ideas had greatly changed, and he saw the wisdom of the principles and practice by which our criminal code was regulated. In 1813 Sir Samuel Romilly's bill for the abolition of capital punishment in cases of shoplifting was carried by the Commons in the new parliament, but it was again rejected in the House of Lords. No further attempt was made towards the amelioration of this branch of our laws till the year 1816; which attempt we have now more particularly to record.

On the 16th of February Sir Samuel Romilly obtained leave to bring in a bill repealing the act of William the Third, which made it a capital offence to steal privately in a shop to the value of five shillings. He described this act as the most severe and sanguinary in our statute book, inconsistent with the spirit of the times in which we lived, and repugnant to the laws of nature which had no severer punishment to inflict upon the most atrocious of crimes. As recently as 1785 no less than ninety-seven persons were executed in London for this offence alone; and the dreadful spectacle was exhibited of twenty suffering at the same time. The capital sentence was now constantly evaded by juries committing a pious fraud and finding the property of less value than was required by the statute. The consequence of severe laws never executed was that crime went on to increase, and the crimes of juvenile offenders especially. On moving the third reading of the bill on the 15th of March, Sir Samuel Romilly called attention to the great number of persons of very tender age who had recently been sentenced to death for pilfering in shops. At that moment there was a child in Newgate not ten years of age under sentence of death for this offence; and the Recorder of London was reported to have declared that it was intended to enforce the laws strictly in future, to interpose some check if possible to the increase of youthful depravity. The bill passed the Commons, but was thrown out in the Lords on the 22d of May. On this occasion the lord

chief justice agreed with the lord chancellor, "that the effect of removing the penalty of death from other crimes had rendered him still more adverse to any new experiment of this kind. Since the removal of the vague terror which hung over the crime of stealing from the person the number of offences of that kind had alarmingly increased. Though the punishment of death was seldom inflicted for crimes of this nature, yet the influence which the possibility of capital punishment had in the prevention of crimes could scarcely be estimated except by those who had the experience in the operation of the criminal law which he had the misfortune to have. When it was considered that the protection of the property in all shops depended on the act before them, and that even now thefts of that description were numerous, the house would not he trusted, take measures to increase them."

When we look back on the debates upon the criminal law, from 1809 to 1816, and see how little was asked by Romilly, and refused to him, compared with the amount of reform that has since been accomplished, we can only regard the arguments for the support of the ancient system of capricious terror as the arguments of men slowly and painfully emerging from barbarism.

When, in the time of Henry VI. more persons were executed in England in one year for highway robbery than the whole number executed in France in seven years; when, in the reign of Henry VIII. seventy-two thousand thieves were hanged, being at the rate of two thousand a year; and when, in the reign of George III. as we have seen, twenty persons were executed on the same morning in London, for privately stealing—we see the principle of unmitigated ferocity, the savagery which applies brute force as the one remedy for every evil, enshrined on the judgment-seat. The system went on till society was heart-sick at its atrocities, and then rose up the equivocating system which lord chancellors, and lord chief justices, and doctors in moral philosophy, upheld as the perfection of human wisdom—the system of making the lightest as well as the most enormous offences capital, that the law might stand up as a scare-crow—an old, ragged, ill-contrived, and hideous mawkin—that the smallest bird that habitually pilfered the fields of industry despised while he went on pilfering. With the absolute certainty of experience that bloody laws rigorously administered did not diminish crime, the legislators of the beginning of the nineteenth century believe, or affected to believe, that the same laws scarcely ever carried into execution would operate through the influence of what they called "a vague terror." As if any terror, as a preventive of crime or a motive to good, was ever vague. The system was entirely kept in existence by the incompetence and idleness of the law-makers and the law-administrators. A well-digested system of secondary punishments never seemed to them to be within the possibility of legislation. We are very far from the solution of this great problem in our own days; but we have made some steps towards its attainment.

The revolting cruelty and the disgusting absurdity of our criminal laws, thirty years ago, were in perfect harmony with the system of police, which had then arrived at its perfection of imbecile wickedness. The machinery for the prevention and detection of crime was exactly accommodated to the machinery for its punishment. On the 3d of April, on the motion of Mr. Bennet, a committee of the House of Commons was appointed to inquire into the state of the police of the metropolis. The committee was resumed in 1817; and two reports were presented, which were amongst the first causes of the awakening of the public mind to a sense of the frightful evils which were existing in what we flattered ourselves to be the most civilized city in the world. Twelve years after, a committee of the House of Commons thus described the police system of 1816 and 1817:—"If a foreign jurist had then examined the condition of the metropolis, as respected crime, and the organization of its police—and if, without tracing the circumstances from which that organization arose, he had inferred design from the ends to which it appeared to conduce—he might have brought forward plausible reasons for believing that it was craftily framed by a body of professional depredators, upon a calculation of the best means of obtaining from society, with security to themselves, the greatest quantity of plunder. He would have found the metropolis divided and subdivided into petty jurisdictions, each independent of every other, each having sufficiently distinct interests to engender perpetual jealousies and animosities, and being sufficiently free from any general control to prevent any intercommunity of reformation or any unity of action." Another committee of the House of Commons reporting in 1833, says of the same system, "The police was roused into earnest action only as some flagrant violation of the public peace, or some deep injury to private individuals, impelled it into exertion; and security to persons and property was sought to be obtained, not by the activity and wholesome vigour of a preventive police, which it is a paramount duty of the State

to provide, but by resorting from time to time, as an occasional increase of the more violent breaches of the law demanded it, to the highest and ultimate penalties of that law, in the hope of checking the more desperate offenders." The same report says, "Flash-houses were then declared to be a necessary part of the police system, where known thieves, with the full knowledge of the magistrates and public officers, assembled, until the State, or individuals from the losses they had sustained, or the wrongs they had suffered, bid high enough for their detection. Flash-houses, known in the scientific phraseology of the police as "flash-cribs" "shades" and "infernals" were filthy dens, where thieves and abandoned females were always to be found, riotous or drowsy, surrounded by children of all ages, qualifying for their degrees in the college of crime." "There," says a Middlesex magistrate, examined before the committee of 1816, "they (the children) see thieves and thief-takers sitting and drinking together on terms of good-fellowship; all they see and hear is calculated to make them believe they may rob without fear of punishment, for in their thoughtless course they do not reflect that the forbearance of the officers will continue no longer than until they commit a forty-pound crime, when they will be sacrificed." A forty-pound crime! the phraseology is as obsolete as if it were written in the pedlar's French of the rogues of the sixteenth century. A forty-pound crime was a crime for whose detection the State adjudged a reward, to be paid on conviction, of forty-pounds; and, as a necessary consequence, the whole race of thieves were fostered into a steady advance from small offences to great, till they gratefully ventured upon some deed of more than common atrocity, which should bestow the blood-money upon the officers of the law who had so long petted and protected them. The system received a fatal blow in 1816, in the detection of three officers of the police, who had actually conspired to induce five men to commit a burglary for the purpose of obtaining the rewards upon their conviction. The highwaymen who infested the suburbs of the metropolis had been eradicated—they belonged to another age. Offences against the person were rarely connected with any offences against property. But the uncertainty of punishment, the authorized toleration of small offenders, and the organized system of negotiation for the return of stolen property, had filled the metropolis with legions of experienced depredators. The public exhibitions of the most profligate indecency and brutality can scarcely be believed by those who have grown up in a different state of society. When Defoe described his Colonel Jack, in the days of his boyish initiation into vice, sleeping with other children amidst the kilns and glass-houses of the London fields, we read of a state of things that has long passed away; but, as recently as 1816, in Convent Garden Market, and other places affording a partial shelter, hundreds of men and women, boys and girls, assembled together, and continued during the night, in a state of shameless profligacy, which is described as presenting a scene of vice and tumult more atrocious than any thing exhibited even by the lazzaroni of Naples.—*Knight's Hist. of Eng. B. I. c. 7. Lond. 1846-7.*

END OF THE FIRST VOLUME.



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